



NEWSLETTER

Edition 6, 2012



Dear Readers,

We welcome you to the latest edition of our regular newsletter, providing you with key information on some of the latest legal developments in Vietnam. In this edition you will find:

- An overview of the most significant changes to the Singapore-Vietnam Avoidance of Double Taxation Agreement of 1994, proposed by the second amending protocol;
- A brief overview on the new Law on Advertising which is expected to improve the efficiency and management of advertising activities as well as providing better protection for consumers;
- A summary of the Law on Prices which aims to establish a common legal framework for better control over the economy consistent with market developments and international commitments of Vietnam;
- An update on a new circular on the disclosure of information on the securities market;
- A short article on the protection of copyright and related rights on the Internet and in the telecommunication networks environment; and
- Certain provisions issued by the State Bank of Vietnam in relation to the financial activities of credit institutions and branches of foreign banks in Vietnam.

We trust that you will find this edition of the newsletter an interesting read and welcome any feedback or comments you may have on any of our topics. Please feel free to email us with your comments and suggestions at newsletter@frasersvn.com.

Whilst we aim to provide a useful update on new legislation, Frasers' Newsletter does not constitute formal legal advice. Should you require further information on any of the issues in this edition of the Newsletter please contact us at newsletter@frasersvn.com.

AMENDMENTS TO THE SINGAPORE-VIETNAM AVOIDANCE OF DOUBLE TAXATION AGREEMENT OF 1994

A second protocol (*Second Protocol*) to amend the existing Singapore-Vietnam Avoidance of Double Taxation Agreement (*DTA*) was signed on 12 September 2012. In our view, the Second Protocol introduces two significant amendments to the DTA, which we discuss in more detail below. The provisions of the Second Protocol will need to be ratified by both countries before they enter into force.

Revision to the Exemption from Capital Gains Tax

Currently, Vietnam does not have the right to impose capital gains tax (*CGT*) on a sale of shares in a Vietnamese entity by a Singapore resident investor. Under the Second Protocol, a Singapore resident investor will have to pay CGT when they sell shares in a non-listed Vietnamese entity, where more than 50% of the value of such shares is derived directly or indirectly from immovable property (i.e. land and buildings) in Vietnam.

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Foreign investors should be aware of this proposed amendment to the DTA, because it may have a substantial impact on their existing or proposed investment structure for a potential tax-efficient exit strategy from a Vietnamese entity which holds immovable property.

Change in the Definition of “Permanent Establishment”

The provisions of the existing DTA which determine whether a Singaporean or Vietnamese service provider has a permanent establishment (*PE*) in either country have been expanded. The Second Protocol provides that a service provider will be considered to have a PE in Vietnam/Singapore where activities of the nature of the services provided continue (for the same or for connected projects within a country) “for a period or periods aggregating more than 183 days within any 12 month period”.

A NEW LAW ON ADVERTISING

With the aim of improving the efficiency and management of advertising activities, and protecting the rights and interests of consumers, a new Law No. 16/2012/QH13 on Advertising was passed in the June 2012 session of the National Assembly (*the Advertising Law*), replacing Ordinance No. 39/2001/PL-UBTVQH10 dated 16 November 2001 on Advertising (*the Advertising Ordinance*). Coming into effect from 1 January 2013, the Advertising Law supplements and updates the legislation in line with developing trends in the advertising sector.

According to the Advertising Law, the definition of “advertising” has been revised to mean the introduction to consumers of the following:

- products, goods and services with or without a profit-making objective; or
- organisations and individuals which are in the business of introducing products, goods, or services, except for news of current affairs, social policies or personal information.

The Advertising Law allows for foreign entities doing business in Vietnam to advertise their products, goods, services, and operations in Vietnam. Foreign entities doing business in Vietnam (as well as in other countries) are expected to hire individuals engaged in the business of advertising services in Vietnam to conduct such activities for them.

