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Notable regulations of decree No. 31/2021/ND-CP detailing and guiding the enforcement of a number of provisions of the Law on Investment 2020



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On March 26, 2021, the Government issued the Decree No. 31/2021/ND-CP ("Decree 31") detailing and guiding the enforcement of a number of provisions of the Law on Investment on investment conditions; business lines and conditions for market access by foreign investors; guarantees for business investment; investment incentives and supports; overseas investment activities; investment promotion; state management of investment in Vietnam and overseas investment. Below are notable contents:

1. List of business lines restricted from foreign investors' market access

Complying with Vietnam's commitments to market opening under new generation free trade agreements, one of the most important changes of the Investment Law 2020 is the regulation that foreign investors may apply market access conditions applicable to domestic investors, except for investment in business lines restricted from foreign investors' market access. Accordingly, Decree 31 has promulgated the List of business lines restricted from foreign investors' market access. This list provides for 84 business lines, including 25 business lines not allowed to foreign investors' market access, and 59

business lines conditional to foreign investors' market access. According to the principle of negative listing, Decree 31 once again affirms that, except for those business lines restricted from foreign investors' market access, foreign investors shall be able to access the market same as domestic ones.

Decree 31 provides for the concept of "business lines without market access commitment of Vietnam which are business lines that, under investment-related international treaties, Vietnam made no any commitment or reserved the right to impose measures against market access obligations, national treatment or other obligations on non-discriminatory treatment between domestic investors and foreign investors". For business lines without market access commitment of Vietnam, market access conditions will be applied in accordance with Vietnamese laws, if any. Where Vietnamese laws provides for no regulation on market access restriction to such business lines, foreign investors shall be able to access the market same as domestic ones. That means Decree 31 should be interpreted that there shall be no process for obtaining opinions from governing ministries when the investment registration agency considers granting foreign investment licenses into business lines without market access commitment of Vietnam.

Except for those business lines restricted from foreign investors' market access, foreign investors shall be entitled to market access conditions same as domestic investors

Market access conditions for foreign investors in the business lines specified in the List of business lines restricted from foreign investors'

investors' market access will be publicly posted on the National Investment Portal.

The above change is a very important new point of the Investment Law 2020 when changing from the principle of positive listing to the principle of negative listing to consider applying market access conditions to foreign investors which express the efforts of Vietnamese Government to attract foreign investment, especially in the context of the 4.0

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economy where more and more new forms of business are coming. However, in practice, specialized management agencies as well as local licensing agencies will take a long time to review, research, unify and implement this new regulation.

2. Detailing many cases of adjustment of investment projects

One of the important new points of Decree 31 in particular and the Law on Investment 2020 in general is the provisions for detailed legal corridors for new forms of investment project mergers and acquisitions, especially investment projects using land. Before the issuance of the Law on Investment 2020 and Decree 31, forms of merger and acquisition of projects such as separation of projects, use of land use rights and properties attached land for contribution of capital or contribution to business cooperation faced difficulties in many provinces due to the lack of specific regulations. Now, in addition to the forms of project adjustment inherited from the Investment Law 2014 and Decree 118/2015/ND-CP such as:

- (i) *Adjustment of investment projects in case investors partially or wholly transfer investment projects*
- (ii) *Adjustment of investment projects in case of division, separation, merger or conversion of economic organizations*
- (iii) *Adjustment of investment projects according to court or arbitration judgments or decisions*

Decree 31 adds new forms of project adjustment including:

- (iv) *Adjustment of investment projects in case investors receive the transfer of investment projects which are collateral assets*
- (v) *Adjustment of investment projects in case of division, separation or merger of investment projects*
- (vi) *Adjustment of investment projects in case of use of land use rights and properties attached to land*

belonging to investment projects as capital contribution to enterprises.

- (vii) *Adjustment of investment projects in case of use of land use rights and properties attached to land belonging to investment projects for business cooperation*

New forms of project adjustment in Decree 31 are expected to make the mergers and acquisitions market more exciting, especially land-use projects, in the context that the economy is being heavily affected by the Covid-19 epidemic.

3. Conditions for investment in the form of capital contribution, share purchase or purchase of contributed capital

In order to tighten the management of investment activities of foreign investors in the form of capital contribution, share purchase, purchase of contributed capital, the Investment Law 2020 added two additional mandatory conditions for investment in the form of capital contribution, share purchase, purchase of contributed capital which are: *Ensuring national defense and security in accordance with the Law on Investment; and Satisfying the provisions of law on land on conditions for receiving land use rights, conditions for land use in islands, border communes, wards and towns, coastal communes, wards and towns.* Accordingly, Decree 31 supplements the mechanism of consultation with the Ministry of National Defense and the Ministry of Public Security on satisfaction of the above conditions for foreign investors investing in the form of capital contribution, share purchase, purchase of capital contributions to economic organizations with land use right certificates in islands, border communes, wards and towns, coastal communes, wards and towns; other areas affecting national defense and security, except for economic organizations implementing investment projects in industrial parks, export processing zones, high-tech parks and economic zones established under the Government's regulations.

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In order to clarify conditions on areas affecting national defense and security, Decree 31 introduced the concept of “*Other areas affecting national defense and security*” including many areas under the law on protection of defense works and military zones; in accordance with the law on guards; the law on protection of important works related to national security; the Government's regulations on combining national defense with socio-economic and socio-economic with national defense; the Prime Minister's decision on approving the master plan on defense layout combined with socio-economic development; The area prohibiting foreign organizations and individuals to own houses to ensure national defense and security in accordance with the law on housing.

