

Special Alert

October 2021

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Regulations on e-commerce in Vietnam to be officially updated

Promulgated on 16 May 2013 and officially effective as from 1 July of the same year, Decree No. 52/2013/ND-CP on e-commerce (“**Decree 52**”) has acted as the legal “backbone” for managing e-commerce activities in Vietnam for several years.

After almost a decade of application and with the gradual diversity of e-commerce activities, including the problems caused by the covid-19 pandemic which brought significant breakthroughs to the scale of the e-commerce market in Vietnam, Decree 52 needed an update. After two draft versions were released, finally on 25 September 2021, the Government officially ratified Decree No. 85/2021/ND-CP amending and supplementing Decree 52 (“**Decree 85**”).

Decree 52 as amended by Decree 85 will hereinafter be referred to as the “**E-commerce Decree**”.

As a heads-up on what impacts it may bring, below are some of the remarkable legal updates under the E-commerce Decree.

Clarification of governing scope

As a response to diversified e-commerce activities, Decree 85 clarifies the governing scope by analogy, clearly excluding the e-commerce activities which are not governed by the E-commerce Decree. In particular, e-commerce activities in specialized sectors (e.g., finance, banking, credit, insurance, lottery, money exchange, gold exchange, foreign currencies exchange and other payment means; betting, lucky games, digital content distribution and publication services, broadcasting and television services) must instead comply with their respective specialized legislations.

Foreign entities being subject of application

The E-commerce Decree covers all foreign traders, organizations (“**Foreign Entities**”) operating in e-commerce activities as identified under Section 5 of Chapter IV as its subjects of application, including: (i) Foreign Entities having websites providing e-commerce services in Vietnam, (ii) Foreign Entities being sellers on e-commerce trading floors (“**ETFs**”) in Vietnam, and (iii) foreign investors in the e-commerce sector.

Beside those having e-commerce websites under Vietnamese domain name and/or displayed in Vietnamese language, foreign entities having e-commerce websites with more than 100,000 transactions per year from Vietnam shall also be considered as Foreign Entities having websites providing e-commerce services in Vietnam and thus subject to the governance of the E-commerce Decree, wherein:

- (i) E-commerce services are defined as e-commerce activities according to which e-commerce service providers establish e-commerce websites to provide an environment for conducting trade promotional activities, sale of goods, or provision of services to other business entities (except for service providers providing website design services and who are not directly involved in business activities, operations or coordination on such websites); and
- (ii) The number of transactions from Vietnam on an e-commerce website will be based on the following sources: (a) the figures voluntarily reported by the Foreign Entities in accordance with the E-commerce Decree; (b) official figures of the competent authorities of Vietnam, comprising customs offices, Internet management authorities, bank management authorities, and tax management authorities; and (c) available and public reports, information which can be verified by the relevant competent authorities.

Social networks (“SNs”) to be treated as ETF

According to Decree 85, operational forms of ETFs include:

- (i) Websites that allow their participants to open stalls for exhibiting and/or introducing goods and/or services;
- (ii) Websites that allow their participants to open accounts for conducting contract signing with customers;
- (iii) Websites with sale-purchase categories, in which participants are allowed to make posts about selling and/or purchasing goods and/or services; and
- (iv) **SNs having one of the activities listed above, whose participants directly or indirectly pay a fee for conducting such activities.**

This revision was raised in the latest draft which is now adopted in Decree 85, adding a new condition about the fee payment made by SN participants. It can be implied from the regulations that SNs only involving one of the activities listed in points (i), (ii) and (iii) above will not be considered as an EFT, as long as their participants do not have to pay for conducting such activities.

Notification and information provision obligations of sale e-commerce website owners

Under Decree 85, only owners of sale e-commerce websites with online ordering functions are required to notify the Ministry of Industry and Trade (MOIT) of the establishment of such websites. The notification shall be carried out online via the MOIT's e-commerce activity management portal before officially selling goods/ providing services to the consumers.

While losing the grip on procedural obligations, competent authorities focus more on those during the operation of sale e-commerce websites. In particular, owners of sale e-commerce websites are now required to store information about transactions conducted via their sale e-commerce websites and sufficiently comply with tax duties.

Regarding obligations of information provision on sale-ecommerce websites, Decree 85 requires only website owner's information as detailed in the E-commerce Decree's Article 29 to be published on the website home page (e.g., traders' name and address; particulars of the traders' enterprise registration; and contact telephone number or other online contact mode for receiving complaints about goods quality). In addition, if a sale e-commerce website has online ordering function, then links to its general transaction conditions, goods transportation and delivery conditions, and payment method must be displayed on the website's home page. These additions and clarifications help to clearly attribute specific responsibilities of specific subjects, ultimately aiming at the protection of consumers' rights.

