

## Decree 85/2021/ND-CP and its effect on the e-commerce regulations in Vietnam

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To timely regulate its quickly changing e-commerce market, Vietnam has been updating several regulations in this field. For this purpose, the Vietnamese Government issued Decree 85/2021/ND-CP (**Decree 85**) to amend Decree 52/2013/ND-CP (**Decree 52**) regarding e-commerce on 25 September 2021, and the new Decree will take effect from the beginning of 2022. The key amendments in Decree 85 are henceforth discussed below.

### Changes in applicable scope and subjects

#### 1. Scope of application

Decree 85 narrows down the scope of application of the existing e-commerce decree. Specifically, the recent decree expressly excludes “*e-commerce activities in finance, banking, credit, insurance, lottery, purchase, exchange of money, gold, forex and other payment methods, betting or prize winning games, distribution, publishing of digital contents, radio and television services which are regulated by specialized laws*” from the applicable scope.

#### 2. Subjects of application

- Foreign providers who are not physically present in Vietnam and whose websites are under foreign domain names may be subject to the e-commerce decree: In the original Decree 52, only foreign traders and organizations having presence in Vietnam (i.e., having set up company, branches, or representative offices in Vietnam) or websites with Vietnamese domain names were subject to the e-commerce regulations. Decree 85 now broadens the applicable foreign subjects to foreign traders and organizations having websites that meet any one of the following criteria: (i) that of using Vietnamese domain names, (ii) that of using the Vietnamese language as a display language, or (iii) that of having more than 100,000 transactions per year from Vietnam, notwithstanding its forms of presence in the investment, branches, or representative offices. The transaction counts are in turn deduced from voluntary reports of the foreign providers, official data of the competent authorities, or other available reports and information that the competent authorities can verify.
- Website design service providers will not be subject to the decree: Decree 85 introduces a new definition of “e-commerce services”, which explicitly states that traders and organizations providing website design services that are not directly involved in the operations, administration and coordination of the website activities will not be determined as “e-commerce traders and organizations”.
- Logistics service providers will be subjects participating in e-commerce activities under the decree: Decree 85 is further supplemented with the definition of logistics service providers now falling under “subjects participating in e-commerce activities”. The allocation of liabilities between the logistics service providers and other e-commerce subjects, and among the logistics service providers themselves has been updated accordingly.

### Sales e-commerce websites

1. Only sales e-commerce websites<sup>1</sup> providing online ordering functions will need to notify Ministry of Industry and Trade (**MOIT**) of their establishment: Article 26.5 of Decree 52 has been amended to narrow the definition of sales e-commerce websites which are required to notify MOIT to those having online ordering functions.
2. More information will need to be publicly announced on the sales e-commerce websites: Beside the information which currently needs to be published on the websites under the original decree, Decree 85 requests the homepages of sales e-commerce websites to announce the point of contact (i.e., phone number or email address) for the purpose of receiving feedback on goods and service quality, and to show links to the general transaction conditions, transportation and delivery details, and payment methods.

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<sup>1</sup> A sales e-commerce website is defined to be an e-commerce website that has been set up by traders, organizations and individuals for the purposes of their trade promotion, sale of goods, or service provision.

The information on goods and services to be announced on the website has also been clarified under the new amendments. Goods-related information on the websites must contain all compulsory contents required of the goods label, save for product-specific contents (e.g., expiry date, manufacturing batch number, etc.). The compulsory contents required of the goods label are in turn regulated under Decree 43/2017/ND-CP, and they include the goods name, name and address of the responsible person, origin, and other contents as required for each of the goods.

### **E-commerce trading floors**

1. Social networks which have certain functions are deemed as e-commerce trading floors<sup>2</sup>: A new form of e-commerce trading floor, namely, social networks approving of participants opening stalls for goods and services displays and introductions, opening accounts to proceed with the execution of contracts, or having a category for the posting of sales-related news, has been introduced in the amendment to Article 35.2 of Decree 52.

However, upon taking a close look at the legislative history, an informed reader would realize that this is not entirely new. In 2014, the legislators determined the described social networks as e-commerce trading floors in Article 6 of Circular 47/2014/TT-BCT of MOIT, and the latest amendment under Decree 85 is essentially an adoption with higher enforcement value to apply the responsibilities of the e-commerce trading floors on social networks.

