FOREIGN INVESTMENT IN TRADING & DISTRIBUTION IN VIETNAM – LEGAL FRAMEWORK with updates from DECREE 09/2018/ND-CP
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1. Overview

2. Decree 09/2018: Key procedural matters

3. Decree 09/2018: Licensing hurdles
ABBREVIATIONS

- **BL**: Business License for trading and distribution of FIEs
- **CPTPP**: Comprehensive and Progressive Agreement for Trans-Pacific Partnership
- **DPI**: Department of Planning and Investment
- **DOIT**: Department of Industry and Trade
- **ENT**: Economic Needs Test
- **ERC**: Enterprise Registration Certificate
- **FIEs**: foreign invested enterprises
- **IRC**: Investment Registration Certificate
- **JSC**: joint stock company
- **LLC**: limited liability company
- **MOIT**: Ministry of Industry and Trade
- **MPI**: Ministry and Planning and Investment
- **OL**: outlet license
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1. OVERVIEW OF REGULATIONS ON TRADING AND DISTRIBUTION

- **Legal framework:** International Treaties and Local Laws

- **Business activities regulated**
  - Trading = Import and Export
  - Distribution (wholesale, retail)
  - Related businesses: logistics services, commercial promotion, etc.

- **Market openings/ restrictions**
  - **Foreign ownership limit:** lifted (for trading and distribution)
  - **Sub-licenses:** Business License (BL) and Outlet License (OL)
  - **Types of goods** to be distributed
Types of goods: not committed to open to foreign investment:

- Cigarettes and cigars
- Books, newspapers and magazines
- Video records on whatever medium
- Precious metals and stones
- Pharmaceutical products and drugs
- Explosives
- Processed oil and crude oil
- Rice, cane and beet sugar

(Vietnam could still grant license on a pilot/case by case basis).
## Investment forms and relevant licenses/ approvals: TWO choices

<table>
<thead>
<tr>
<th>Set up anew</th>
<th>Acquire existing (local) company (M&amp;A)</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Licenses required:</strong></td>
<td><strong>Licenses/ approval required:</strong></td>
</tr>
<tr>
<td>1) Investment Registration Certificate (IRC) – for the foreign investor’s</td>
<td>1) <strong>M&amp;A approval</strong> – approve for the acquisition; and</td>
</tr>
<tr>
<td>project in Vietnam; and</td>
<td></td>
</tr>
<tr>
<td>2) Enterprise Registration Certificate (ERC) – for the foreign investor’s</td>
<td>2) <strong>Amended ERC</strong> (for LLC)/ <strong>Notification</strong> (for JSC) –</td>
</tr>
<tr>
<td>company to be set up in Vietnam</td>
<td>record acquirer as new (co-)owner</td>
</tr>
</tbody>
</table>

3) **Sub-licenses**
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1. Overview

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2. DECREE 09/2018/ND-CP: IDENTITY INFORMATION

- **Issue date:** 15 Jan 2018
- **Effective date:** 15 Jan 2018
- **No guiding circular**
- **Repealing** Decree 23/2007/ND-CP (and its guiding circular No. 08/2013/TT-BCT)
- **Transition provisions:** Article 50
2. DECREES 09 AND RELEVANT LICENSING PROCESS (SET UP ANEW)

**Step 1**
Apply for IRC

- 15 working days
- Department of Planning and Investment (DPI) (provincial level)

**Step 2**
Apply for ERC

- 3 working days
- DPI

**Step 3**
Apply for Business License

- 10 working days
- Department of Industry and Trade (DOIT) (provincial level)

**Step 4**
Apply for Outlet License (if any)

- 20 working days
- DOIT

If ENT approval required:
- 2 months
- Consult the MOIT (and relevant ministries)

Restricted or not committed business:
- Consult the MPI (and relevant ministries)

Restricted or not committed trading & distribution and related activities:
- Consult the MOIT (and relevant ministries)
2. DECREE 09 AND RELEVANT LICENSING PROCESS (ACQUISITION)