In fact, for both foreign investors and Vietnamese enterprises, determining whether a specific location subject to *Other areas affecting national defense and security*” is a complicated task due to the fact that there are many relevant legal documents, even internal documents of State agencies which are not public.

4. Security deposit for implementation of investment projects

The Investment Law 2020 introduced a new regulation that benefits investors by allowing investors to secure the implementation of the project by submitting a credit institution's guaranty instead of compulsory deposit in cash.

The Decree 31 clarifies that the investors shall have to make a deposit or submit the guarantee certificate of a credit institution after the investor's approval or approval of the auction winning result, and before making compensation for ground clearance (in case the investor does not advance the compensation for resettlement support) or before the decision on land allocation or lease or approval on the change of land use purposes. In case the project is secured by a guarantee certificate of a credit institution, such credit institution shall have to pay the deposit amount which is payable by the investor in case the project's schedule for

putting into exploitation and operation is delayed or in case the project is terminated by the investment registration agency (except for case of termination of the project to protect national relics, antiquities or treasures).

5. Supplementation of conditions and procedures for shutdown of investment projects

The Investment Law 2020 provides for new regulation allowing investors to cease operation of investment projects (without terminating investment projects). Especially, in case of shutdown of the project due to force majeure, investors are entitled to land rental exemption or land use fee reduction during the shutdown period.

Decree 31 provides for conditions and procedures for shutdown of investment projects in cases of self-determination of shutdown of investment projects; decision for cease operation of investment projects of state investment management agencies; investment projects causing harm or risk to national defense and security. The total downtime of the investment project shall not exceed 12 months.

6. Attraction of investment in innovative start-up small and medium-sized enterprises and innovative start-up investment funds

Decree 31 supplements the regulations on facilitating foreign investors to establish innovative start-up small and medium-sized enterprises or contribute capital, buy shares or capital contributions to these enterprises. Accordingly, foreign investors shall only need to conduct procedures as prescribed for domestic investors in accordance with the Law on Enterprises without obtaining Investment Registration Certificate or approval for capital contribution, share purchase, contributed capital purchase if such enterprises meet certain conditions of innovative start-up investment projects.

7. Decree 31 amends, replaces and abolishes several other Decrees

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Decree 31 takes effect on March 26, 2021, amending and supplementing many of relevant Decrees to conform with new changes in Decree 31 such as:

- (i) Decree No. 46/2014/ND-CP on land and water surface rents;
- (ii) Decree No. 52/2020/ND-CP on golf course investment and business;
- (iii) Decree No. 25/2020/ND-CP on elaboration of some Articles of the Law on Bidding on investor selection;
- (iv) Decree No. 96/2016/ND-CP providing for security and order conditions for a number of conditional business lines;
- (v) Decree No. 82/2018/ND-CP on management of industrial parks and economic zones;
- (vi) Decree No. 11/2013/ND-CP on management of investment in urban development;
- (vii) Decree No. 99/2003/ND-CP on promulgation of hi-tech zone regulations;
- (viii) Decree No. 94/2020/ND-CP regulating preferential mechanisms and policies for Vietnam National Innovation Center.

At the same time replace and repeal many of the following decrees and regulations:

- (ix) Decree of Government No. 118/2015/ND-CP dated November

12, 2015, guidelines for some Articles of the Law on Investment;

- (x) Decree No. 37/2020/ND-CP dated March 30, 2020 on amendments to list of industries benefitting from investment incentives attached to Decree No. 118/2015/ND-CP on elaborating to Law on Investment;
- (xi) Decree No. 83/2015/ND-CP dated September 25th 2015, regulations on outward investment;
- (xii) Decree No. 104/2007/ND-CP of June 14, 2007, on provision of debt collection services.;
- (xiii) Decree No. 69/2016/ND-CP dated July 01, 2016, requirements for running debt trading service;
- (xiv) Decree No. 79/2016/ND-CP dated July 01, 2016, conditions for training business in specialist knowledge, professional competence in management and operation of apartment buildings, knowledge of real estate brokerage practicing, real estate transaction management;
- (xv) Article 2 of Decree No. 100/2018/ND-CP dated July 16, 2018 amending and annulling some regulations on necessary business conditions in fields under the management of the Ministry of Construction.

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Chúng tôi giữ quyền sửa đổi, tạm ngừng hoặc ngừng vĩnh viễn hoạt động của bản tin này hoặc bất kỳ phần nào của bản tin mà không thông báo trước. Chúng tôi không chịu bất kỳ trách nhiệm nào về các sửa đổi, tạm ngừng hoặc ngừng vĩnh viễn hoạt động của bản tin này.

Nếu bạn có vấn đề nào cần tư vấn, hãy liên hệ với chúng tôi hoặc yêu cầu luật sư của bạn tư vấn về vấn đề đó cho bạn.

Tất cả các quyền, bao gồm cả quyền sở hữu, quyền tác giả, quyền liên quan và các quyền sở hữu công nghiệp đối với nội dung thông tin, thiết kế, trình bày mỹ thuật của bản tin này thuộc chúng tôi và được bảo vệ theo Luật Sở hữu Trí tuệ Việt nam, các hiệp định, hiệp ước quốc tế mà Việt nam đã ký kết.

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