



LEGAL UPDATE

DECREE 9 ON TRADING (EXPORT/IMPORT) AND DISTRIBUTION BY FOREIGN-OWNED ENTERPRISES

Decree No. 09/2018/ND-CP (**Decree 9**) on goods trading and directly related activities by foreign investors and economic organisation with foreign invested capital in Vietnam entered into force on 15 January 2018 and replaces Decree No. 23/2007/ND-CP (**Decree 23**).¹

Decree 9 clarifies certain terms that led to difficulties for relevant parties under Decree 23. For example, clear information is given on the business license requirements, issuance term, administrative procedures as well as the empowered authorities

Positive points in Decree 9 are that requirements for foreign owned enterprises (**FOE**) to obtain a business licence are reduced, the retail sector for various commodities is opened up, and companies from countries that are not a member of the World Trade Organisation (**WTO**) can engage in business activities under the same conditions. However, it also introduces requirements for services that under Decree 23 were not required to obtain a business licence.

We set out the key points below.

1. Services for which business licence is required

Contrary to Decree 23 where all FOEs active in trading, export and import (retail and wholesale) were required to obtain a business licence, Decree 9 limits this requirement to certain services and goes beyond the requirements under the WTO Commitments. Decree 9 sets out that the following business activities need to obtain business licence:

- a. goods retail distribution;
- b. import and wholesale distribution of lubricants;
- c. logistic services excluding the sectors for which Vietnam has committed to open the market in relevant international treaties;
- d. goods leasing (excluding financial leasing), excluding the leasing of construction equipment whit operators;

- e. trade promotion services² excluding advertising services;
- f. trade intermediation services³;
- g. e-commerce services; and
- h. tendering and bidding organising services for goods and services.

Under Decree 23 FOEs providing lease of, commercial promotion services, e-commerce, commercial intermediary services, and tendering and bidding services were not required to obtain a business licence. In case of an amendment related to the corporate information such as name, address, legal representative, and owner, an FOE providing these services before Decree 9 entered into force, may be required to apply for a business licence though.

2. Foreign owned enterprises covered

Decree 09 also reduces the number of FOEs that need to obtain a business licence, as under Decree 23 an FOE with as little as 1% foreign investment needed to obtain a business licence. The foreign investment part has been increased considerable and now the following types of FOE need to obtain a business licence when they are active in export, import and trading:

- a. a company whose (direct) owner is a foreign entity;
- b. a company with 51% or more of its equity owned by a foreign entity; and
- c. company of which 51% or more of its equity is directly owned by a foreign entity as listed under a. or by a company as listed under b.

3. Barrier removed for import, export and wholesale distribution

3.1 Import and wholesale distribution

A significant improvement under Decree 9 is that importing and wholesale distribution by an FOE is allowed for all goods and products as long as these are not prohibited from being imported and distributed in Vietnam in accordance with the relevant laws.

¹ Decree 9 provides guidelines for the Law on Commerce and Law on Foreign Trade Management on goods.

² Trade promotion services cover promotional activities, displays and introductions of goods and services, and trade fairs and exhibitions.

³ Trade intermediation services cover representation of business entities, commercial brokerage, purchase and sale of goods by authorised dealers and commercial agency).



FOEs are now allowed to import and wholesale distribute goods without obtaining separate business license in case such goods are not lubricant products and

3.2 Export

To be able to export goods that are not on the list of goods prohibited for export under the laws of Vietnam, an FOE only needs to amend its operational certificates, i.e. ERC and IRC, and there is no need to obtain any additional business license.

4. Competent authorities

In principle the Department of Industry and Trade of each city or province will be in charge of issuing, amending and revoking the business license and retail store establishment license. Even though in certain cases MOIT still might need to review first.

5. Term of trading license

The term of a trading license shall be unlimited, except for certain cases (e.g. term for distribution of lubricant shall be capped at 5 years).

6. Retail of certain types of goods and products

An FOE supermarket or convenience store may now sell goods that are not included in the WTO commitments, such as rice, sugar, media recordings, books, newspapers, magazines, subject to the appraisal of the Ministry of Industry and Trade (**MOIT**).

7. Economic Needs Test requirements

Decree 9 does not abolish the Economic Needs Test (**ENT**)⁴ requirements. Accordingly, for an FOE that wishes to set up a second retail store the ENT will be applied.

The exemption of ENT applies now only to retail outlets with a surface less than 500 m² being located in a trading centre, and that is *not a mini-supermarket or convenience store*. This last requirement is new under Decree 9 and broadens the applicability.

The positive point is that Decree 9 now contains a more detailed timeline for the ENT process.

8. Revocation of licence

Decree 23 did not set out the reasons to revoke a licence. The reasons for revocation of the business licence and the retail outlet establishment licence are now clearly stated in Decree 9. A licence can – for example – be revoked in case of: suspension of activities for a certain amount of time without informing licencing authorities, other required licences are not obtained, forged information is submitted or required periodical reports are not submitted.

9. Transitional provisions

Decree 9 also contains certain provisions on how to deal with the different requirements as provided for in Decree 9 and 23.

For more information, please contact:

Mark Oakley / Managing Partner
mark.oakley@acsvlegal.com

Hieu Pham / Associate
hieu.pham@acsvlegal.com

⁴ For the ENT the relevant authorities will assess the following: impact of the new retail store to the current market area, the number of retail stores operating in the geographical market area, market area stability, impact on traffic density,

environmental sanitation and fire prevention in the geographical market area, contribution to socio-economic development of the geographical market area, and contribution to the State budget.