**Step 1:**
- Apply for M&A approval
- [15] days
- Department of Planning and Investment (DPI) (provincial level)

**Step 2:**
- Apply for amended ERC/ Notification
- [3] working days
- DPI

**Step 3:**
- Apply for Business License
- [10] working days
- Department of Industry and Trade (DOIT) (provincial level)

**Step 4:**
- Apply for Outlet License (if any)
- [20] working days
- DOIT

- [If ENT approval required: 2 months]

**Restricted or not committed business:** Consult MPI (and relevant ministries)

**Restricted or not committed trading & distribution and related activities:** Consult MOIT (and relevant ministries)

Consult the MOIT
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3. DECREE 09: LICENSING HURDLES

1) IRC
2) ERC
3) (in case of share acquisition) M&A Approval
4) Business License (BL): for engaging in trading and distribution
5) Outlet License (OL): for establishing and operating each retail outlet (site for conducting retailing activities)
# 3. DECREE 09: LICENSING HURDLES - IRC

<table>
<thead>
<tr>
<th>Key requirements:</th>
<th>RedAct:</th>
</tr>
</thead>
<tbody>
<tr>
<td>a) Investor’s nationality</td>
<td>a) Check membership of international trade treaties (Art. 6.2 and 9.2) → Should consider CPTPP member.</td>
</tr>
<tr>
<td>b) Investor’s financial capability</td>
<td>b) The investor’s financing commitment OR the investor’s (profit-making) financial reports</td>
</tr>
<tr>
<td>c) The FIE’s business lines</td>
<td>c) “retail distribution”: NOW redefined (Art. 3.7)</td>
</tr>
<tr>
<td>d) The FIE’s types of goods</td>
<td>d) Check for non-eligible goods</td>
</tr>
<tr>
<td>e) The FIE’s head-office address</td>
<td>e) Eligibility of the leased premises and the lessor</td>
</tr>
<tr>
<td>f) Investment project proposal</td>
<td>f) Investment project proposal: purpose, scale, capital, location, labor,…</td>
</tr>
<tr>
<td>g) Retail outlet (separate issue)</td>
<td></td>
</tr>
</tbody>
</table>
# 3. DECREE 09: LICENSING HURDLES - ERC

<table>
<thead>
<tr>
<th>Key requirements:</th>
<th>RedAct:</th>
</tr>
</thead>
<tbody>
<tr>
<td>a) The FIE’s corporate form</td>
<td>a) Know the pros and cons of each corporate form (LLC vs JSC) especially corporate management</td>
</tr>
<tr>
<td>b) The FIE’s legal representative(s)</td>
<td>b) How many legal reps?</td>
</tr>
</tbody>
</table>
### 3. DECREE 09: LICENSING HURDLES – M&A APPROVAL

<table>
<thead>
<tr>
<th>Key requirements</th>
<th>RedAct:</th>
</tr>
</thead>
<tbody>
<tr>
<td>a) Investor’s nationality</td>
<td>a) Check membership of international trade treaties (Art. 6.2 and 9.2) → Should consider CPTPP member</td>
</tr>
<tr>
<td>b) The FIE’s business lines &amp; types of goods</td>
<td>b) Remove the restricting business lines/ goods</td>
</tr>
<tr>
<td>c) The FIE’s new legal rep</td>
<td>c) (For replacing the existing legal rep): pre-agreed for integration/ (post-)closing</td>
</tr>
<tr>
<td>d) Retail outlet (separate issue)</td>
<td></td>
</tr>
</tbody>
</table>
### 3. DECREE 09: LICENSING HURDLES – BUSINESS LICENSE

**WHO must obtain Business License?**

- **Foreign investor**
  - **≥ 51%**
  - **Holding Company**
  - **≥ 51%**
  - **Operating Company**
  - **must obtain Business License**

- **Foreign investor**
  - **< 51%**
  - **Holding Company**
  - **Operating Company**
  - **NO Business License**

**Any foreign shareholding**

[Offshore to Vietnam]
# 3. LICENSING HURDLES: BUSINESS LICENSE (CONT.)