Below are some other notable provisions of the Advertising Law:

Provisions on Prohibited Acts

Compared with the Commercial Law, the list of products, goods and services prohibited from being advertised has been expanded, as has the list of acts banned from advertising activities. The Advertising Law tightens regulations on advertising alcoholic beverages by prohibiting advertising of beverages with an alcohol concentration of 15% or more, down from 30% as stipulated in the Commercial Law. Additional provisions refer to the Law on Competition and Law on Intellectual Property, for the purpose of identifying wrongful and prohibited acts.

In addition, should an advertisement require assessment, the Appraisal Council for Advertising Products, under

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the Ministry of Culture, Sports, and Tourism, shall determine whether the advertisement in question complies with the law.

Advertising Conditions

The Advertising Law specifies a number of conditions to which entities conducting business in advertising services must adhere, including the requirement for such an entity to have a business registration certificate authorising it to advertise goods or services.

For certain advertisements there must be documents, provided by an advertiser to an entity conducting business in advertising services, evidencing the compliance of the goods and services with regulations stipulated by law, such as specific conditions applicable to medicine, medical equipment, cosmetics, chemicals, pesticides, nutritional products for infants, health services, and food products.

A new provision under the Advertising Law holds advertisers and entities conducting the business of advertising services jointly responsible for any misleading or incorrect information in an advertisement.

Advertisements in foreign languages are permitted in certain cases, provided they comply with the conditions stipulated in the Advertising Law.

Advertising in Specific Media

The Advertising Law has amended and supplemented detailed provisions with respect to each type of advertising, as follows:

- *Advertising in the media:* The new Advertising Law has removed the limit on the frequency of advertising. Instead, the Law provides certain restrictions in relation to certain broadcasts. During broadcasts of current events and live events on national days, for example, no commercials shall be aired.

The area covered by advertisements in printed newspapers must not exceed 15% of the total area of one issue of the newspaper, except in specialised advertising supplements.

For radio and television broadcasts, advertising must not exceed 10% of the total duration of a broadcast on any given day for each broadcasting organisation. The duration of advertising on a paid channel shall not exceed 5% of the total duration of a broadcast.

The Advertising Law introduces new regulations for electronic media and website advertising. Advertisements on websites of foreign entities which conduct cross-border advertising, thereby earning revenue from such acts in Vietnam, shall comply with the Advertising Law and other relevant laws (e.g. the applicable laws on tax and media, etc.). Vietnamese laws will always be enforced, even in relation to non-profit activities.

The Advertising Law also provides the procedures and requirements for issuing advertising inserts or launching advertising channels or advertising broadcasting programmes;

- *Advertising electronically or via terminals and other telecommunications equipment:* Advertising messages

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and emails are only allowed to be sent to recipients who have provided prior consent; advertisement frequency shall be observed, and recipients must be able to refuse receipt of such ads without any service charge being applied;

- *Advertising in printed publications* (such as books, catalogues and advertising leaflets), *on audio records, video records and other technological equipment*;
- *Advertising on billboards, banners, signboards, neon signs, and specialised advertising screens*: The Advertising Law requires that the time limit for advertising on billboards and banners shall not exceed 15 days. Outdoor advertisements with specialised screens (e.g. LED or LCD screens) shall not be permitted to use audio effects. The Advertising Law provides particular cases where construction permits for advertisement works must be obtained;
- *Advertising on transport vehicles; ads by loudspeaker and similar*;
- *Advertising at fairs, seminars, conferences, functions, exhibitions, and cultural and sporting events*; and
- *Advertising by persons conveying advertising products and advertising objects*: Under the Advertising Law, any organisation or individual organising group advertisements shall send notices to the local competent bodies at least 15 days prior to the date of implementation of such advertising. Beyond that time limit, and without any written response from such competent bodies, the advertisements shall be permitted only in accordance with the reported contents.