2. E-commerce trading floor service providers will bear more and stricter responsibilities: Decree 85 requests more cooperation from the e-commerce floor service providers in preventing activities against the laws, such as removing information about goods or services violating laws within 24 hours from receiving requests from the competent authorities, or receiving news of, responding to, and settling disputes in relation to the trading floors on the e-commerce management portal of MOIT.

Moreover, if their trading floors have online ordering functions, the e-commerce trading floor service providers must take joint liability for compensation in the event that any regulatory obligations are violated (i.e., obligations to take remedial measures upon the detection or receipt of reports about such violations, or to support the competent authorities in investigating and handling illegal acts and settling disputes).

### **New regulations for foreign traders and organizations**

1. Foreign e-commerce service providers must register their e-commerce activities and coordinate with the competent authorities in preventing illegal transactions: Decree 85 introduces new responsibilities for service providers having websites providing e-commerce services in Vietnam. In particular, they must register their e-commerce activities, and set up representative offices or assign authorized representatives in Vietnam. They are also requested to coordinate with the competent authorities in preventing transactions of goods and services that violate Vietnamese laws.

2. The trading floor service providers in Vietnam must be responsible for foreign sellers on their floors: Under Decree 85, if foreign sellers having no presence in Vietnam sell goods on Vietnamese e-commerce trading floors, the trading floor service providers are explicitly responsible for:

- verifying the identity of such sellers; and
- performing one of the following responsibilities: (i) requesting the foreign sellers to exercise their right to export, and right to import applicable for foreign sellers that have no presence in Vietnam, (ii) organizing the importation of goods according to the purchasers' entrustment, or (iii) requesting the foreign sellers to designate their commercial agents in Vietnam.

3. The market access conditions for e-commerce services have been specified: Recently, e-commerce activity has been considered a conditional market access line as prescribed in Annex I-B of the so-called Decree 31/2021/ND-CP guiding the Law on Investment. According to Article 67c that is supplemented by Decree 85, a foreign investor will be able to invest in the form of establishing a business organization, through the means of contributing

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<sup>2</sup> An e-commerce trading floor is defined to be an e-commerce website that allows traders, organizations, and individuals which do not own the website to implement a part or whole of their sales of goods or services on the website. An online securities exchange website is not an e-commerce trading floor.

capital, or by purchasing shares of a company. It should be noted that the foreign investor will have to fulfill all investment conditions under the relevant regulations, such as obtaining the trading license for a foreign-invested e-commerce company, and making a notification relating to the economic concentration to competent authorities if the capital contribution or shares purchase constitutes a considerable concentration under Competition Law.

Besides, a foreign investor controlling one enterprise or more in the group of five leading enterprises in the e-commerce market must obtain the appraisal of Ministry of Public Security on national security during the trading license stage to access the Vietnam market.<sup>3</sup> The word “controlling” under Decree 85 is understood as either:

- holding more than 50% of charter capital or voting shares of the company;
- having the right to directly or indirectly appoint, dismiss or remove the majority or all members of the board, the chairman of the members’ council, director or general director; or
- having the right to decide on key matters of the business, including the technological foundation, business form, selection of business lines, areas, modes, selection of business size and lines, selection of methods, forms of capital mobilization and use.

The five leading enterprises in the e-commerce market are determined based on the criteria of the number of visits, sellers, transactions, and the total transaction values. MOIT will announce the list of such leading enterprises.

In addition, according to Article 3.2.c of Decree 85, the foreign investors must fulfill the requirements stipulated in Article 67c mentioned above by 1 January 2023.<sup>4</sup>

With Decree 85 coming into effect soon, it is expected to create new tasks for e-commerce subjects to comply with, while offering more protection to Vietnamese consumers. It is likely that Vietnam will get tougher on its digital economy, so relevant companies should keep a cautious eye on regulatory matters and fulfill their given obligations. We will keep making more updates on other regulations regarding the digital market in Vietnam.

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<sup>3</sup> This requirement does not apply to investments in small or medium-sized innovative enterprises.

<sup>4</sup> Although the wording of Article 3.c of Decree 85 is ambiguous, it is likely that such a transitional provision will also target the foreign investments in e-commerce that have been performed before the effective date of Decree 85.

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