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KEY NOTES ON NEW DECREE 31 IMPLEMENTING LAW ON INVESTMENT 2020

On 26 March 2021, the Government issued Decree 31/2021/ND-CP guiding the implementation of Law on Investment 2020 (“**Decree 31**”). Decree 31 has taken into effect since the issuance date and has the following notable new points as compared to Decree 118/2015/ND-CP (“**Decree 118**”):¹

1. List of sectors and businesses in which foreign investors are subject to market access restrictions

Decree 31 explicitly provides a list of sectors and businesses in which foreign investors are subject to market access restrictions, including (i) sectors and business in which market access by foreign investors are not yet permitted and (ii) sectors and business in which foreign investors are subject to conditional market access.² For category (i), the foreign investors are not permitted to invest in those sectors and business. In terms of category (ii), the foreign investors shall satisfy the conditions for market access published on the National Investment Portal (www.dautunuocngoai.gov.vn).³ In addition, such list sets out not only the services but also some

¹ The new provisions on the offshore investment activities are not covered in this note.

² Appendix I of Decree 31.

³ Article 18.1 of Decree 31.

manufacturing businesses such as manufacture of paper, manufacture of construction materials and manufacture of cigarette.

Regarding the sectors and business in which Vietnam has not yet committed to the market access for foreign investors, the conditions for market access are as below:⁴

- i. If there is no market access restriction provided in laws, resolutions of the National Assembly, ordinances, resolutions of the Standing Committee of the National Assembly, decrees of the Government (collectively the “**Laws**”), the foreign investors are treated as domestic investors in terms of the market access (e.g. no foreign ownership limit); or
- ii. If the Laws provide the market access restrictions applicable to foreign investors, the Laws will be applied.

2. Application dossier for M&A Approval

The application dossier for approval of contributing capital or purchasing shares or purchasing a capital contribution portion in an economic organization (“**M&A Approval**”) comprises the following new contents and documents, *among others*:⁵

- i. Expected transaction value which shall be declared in the application form;
- ii. In-principle agreement on the capital contribution or shares acquisition or capital transfer; and
- iii. Copy of the land use right certificate of the economic organization (if economic organization has the land use right certificate for land on an island or a coastal or border commune, ward or town or in other areas affecting national defense and security, except for the economic organization implementing projects located within industrial zones, export processing zones, high-tech zones, or economic zones).

3. Treatment of foreign-invested economic organizations established before Law on Investment 2020 takes effect

The economic organizations set out in Article 23.1 of Law on Investment 2020⁶ are not required to satisfy the conditions and implement the investment procedures applied to the foreign investors if

⁴ Article 17.4 of Decree 31.

⁵ Article 66 of Decree 31.

⁶ (i) More than 50% of its charter capital is held by a foreign investor(s), or a partnership has a majority of partners being foreign individuals in the case of an enterprise being a partnership; or (ii) More than 50% of its charter capital is held by an economic organization (s) prescribed in point (i) above; or More than 50% of its charter capital is held by a foreign investor(s) and an economic organization (s) prescribed in point (i) above.

the establishment of another economic organization or investment in the form of capital contribution or shares acquisition in another economic organization or the business co-operation contract (“BCC”) are performed by those economic organizations before the effective date of Law on Investment 2020 (i.e., 01 January 2021).⁷

The economic organizations incorporated before the effective date of Law on Investment 2020 and fall within the cases as provided in Article 23.1 of Law on Investment 2020 are required to satisfy the conditions and implement the investment procedures applied to the foreign investors when:⁸

- i. Amendment of projects that are implemented before the effective date of Law on Investment 2020;
- ii. Supplement, change to business lines;
- iii. Establishment of other economic organizations;
- iv. Investment in the form of capital contribution or shares acquisition or purchase of capital contribution portion of other economic organizations; or
- v. Investment in the form of BCC.

