

**DIALOGUE BETWEEN MINISTRY OF PLANNING & INVESTMENT AND
RELEVANT MINISTRIES/AGENCIES AND VBF**

14:00 – 17:00, May 17th, 2016

MPI Premises, 6B Hoang Dieu Street, Hanoi

List of Participants: Appendix 1

MEETING MINUTES

***DECREE NO.07/2016/NĐ-CP DATED 25/01/2016 DETAILING REGULATIONS ON
ESTABLISHMENT OF REPRESENTATIVE OFFICES OR BRANCHES OF FOREIGN
TRADERS IN VIETNAM***

Prepared by Vietnam Business Forum

Evaluation of Decree 07

Mr. Vu Ba Phu – Director General, Planning Department, MOIT

Decree 07 has much improvements comparing with Decree 72:

- Expand and specify the amendment scope of the Decree to comply with WTO commitments and international treaties.
- Simplify administrative procedures, create favorable conditions for foreign traders; especially shorten up to 50% time for administrative procedures, reduce 50% number of reports and at least 25% the cost for compliance with administrative procedures; adopt simple and fast announcement for business termination instead of complicated procedures as previously.

Main issues raised by VBF

Responses by Mr. Vu Ba Phu – Director General, Planning Department, MOIT

1. Activities of representative office prescribed in Article 30, Decree 07 are narrower than those of Decree 72

Activities of rep. office according to Decree 72 were divided into 4 groups. Now, there is only 1 group of issues, called all activities related to business investment promotion activities, which excludes activities requesting business contractual agreement for generating benefits.

2. MOIT urgently releases the procedure of Vietnam's commitments – regarding rep. offices, branches – in international treaties that Vietnam is a member

Under the leadership of the Office of Government (OOG), the schedule has been already completed by MOIT and now submitted to the leaders. MOIT will announce this schedule within May 2016 in the MOIT website.

MOIT will review every 6 months the business lines for updates (if any). Currently, only business lines in the WTO and TPP commitments have been reviewed. Those in the EVFTA and CRF will be updated every 6 months.

3. Fiscal report is requested to submit to certify the existence and activities of foreign traders in the most recent fiscal year

It aims to encourage genuine foreign traders to do business in Vietnam with the purpose of promoting true business investment and sort out those setting up a rep. office in Vietnam to access the preferential policies on immigration and work permits.

4. Request for consular legalisation of documents issued by authorised agencies

It aims to ensure the reliability of documents in accordance with regulations of Vietnam's laws and prevent the fake documents. In reality, it's very difficult to control the fake foreign documents or profiles.

5. Departments of Industry & Trade (DoIT) usually have different requests compared with those prescribed at Decree 07 and MOIT's guidances

MOIT disagrees with the opinion that enterprises don't dare to name such DoIT. With a current straightforward and "action" Government, it's unavoidable for State's authorities to listen and acquire direct comments/responses from enterprises.

Mr. Fred Burke – VBF Head of VBF Investment & Trade WG

There are thousands of rep. offices in Vietnam currently, playing important role in Vietnam's economic integration and serving as key links with the global supply chain. Many of them would like to transfer into trading or service companies which are fully taxable in Vietnam. However, it's difficult for them to get approval. Rep. office can facilitate contracts for all kind of goods, but if they become limited company, they will have to apply separately for HS code for each imported goods. In reality, transferring from rep. office into company or branch/affiliate faces some burdens.

Decree 07 opens the idea of allowing rep. office to convert into branch that legally operates and pays tax in Vietnam. However, it requires more details on methods of taxation, application procedures, and whether HS code is needed for each product to be traded in Vietnam.

Consular legalisation for documents issued by authorised agencies (notarisation, translation, consular legalisation) takes cost and time (usually from 4 – 6 weeks). MOIT has mentioned as a method to prevent fraud. However, it is not an effective way as legalisation of documents for a fake company is too easy. Therefore, VBF doubts that this method is able to prevent fraud, but apparently imposes serious delay and cost in carrying out rep. office's activities.

How the existing rep. offices will be treated under the new rules? Is the application for new license needed? Will rep. office still be able to include the function of monitoring, promoting the performance of contracts signed with Vietnamese partners? As far as it is understood, though the language of new Decree has changed, activity scope of rep. office still remains.

Responses by Mr. Vu Ba Phu – Director General, Planning Department, MOIT

More discussions are still needed to see if any provision of Decree 07 could be changed. This is a legal gap in promoting the implementation of contracts that rep. offices are not allowed to perform according to the current provisions of Decree 07.

In order to implement specific requirements as VBF mentioned, relevant legal procedures such as tax, tax management, legal representative of branch/office must be taken into account. MOIT well notes the recommendation and hopes to receive detailed comments in document.