NEW LAW TO IMPROVE PRICE STABILITY IN VIETNAM

On 20 June 2012, the National Assembly passed a new Law on Prices, No. 11/2012/QH13 (**Law on Prices**), replacing Ordinance 40/2002/PL-UBTVQH10 of the Standing Committee of the National Assembly dated 26 April 2002 (**Ordinance on Prices**). The Law on Prices is aimed at establishing a common legal framework with clearer guidelines on how pricing control works in an effort to support and protect Vietnam's economy. The Law on Prices shall come into effect from 1 January 2013.

Goods and Services Targeted for Price Stabilisation

The following items are considered essential for production and human sustenance, and are subject to price stabilisation under the Law on Prices:

- oil and petroleum finished products;
- electricity;
- liquefied petroleum gas;
- nitrogenous fertilisers, NPK fertilisers;
- pesticides prescribed by law;

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- preventative vaccines for cattle and poultry;
- edible salt;
- milk for children less than six years of age;
- edible sugar, including refined sugar;
- paddy and ordinary rice; and
- drugs for the prevention and treatment of human disease on the list of essential medicines.

This list is not exhaustive, and is subject to the final decision of the Standing Committee of the National Assembly.

Price stabilisation shall be implemented if the price of goods and services in relation to the above-mentioned list rises abnormally and negatively impacts upon socio-economic stability. The Law on Prices does not provide any detailed guidance in relation to the above-mentioned categories, but does regulate the Government's responsibility to clarify them.

Subject to Government discretion, measures for price stability, if applied, will be made within a regulated time. During this time, individuals and organisations involved in the affected businesses will be obliged to register their related products or services with the State authorities that issued the decision on measures for price stability (either the Government or the provincial People's Committee).

Goods and Services Under Price Determination

The Law on Prices identifies three groups of goods and services for which prices will be determined by the State, including: (i) goods and services exclusively manufactured and traded by the State; (ii) important natural resources; and (iii) goods held in storage as national reserves, public utility products and services and public professional services funded by the State budget. The list may vary and is subject to the final decision of the Standing Committee of the National Assembly.

Depending on the nature of the goods and services, prices, price frames, and minimum and maximum price levels shall be determined by State authorities.

Price Negotiation

The Law on Prices introduces cases in which price negotiation between buyers and sellers under the supervision of the relevant State authorities is implemented for goods and services that are:

- not in the list of goods and services whose prices are determined by the State; and
- important and produced and traded under specific conditions or in a controlled competitive market; or are exclusively purchased or sold; or the buyer and the seller are dependent on each other and irreplaceable.

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Additional Regulations on Price Appraisal

Under the Ordinance on Prices, price appraisal is applicable only for State-owned assets. Under the Law on Prices, however, the list of goods and services eligible for price appraisal is extended to include the assets of any organisation or individual requesting price appraisal. This step has been added to better protect consumer rights, entitling consumers to have goods, products, assets and services evaluated, rather than having to accept prices promoted by sellers.

Price appraisal enterprises, stipulated under the Law on Prices, are those which are established pursuant to the Law on Enterprises and are granted adequate certificates to undertake price appraisal services. Conditions for granting such certificates vary, and are subject to the form of enterprise established; however, there are at least three price appraisers for each enterprise.

The Law on Prices creates new opportunities for foreigners to invest in price appraisal businesses of which detailed activities shall be subject to another piece of legislation to be issued by the Government in the future.

DISCLOSURE OF INFORMATION ON THE SECURITIES MARKET

Continuing its efforts to promote transparency, Vietnam's Ministry of Finance issued Circular No. 52/2012/TT-BTC on 5 April 2012, guiding the disclosure of information on the securities market (**Circular 52**). This Circular came into effect from 1 June 2012, replacing Circular No. 09/2010/TT-BTC (**Circular 09**). In addition to Circular 52, the State Securities Commission (**SSC**) promulgated Decision No. 515/QD-UBCK dated 25 June 2012 enabling the disclosure of information on the SSC website (**Decision 515**).

Both Circular 53 and Decision 515 govern public companies, issuing organisations (except bond issues guaranteed by the Government), securities companies, fund management companies, the Stock Exchanges, the Viet Nam Securities Depository Centre (**SDC**) and relevant persons.