Obligations of ETFs owners are detailed and updated

- (i) Similar to owners of sale e-commerce websites, under Decree 85, only ETFs owners' information as specified in the E-commerce Decree's Article 29 are required to be published on the ETFs' homepages. In addition, for foreign sellers on ETFs, their private names must be transliterated into Vietnamese or displayed in Latin characters. However, during the operation, ETFs' owners must verify the identification of foreign sellers on their ETFs, and perform one of the following responsibilities:
 - Request foreign sellers to exercise the import, export rights of foreign traders not having prescribed commercial presence in Vietnam;
 - Organize the entrusted import/ export activities of the purchasers in respect of goods of Foreign Entities transacted on their ETFs; or
 - Request foreign sellers to appoint their commercial agencies in Vietnam.
- (ii) For obligations in respect of handling, and cooperating with the state agencies in investigation and handling of illegal business activities on the ETFs, Decree 85 provides for specific actions to be taken by the ETF owners under the new Articles 36.8 and 36.9. These new regulations help clear out the ambiguities for ETF owners, who now certainly know how and what to do on their sides. On the other hand, when the regulations become clearer, it is also easier for the state agencies' management and sanction of those violating entities.

Some of the remarkable actions to be taken as mentioned above include, inter alia:

- In handling illegal business activities: preventing and removing from the ETFs information on transactions of prohibited goods and/or services under the laws; removing information on violating goods and/or services within 24 hours upon receipt of competent authority's request; coordinating with owners of intellectual property rights ("IPRs") to identify and remove IPRs-infringing products in accordance with the published operation schemes of the ETFs; and warning or rejecting provision of services temporarily or perpetually, to sellers committing illegal business conducts on the ETFs; and
- In cooperation with the state agencies: providing competent state authorities with information on those subjects having signs of violation and/or actions on the ETFs upon detection or report; regularly updating keywords as being recommended by the competent authorities from time to time and filtering information based on such keywords before information about goods/ services is displayed on the website; and receiving and responding to information for resolving disputes, complaints relating to the ETFs on the MOIT's e-commerce activity management portal at online.gov.vn.

(iii) Decree 85 also supplements a new clause 11 to Article 36 of the E-commerce Decree. Accordingly, the owner of ETFs with online order functions has to comply with additional obligations, including:

- Assign a point of contact to receive and provide online information to the state managing agencies;
- Act on behalf of foreign sellers via the ETFs in handling consumers' complaints;
- Act as the point of contact to receive and handle consumers' complaints, in case relevant transactions conducted on the ETFs involve more than one party;
- Store information regarding order transactions conducted on the ETF in accordance with accounting regulations; and
- Jointly compensate in case of violating obligations in respect of handling, and cooperating with the state agencies in investigation and handling of illegal business activities on the ETFs.

It seems like these new regulations applicable to ETFs with online order functions will apply to most of the current ETFs in Vietnam since an online ordering feature is no longer a novel function to ETFs users.

Obligations of Foreign Entities being subjects of Decree 85

Foreign Entities having websites providing e-commerce services in Vietnam (which are subject of application of the E-commerce Decree as mentioned in the section two (Foreign entities being subject of application) above) are required to comply with the following obligations:

- (i) Registration of the e-commerce activities in accordance with the E-commerce Decree;
- (ii) **Establishment of their representative office** in Vietnam in accordance with the prevailing laws **or appointment of their authorized representatives** in Vietnam.
- (iii) Cooperation with state management agencies in preventing transactions of goods and services in violation of legal regulations;
- (iv) Compliance with obligations related to consumer protection; products and/or goods quality in accordance with the law of Vietnam; and
- (v) Provision of an annual report to the MOIT on the operation statistics by the 15th day of January for the preceding year.

Foreign sellers on ETFs in Vietnam are required to comply with ETF's operation schemes when selling their goods thereon. In addition, prescribed customs clearance procedures (under the Law on Customs) must be conducted for imported and exported goods which are transacted via e-commerce.

Provision of e-commerce services in Vietnam is a conditional business for foreign investors in the e-commerce sector. In conformance with regulations of the 2020 Investment Law, Decree 85 further provides details on respective market conditions applicable to foreign investors (excluding those investing in small and medium enterprises (SMEs) in line with the country's regulations on supporting SMEs), comprising: (i) providing e-commerce services in Vietnam in compliance with Articles 21.1 and 21.2 of the 2020 Investment Law; and (ii) foreign investors with a dominant stake in one or more enterprises in the group of the top five ecommerce operators in Vietnam as published by the MOIT would have to obtain national security clearance from the Ministry of Public Security.

Other remarkable points of Decree 85

Decree 85 clearly requires that all subjects participating in e-commerce activities must comply with regulations in relation to information safety, cybersecurity and other relevant sectors of laws.

As for the principle to identify customer protection obligations, Decree 85 clearly defines the circumstance and applicable subjects. Particularly, in case entities providing e-commerce services conduct the services of notifying goods and/or services information of sellers to consumers, such entities shall be considered as third parties providing information in accordance with the laws on consumers' rights protection. Accordingly, entities providing infrastructures are no longer mentioned.

Article 63 is also amended and supplemented to detail the activities in providing electronic contracts certification services.

Decree 85 will officially take effect on 1 January 2022, upon which:

- Those entities who successfully notified/registered their e-commerce activities with the MOIT in accordance with Decree 52 must, within 180 days, carry out the amendment, supplementation of their notification/registration in accordance with the new Decree 85;
- Those entities who have submitted dossiers to (and not yet been certified/approved by) the

- MOIT for notification/registration of e-commerce activities in accordance with Decree 52 will have to re-conduct the notification/registration in accordance with Decree 85; and
- Foreign sellers on ETFs and foreign investors in e-commerce sector will have to, within 12 months, conduct their respective obligations under Articles 67(b) and 67(c) of Decree 85.

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