**WHAT business activities required to obtain Business License?**

<table>
<thead>
<tr>
<th>Business License Required</th>
<th>NOT required</th>
</tr>
</thead>
<tbody>
<tr>
<td>Import or wholesale of oil, greases (HS 2709 and 2710) (*)</td>
<td>Export right of all goods</td>
</tr>
<tr>
<td>Retail of • rice, sugar, articles with recorded images, books, newspaper and magazines (*)</td>
<td>Import and wholesale right (except for oil, greases)</td>
</tr>
<tr>
<td>• Other goods</td>
<td></td>
</tr>
</tbody>
</table>

**Related activities, comprising of (*):**

1. Logistics services **NOT** commit to open to foreign investment;
2. Leasing goods (excluding financial lease and leasing construction equipment with operator);
3. Commercial promotion service (excluding advertising);
4. Commercial intermediary activities;
5. E-commerce services;
6. Services for tendering/ bidding goods and services.

**Sale agency and franchising**

**Other related activities, including:**

1. Logistics that are committed to open to foreign investment
2. Trade inspection services
### WHAT business activities required to obtain Business License? (cont.)

<table>
<thead>
<tr>
<th>Activity</th>
<th>Description</th>
</tr>
</thead>
<tbody>
<tr>
<td>Import right</td>
<td>NOT include the right to organize or participate in a goods distribution system in Vietnam</td>
</tr>
<tr>
<td>Wholesale</td>
<td>Sell goods to other wholesaling and retailing business entities and other organizations</td>
</tr>
<tr>
<td>Retail</td>
<td>Sell goods to individuals, family households and other organizations for use for <em>consumption purposes</em></td>
</tr>
</tbody>
</table>

**NEW:** Including sell to *manufacturers* for their own manufacturing
3. LICENSING HURDLES: BUSINESS LICENSE (CONT.)

**WHAT Conditions to be met for obtaining Business License?**

<table>
<thead>
<tr>
<th>Case</th>
<th>Conditions</th>
<th>BL Term</th>
</tr>
</thead>
</table>
| Members from international treaties to which Vietnam is a party (for | 1) Meeting the conditions on market opening;  
                                                                           | 2) Having a financial plan for the business activities;  
                                                                           | 3) **NO overdue tax debts** (for Vietnam-based companies established for ≥ 1 year) | Not stipulate  
                                                                           | 5 years                                                                 | No limit? |
| Non-members                                                          | Conditions (2) and (3) of the Case immediately above, and:  
                                                                           | a) Compliance with specialized laws;  
                                                                           | b) Competitive level of domestic enterprises in the same sector;  
                                                                           | c) Ability to create jobs for Vietnamese laborers;  
                                                                           | d) Ability to contribute and level of contribution to the State budget | 5 years |
| Services Vietnam does not commit to open                             |                                                                                           |                          |
| Products Vietnam does not commit to open (i.e. oil, greases, rice,  |                                                                                           |                          |
                                                                           | sugar, articles with recorded images, books, newspaper and magazines)                  |                          |
### Permissible activities

| Import, wholesale of Oil, greases (HS 2709 and 2710) | FIEs licensed to:  
|-------------------------------------------------|--------------------------------------------------|
|                                                  | ▪ Manufacture oil, greases; or  
|                                                  | ▪ Manufacture or distribute goods using oil, greases |

| Retail of rice, sugar, articles with recorded images, books, newspaper and magazines | FIEs having retail outlets in the form of *supermarkets, mini-markets and convenience stores* |
3. LICENSING HURDLES: OUTLET LICENSE