A new requirement of Circular 52 is that large-scale public companies face an obligation for information disclosure. According to Circular 52, large-scale public companies are defined as companies with a charter capital of VND120 billion or more, and not fewer than 300 shareholders.

Disclosure must be made by the legal representative of a company or the person authorised to disclose information. This person will be responsible for the accuracy, credibility and timeliness of the information.

Circular 52 further adds a number of requirements regarding corporate governance. Under Circular 52, public companies will have to submit a report every six months and disclose information about the administration of the company as well as all documentation relating to annual or ad-hoc General Meetings of Shareholders no later than 15 days prior to the opening of such meetings. This Circular also sets out provisions in respect of the disclosure of information relating to offers of securities and progress on utilisation of the proceeds gained from every-six-month offer tranches. Where there is a change in the purpose of capital use, public companies shall be obliged to provide pre-disclosed information on the reasons for change and the documents informing the Board of Management or General Meeting of Shareholders about such a change in advance.

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Circular 52 amends the requirements for information disclosure by listing organisations and large-scale public companies where the following occur:

- a decision or resolution made by the General Meeting of Shareholders or Board of Management passing loan agreements and other contracts with a value of 50% or more of the total value of assets based on the audited annual financial statements of the most recent year or verified semi-annual financial statements of the most recent year; or
- a resolution or decision by the General Meeting of Shareholders or Board of Management passing the purchase or sale of assets with a value of more than 15% of the total value of assets based on the audited annual financial statements of the most recent year or verified semi-annual financial statements of the most recent year.

Circular 52 repeals provisions relating to the information disclosure requirements by major shareholders by no later than three days prior to the trading tranche. Major shareholders shall only be required to report within seven days from the day on which they will become or cease to be major shareholders, or where there is any change in the ownership of shares exceeding the 1% margin.

According to Decision 515, entities subject to the disclosure of information shall be responsible for submitting information in written and/or electronic form. Information in writing shall be original, duly signed and stamped in accordance with the law and submitted to the SSC by courier or by hand. Information submitted electronically shall comprise files stored in file.doc and file.xls formats, clearly stating the full names and positions of the undersigned persons, file numbers, and file dates as well as files stored in file.pdf format with signatures and stamps of the company.

Under Decision 515, before disclosing information on the SSC's electronic portal, organisations must register the following information with the SSC: (i) the name and contact details of a legal representative of the company or a person authorised to disclose information; (ii) an email address that is specifically used for sending information to the SSC; and (iii) a corporate overview for building a database of companies in the SSC's electronic portal.

NEW INSTRUMENT FOR PROTECTION OF COPYRIGHT ON THE INTERNET

With Vietnam's demographic of YouTube and Facebook users showing no signs of waning, every work subject to copyright is exposed to increasing risks of violation on the Internet. Recognising this significance, the Ministry of Information and Communications and the Ministry of Culture, Sports and Tourism promulgated Joint Circular No. 07/2012/TTLT-BTTTT-BVHTTDL on 19 June 2012, stipulating the duty of enterprises providing intermediary service (*IS Enterprises*) with respect to the protection of copyright and related rights on the Internet and in the telecommunication networks environment (*Joint Circular 07*).

Under Joint Circular 07, intermediary services shall include: telecommunication services; Internet services; services of online social networks; digital information search services; and services of leasing digital information storage space, including the service of leasing website storage space.

"Digital information" shall comprise works, performances, audio recordings, video recordings, and broadcast

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programmes that have been digitalised and processed, stored, exchanged, transmitted, and supplied on the Internet and in the telecommunication networks environment.

According to Joint Circular 07, IS Enterprises shall have various responsibilities for the protection of copyright and related rights. One of the most notable responsibilities set out in Joint Circular 07 is that every IS Enterprise shall be responsible for the direct payment of damages due to any violation of copyright and related rights as prescribed by the laws on intellectual property and other related laws in the following cases:

- (1) editing, abbreviating and copying digital information content in any manner without the permission of the rights holder;
- (2) intentionally cancelling or disabling technical measures performed by the rights holder for protection of copyright and related rights;
- (3) being the source of publishing, transmitting, or supplying digital information content via the Internet and telecommunication networks without the permission of the rights holder; and
- (4) operating as a secondary source in the distribution of digital information content which was obtained in violation of copyright and related rights.