Regarding the signing of arisen contracts such as project extension contract, Decree 07 has still not mentioned. However, as confirmed earlier, the rights of rep. office stipulated in Decree 07 is not narrower than those in the former Decree 72.

Mr. Fred Burke – VBF Head of VBF Investment & Trade WG

Decree 72 stipulates that *rep. office is allowed to supervise, promote the performance of contracts signed with Vietnamese partners*. This phrase has not been mentioned in the new

Decree. Therefore, it can be understood that activities of rep. office is limited. VBF requests MOIT to clarify this interpretation.

Responses by Mr. Vu Ba Phu – Director General, Planning Department, MOIT

Decree 07 stipulates, *rep. office performs the functions of liaison office in market research, promoting business and investment opportunities for traders that it represents for.* “Promote the performance of contracts signed with Vietnamese partners” could be found in the phrase “promoting business and investment opportunities”.

Mrs. Hoang Thi Bich Ngoc – Lawyer, Nagashima Ohno & Tsunematsu, Hanoi Branch

Article 3, Decree 07 stipulates: foreign traders are allowed to establish rep. office/branch in Vietnam in accordance with Vietnam’s commitments in the international treaties that Vietnam is a member. In the WTO agreement, Vietnam has committed in only some service industries. Are traders of other service industries allowed to set up rep. office in Vietnam? In case that foreign firms have various business lines, how to define the main business line to certify that this one is included in Vietnam’s commitments?

According to Article 3.1, Decree 07, Vietnam is not committed to open its market in pharmaceutical field. Once Decree 07 is effective, whether pharmaceutical firms are allowed to establish rep. office in Vietnam? There will be more controls on entities that are allowed to set up rep. office. MOIT is requested to confirm this interpretation.

Responses by Mr. Vu Ba Phu – Director General, Planning Department, MOIT

The Government requested MOIT to review the open procedures for rep. office/branch, which will be public in the websites of Government, Ministry of Science and Technology, and MOIT within this month (May 2016).

Establishing rep. office of pharmaceutical firms is not the subject for amendment of Decree 07, but follows the Vietnam’s commitments in treaties or with other partners on opening the market.

Specialised business activities will be imposed stricter control, especially pharmaceutical ones. In the PM’s viewpoints on conditional business investment, stricter control is needed for the sake of the society.

DRAFT DECREE REPLACING DECREE 23

Main issues raised by VBF

Responses by Mr. Vu Ba Phu – Director General, Planning Department, MOIT

1. Separation of business license as an independent one is a backward step in the administration reform. It should be included in the procedures of investment registration or enterprise registration

MOIT plans to separate completely procedures of business license from those of investment/enterprise registration and assigns DoITs to perform to ensure the nature of a license on business condition for a foreign invested entity and compliance with Investment Law.

Article 22.3, Law of Commerce: goods purchase is a conditional business activity under the management authority of industry & trade sector and licensed by professional competent agencies. By doing so, investment issue could be separated from business one. Vertical sector management could be also consolidated. Investment Law and Decree 118 no longer stipulate the verification for procedures of business registration in field of goods purchase. Therefore, the separation of the two permits is necessary.

In order to ensure decentralisation and administrative reform following vertical sectors, the authority for registration/licensing is assigned for DoIT. This will minimise procedures for comments, which takes huge amount of time currently. 90% work amount will be decentralised to DoIT for its resolution. In reality, in Hanoi, 50% in total 3000 FDI enterprises performs goods purchase activity. However, Hanoi Department of Planning and Investment is just able to examine more than 30 FDI firms annually on performance of FDI projects only without specialised/professional checking. Meanwhile, DoIT is able to mobilise staff of market management and intersector inspection team from MoIT. To sum up, post-inspection will be increased and document receiving procedures will be simplified as much as possible.

Responses by Mr. Tran Hao Hung – Director General, Department of Legistaion, MPI

Separating business license from investment registration is a completely good solution because:

- Business licence is a general business condition applied for both Vietnamese and foreign enterprises in conditional business lines. This license is effective after the establishment of enterprise, which is in line with Article 6 & 7, Investment Law.
- Helps to minimise considerably time for commenting and reviewing procedures to issue investment license (review conditions and kind of products that foreign investors are allowed for trading; compare with commitments to see harmonised level with international agreements, etc). It will be hard to issueing investment license within 15 days without separation.

Ministry will not repeat discussion of combining procedures of investment & business registrations as prescribed in the former Investment Law. The combination of those procedures is not in line with legal nature of enterprises and investment projects. The most important thing is to build up a coordination scheme to handle investment/business registration procedures for enterprises' convenience.

2. 5-year duration for business license and retail establishment permit is too short and negatively influences the long-term business/investment plan of enterprises

This provision helps to strengthen management and minimise pricing and loss transfer. In reality, many FDI firms are suspected to perform pricing/loss transfer. However, under the current provisions, the Ministry will not able to apply any discipline. 5-year duration, therefore, aims to resolve this issue. However, MOIT is still in the drafting process. VBF is requested to contribute more recommendations/solutions to better control this issue.