4. Foreign ownership limit under international treaties

Decree 31 clearly sets out 4 principles of the application of foreign ownership limit (“FOL”) under international treaties as follows:⁹

- i. If there are 2 or more foreign investors contributing capital or purchasing shares or purchasing a capital contribution portion in an economic organization (“M&A Activities”) and subject to one or more international treaties, the total foreign ownership of all investors in such economic organization shall not exceed the highest FOL for a specific business line under one of the applicable treaties;
- ii. If there are 2 or more investors with the same country or territory doing the M&A Activities, the total foreign ownership of such investors shall not exceed the FOL under the applicable treaty;

⁷ Article 119.1 of Decree 31.

⁸ Article 119.2 of Decree 31.

⁹ Article 17.10 of Decree 31.

- iii. If an economic organization having various business lines that are subject to different FOLs under the applicable treaty, the total ownership of foreign investors in that economic organization shall not exceed the FOL for the business line having the lowest FOL; and
- iv. For public companies, securities companies, securities investment fund management companies or securities investment funds, securities investment companies, the FOL will follow the laws on securities if any.

5. Principles in the application of investment incentives

Decree 31 details some principles of the application of investment incentives for the following cases: (i) enterprise or project restructuring, (ii) projects located within the industrial zones, export processing zones whose purpose is changed or operation is terminated or is taken out of the master plan, and (iii) change to the administrative boundary.¹⁰

6. Recognition of retained profit for re-investment

In addition to equity capital and mobilized capital, Decree 31 explicitly recognizes retained profit for re-investment as one source of investment capital.¹¹ In practice, some investment authorities have already accepted the use of retained profit as a source of investment capital even Decree 118 was silent on this, Decree 31 only specifically recognizes this.

7. Determination of term of investment

Decree 31 also explicitly provides that the authorities issuing the in-principle investment approval or Investment Registration Certificate can consider and determine the term of investment of a project depending on its objectives, scale, location, and operation requirements.¹² In practice, the investment authorities have already performed this right even Decree 118 was silent on this point, Decree 31 only specifically recognizes it.

8. Request competent courts to declare a “false” transaction null and void

Decree 31 provides that in case investors implement projects based on a “false” transaction, the investment registration authorities and relevant persons are entitled to request the competent court to declare such transaction null and void. The judgment or decision with legal effect of the court shall be the basis for the investment registration authorities to terminate a part or whole of the project.¹³

¹⁰ Articles 20.7, 20.8, and 21 of Decree 31.

¹¹ Article 28.1(c) of Decree 31.

¹² Article 27.3 of Decree 31.

¹³ Articles 59 of Decree 31.

9. Project performance guarantee by the investors

If investors are required to make an escrow deposit or submit a bank guarantee to secure the project performance, they can do so *after* the issuance of the in-principle investment approval or decision on approval of investor or decision on approval of the auction result and *before* (i) the implementation of the compensation and resettlement plan (if not making the advance payment for compensation and resettlement) or (ii) *before* the issuance of the land lease decision, land allocation decision or decision on the conversion of land use purpose (if making the advance payment for compensation and resettlement or the investor is selected via an auction of land use right and pays land rental annually).¹⁴

10. Guarantee of the State for implementation of projects

Based on Law on Investment 2020, Decree 31 sets out one form of guarantee of the State for implementation of projects being partial support of foreign currency balance. In addition, other forms of guarantee shall be decided by the Prime Minister.¹⁵

11. In-principle investment approval and investor selection

In case many authorities have power to issue the in-principle investment approval to a project, the authority having the highest power shall be entitled to do so.¹⁶

For some projects that are not subject to an auction of land use right or a bidding for selection of investors but there are 2 or more investors concurrently submit valid dossiers to apply for implementing the project at the same location, those investors must follow a separate procedure as set out in Article 29.7 of Decree 31.

¹⁴ Article 26.5 of Decree 31.

¹⁵ Article 3 of Decree 31.

¹⁶ Article 29.1 of Decree 31.

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