**WHO must obtain (Retail) Outlet License? (same to Business License)**

- **Foreign investor**
  - Any foreign shareholding
  - Operating Company
    - Outlet 1
    - Outlet 2
  - Holding Company
    - ≥ 51%
    - Outlet 1, Outlet 2

- **Foreign investor**
  - Operating Company
    - Outlet 1
    - Outlet 2
  - Holding Company
    - < 51%
    - Outlet 1
    - Outlet 2

- **Offshore to Vietnam**
  - Operating Company
    - Outlet 1
    - Outlet 2
  - Holding Company
    - Foreign investor Holding Company
      - Foreign investor operating company
        - ≥ 51%
        - Outlet 1
        - Outlet 2
      - < 51%
        - Outlet 1
        - Outlet 2

**must obtain Outlet License**

**NO Outlet License**
WHAT Conditions to be met for obtaining Outlet License?

1) Meeting the ENT tests

2) Having **financial plan** for the retail outlet;

3) (in case the applicant has been established in Vietnam ≥1 year) **no overdue taxes**;

4) Location of retail outlet: comply with the relevant master plans of “**geographical market region**”

- Scale of relevant geographic market (RGM)
- Number of existing retail outlets in RGM
- Market stability and operating activities of other retail outlets and traditional markets in RGM
- Traffic density, environment hygiene, fire safety in RGM
- Potential contribution to the socio-economic development of the RGM (i.e. jobs for locals, development of the retailing sector in RGM, environment improvement and living conditions of inhabitants in RGM and potential contribution to state budget)

ENT shall be removed after 5 years from effective date of CPTPP
3. LICENSING HURDLES: OUTLET LICENSE (CONT.)

ENT exemptions

❑ First retail outlet

❑ Any retail outlet beyond the 1st

1) having area of \(< 500m^2\) each; AND

2) located inside a **shopping mall**; AND

3) **NOT** in the form of a convenient store or mini supermarket.

A retail outlet beyond the 1\(^{st}\) one is an outlet which is:

- **Established in Vietnam by one of the foreign investors Or FIE already having retail outlet(s) in Vietnam; OR**

- **Established under the same name or brand with at least one retail outlet owned by an FIE in Vietnam.**
3. LICENSING HURDLES: OUTLET LICENSE (CONT.)

Some examples of retail outlet beyond the 1st one

A retail outlet beyond the 1st one is an outlet which is:

- Established in Vietnam by one of the foreign investors OR FIE already having retail outlet(s) in Vietnam; OR
- Established under the same name or brand with at least one retail outlet owned by an FIE in Vietnam.
A retail outlet beyond the 1st one is an outlet which is:

- Established in Vietnam by one of the foreign investors OR FIE already having retail outlet(s) in Vietnam; OR
- Established under the same name or brand with at least one retail outlet owned by an FIE in Vietnam.

Some examples of retail outlet beyond the 1st one (cont.)
3. LICENSING HURDLES: OUTLET LICENSE (CONT.)

Duration of Outlet License (Article 26.2[a])

- Equal to IRC’s remaining term
- In case of no IRC: subject to the (remaining) use term of the outlet’s premises (!?)
Temporary practice:

- May apply **concurrently** for all of the **existing** retail outlets
- Existing retail outlets may **continue operating** during the submission process (maybe subject to DOIT’s written confirmation)
- Time for application: not regulated, should be asap

**Key licensing notes for M&A cases**

3. LICENSING HURDLES: M&A MAY OFFER ADVANTAGES

- **Foreign investor**
  - Share transfer
  - ≥ 51%

- **Local investor**
  - Share transfer
  - ≥ 51%

- **Retailer**

- **Holding Company**
  - Any shareholding

- **Offshore to Vietnam**
  - Vietnam

- **Outlet 1**

- **Outlet 2**

- **must obtain OL**
3. LICENSING HURDLES: HOLDING STRUCTURE OPTION

Free from BL, OL requirement; Should be prepared for ENT removal (via CPTPP)
Thank you!

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