3. Delegate the authority of issuing retail/wholesale establishment permit for Management Unit

Business license is granted for economic entities/enterprises to perform goods purchase activity over the whole country, not within the scope of industrial zone only. Enterprises who apply for retail/wholesale establishment permit will aim at the market nationwide, not only the market in the industrial zones.

In order to consolidate professional management, delegating almost the tasks for DoIT makes sense and saves time for enterprises. In reality, there is little information exchange on State management of business lines between DoIT and Management Unit of industrial zones.

4. Economic entities with below 51% FDI capital are allowed to perform every retail/wholesale activity and establish retail/wholesale facilities without implementing procedures for permits

Economic entities with even 1% FDI capital are also the subject for amendment of Decree 23. However, MOIT has referred provisions of Investment Law and Decree 118, business practice, and other countries' experience. Accordingly, the following groups are proposed not to require to apply for business registration/licence for retail/wholesale activities:

Group 1: foreign investors/funds via purchasing shares on the stock market to contribute their equity in public limited companies, which perform goods purchase activity and activities directly related to goods purchase, in line with MOIT procedures.

Group 2: foreign-invested economic entities, as prescribed in Article 23.2 Investment Law, with below 51% FDI capital that performs rights of import/export and wholesale distribution, without wholesale establishments, of products in line with MOIT procedures.

Group 3: foreign-invested economic entities, except cases in point b of this Article, engaging in goods purchase activity and activities directly related to goods purchase, have foreign investor as shareholder or member of economic entity without authority to approve economic entity's decision as prescribed in the charter of this economic entity.

5. Request to eliminate provision of Article 6.3 on conditions for granting business license for FDI enterprises because it is difficult for both management agencies and enterprises to perform in reality

This provision will be eliminated, means that permit issued by competent authority from home country will be no longer required for investors.

6. Request to eliminate provisions of Article 6.5 & 6.6 on financial capacity and experience capacity of enterprises.

As reflected in the last 10 years, MOIT realises that it's crucial to have provisions of financial capacity and business experience capacity because:

- It's hard for enterprises with continuous business losses to have financial capital to perform future business activities. Therefore, it does not make sense for them to ask for business license.
- It's hard for enterprises with chartered capital of 5 – 10 thousand USD only to perform retail/wholesale business.

7. According to provisions of Draft Decree, in case that FDI enterprises which are already granted business registration or investment registration but without approval of business license, their project activities are deemed to terminate

It's impossible that enterprises are allowed to investment but unable to get business license. The reality shows that almost 100% FDI firms operates in various business lines. Goods purchase is just one of their business activities.

8. Recommendations on spelling and better word choice are well noted.

Other issues

VBF member

According to Decree 23, permits on goods purchase activity include: business license, retail/wholesale establishment license. For enterprises without retail/wholesale establishments, is only business license required for them to perform rights of import and wholesale distribution without establishing wholesale facility?

Enterprises do not set up a wholesale establishment at the headquarters but a branch in another province/locality. In case enterprises wish to have a retail establishment, will that retail establishment be deemed to be the first or second retail establishment? Besides branch establishment license, is business license or retail establishment license required for that branch? Whether enterprise or branch is in charge of applying for that license?

5-year duration of business license and retail/wholesale establishment license is said to minimise the pricing transferring or re-granting license for loss businesses. In the legal framework, State management authorities have rights to supervise enterprises' activities and impose punishment such as withdrawing licenses. In case of suspicion of pricing transfer, tax authorities will examine and resolve on tax aspects. Therefore, it can be said that the 5-year duration is more about administrative procedures than helps to ensure enterprises' compliance.

Response by Mr. Vu Ba Phu – Director General, Planning Department, MOIT

In principle, that retail establishment at the branch could be seen as the 1st retail establishment of the enterprise. Draft Decree 23 has not yet considered re-granting the business license at the province/locality. MOIT well notes this issue for further discussion.

Mr. Tran Anh Duc – Co-head of VBF Investment & Trade WG

Once business license is amended, is the revision of business registration and investment registration required accordingly? Or is business license completely independent of investment/enterprise registration?

Response by Mr. Vu Ba Phu – Director General, Planning Department, MOIT

There is no revision needed in this case. Business license is independent and professional one.

Mr. Tran Anh Duc – Co-head of VBF Investment & Trade WG

Is foreign-invested economic entity with over or below 51% foreign capital deemed to be foreign or local enterprise? If the rate is below 51%, the procedures will be similar with those for local investors according to the Investment Law. However, enterprises with even 1% foreign capital will still have to apply for retail establishment license, which causes a huge disadvantage for enterprises.

Response by Mr. Vu Ba Phu – Director General, Planning Department, MOIT

Decree 118 stipulates on investment issues, not the professional business registration.

Mr. Tran Anh Duc – Co-head of VBF Investment & Trade WG

Article 6: Conditions for business license: *only applied for countries participating in international treaties that Vietnam is a member =>* Decree 118 has resolved this issue and stipulates the application for other countries. This Article is requested to revise to be in line with Decree 118.

Response by Mr. Vu Ba Phu – Director General, Planning Department, MOIT

MOIT will take into consideration.

Mr. Tran Anh Duc – Co-head of VBF Investment & Trade WG

Article 6.6: investors must have experience capacity in their business fields: Many foreign investors in Vietnam often set up a new company to implement projects in Vietnam, aiming to avoid risks. In case projects in Vietnam go bankruptcy, it will bear no impacts on other companies in the corporation. Only project company will suffer from losses. As a brand new one, the project company itself has no experience capacity but its shareholders do. Whether the experience capacity of corporation's shareholders is accepted?

Response by Mr. Vu Ba Phu – Director General, Planning Department, MOIT

It is a qualitative provision. MOIT will consider experience capacity of both shareholders and investors.

Mr. Tran Anh Duc, Co-head of VBF Investment & Trade WG

Article 44.1 & 44.2 on revoking business license in various cases: what is the reason/foundation for revoking the license? Permit withdrawal bears huge impacts on investor's interests. Therefore, it should be in line with cases as prescribed in the Investment Law. It's not the idea that each Ministry or sector set its own cases.

Response by Mr. Vu Ba Phu – Director General, Planning Department, MOIT

MOIT will note for further consideration.

Mr. Tran Anh Duc – Co-head of VBF Investment & Trade WG

What is the foundation/reason for the duration of business license? In case the project is authorised for 20 – 30 years, it makes no sense to stipulate just 5 – 10 year duration for business license.

Response by Mr. Vu Ba Phu – Director General, Planning Department, MOIT

It's well noted. However, VBF is requested to provide reasonable explanation for the duration (why it should not be 5 years) to ensure the State management.

Response by Mr. Nguyen Nhat Hoang – Director General, Foreign Investment Agency, MPI

Regarding Draft Decree replacing Decree 23, it's requested to conduct a separate meeting with MOIT for deep discussion.

CONCLUSION**Mr. Tran Hao Hung – Director General, Department of Legislation, MPI**

MOIT is requested to thoroughly consider VBF comments/recommendations, especially those relating to the consistency among Investment Law, Decree 118, and Draft Decree replacing Decree 23 in order to avoid legal conflicts. MPI will also support MOIT on this issue.

VBF is requested to provide further arguments on its disagreement on the duration of business license. It is even duration limitation for car license. Does it make sense to limit the duration of retail business license?

VBF is requested to include the following task in its working agenda as one of its priorities: support MPI and relevant authorities to review and consolidate all the difficulties/ obstacles during the implementation of Investment Law, Enterprise Law in relations with other relevant Laws, especially Laws on investment projects requiring land usage.

Prime Minister has established the Working Group for implementing Enterprise Law and Investment Law. Minister Nguyen Chi Dung will, in replacement of former Minister Bui Quang Vinh, be the Head of this Working Group. MPI would like to invite one VBF member to join the Working Group so that VBF always has its voice in the implementation of Enterprise Law and Investment Law. It's the idea that a representative of VBF Investment & Trade WG could join the Group. MPI will consider the decision for supplementing this new member within next week.

Mr. Nguyen Nhat Hoang – Director General, Foreign Investment Agency, MPI

It's recommended that VBF Working Groups to conduct regular meetings, consolidate, and group issues. E.g: Group 1: issues raised many times by VBF and responded by relevant Government agencies but still no specific results; Group 2: newly arisen issues; Group 3: issues in consideration process.

- Government agencies have responsibility to resolve and response.

Comments should be divided into 2 groups: Laws/policies and Implementation.

VBF needs to push Government agencies more strongly. Basing on the issues received, MPI will coordinate all MPI Departments together with other Ministries to sort out the policy issues for further implementation.

In October 2016, using one Law/Decree to revise many other Laws/Decrees will be adopted. VBF is requested to regularly consolidate and review all laws and relevant policies for comprehensive revision.

MPI together with other Ministries and sectors are reviewing, consolidating, and updating business lines that are “open” in the market's concept; after that, the information will be published for provinces, investors, and consulting firms' reference.

Regarding implementation issues, specific cases should be clarified so that MPI Departments (Business Registration Management Agency, Foreign Investment Agency, or WG for implementing Investment/Enterprise Law) are able to direct localities/provinces to resolve.

It is requested to group issues/problems in topics/themes. Beside MPI, VBF may contact other Ministries. MPI will facilitate the organisation of thematic meetings with other Ministries.