With respect to cases 3 and 4 above, and pursuant to the Civil Code, as a general proposition, an entity may be liable to pay compensation for damages if the entity is found to be at fault (with or without intent), except in particular cases provided by the law. Given the practical complexity and difficulty for an IS Enterprise to determine the legitimacy of digital information content uploaded by its users, more implementing guidelines should thus be provided. In particular, these should clarify whether or not an IS Enterprise shall be liable for compensation even if it has clearly warned the users and does not and/or cannot know whether the content of the digital information is in violation of copyright and related rights. Clarification should also be provided in respect of the cases where an IS Enterprise is in violation, though at the time of writing, It remains unclear how the competent State authorities will determine whether an IS Enterprise is at fault.

In addition, Joint Circular 07 regulates that IS Enterprises are obliged to request the commitment of their service users to the legitimate use of digital information content uploaded and posted on the Internet and in the telecommunication network systems. Such IS Enterprises shall also warn social network users of the liabilities of civil compensation, possibilities of administrative sanctions, or criminal sanctions imposed for violating the laws governing copyright and related rights.

In conclusion, whilst Joint Circular 07 could be a new 'weapon' against copyright violators, more implementing guidelines should be provided to clarify ambiguities in order to facilitate its application, and prevent such a 'weapon' from unintentionally harming 'innocent' entities.

NEW REGULATIONS ON INTER-BANKING ACTIVITIES

Recognising the need to update inter-bank operating regulations and move closer in line with international standards, the State Bank of Vietnam (**SBV**) issued Circular No. 21/2012/TT-NHNN (**Circular 21**) on 18 June 2012,

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replacing Decision No.1310/2001/QĐ-NHNN (**Decision 1310**) of the SBV Governor dated 15 October 2001.

Circular 21 came into effect from 1 September 2012 and provides practical requirements for lending and borrowing activities; repo of valuable papers between credit institutions (i.e. commercial banks, finance companies, finance leasing companies, co-operative banks, people's credit funds, and micro-finance institutions); and foreign bank branches on the currency market.

The following guidelines are provided under Circular 21: (i) methods to determine terms; (ii) parameters for lending and trading of valuable papers transactions, such as the term of purchase and sale of valuable papers; and (iii) relevant time frames and prices, including the lending date, maturity date, purchasing date, repo date, interest rate, purchasing price, and repo price.

The most notable point is that the *purchasing date/repo date* is determined only upon completion of the transfer of ownership of valuable papers *and* any accompanying payment.

Conditions for Participating in Transactions

In order to participate in lending and borrowing transactions, and term purchase and sale of valuable papers between credit institutions and foreign bank branches (**the transactions**), each of the parties involved in such transactions shall fully satisfy the following conditions:

- possess the required technical specifications to satisfy transactions on the currency market;
- possess adequate staff with the necessary qualifications and expertise to conduct such transactions;
- possess internal regulations on professional activities and on the risk management of such transactions in compliance with the provisions stated in Circular 21;
- send written internal regulations to the Credit Department of the SBV immediately after they are issued; and
- not be subject to SBV restrictions, suspensions, or temporary suspensions on the lending and borrowing activities, term purchase and sale of valuable papers on the inter-banking markets at the time of undertaking such transactions.

In addition, credit institutions or foreign bank branches wishing to conduct lending transactions shall not have debts which have been overdue for 10 or more days with respect to inter-banking trading activities at the time of undertaking such transactions.

Conducting Transactions and Making Payments

Transactions are permitted via electronic trading networks, or by telephone (recorded) or other forms subject to the parties' agreement.

Transactions in Vietnamese Dong (**VND**) by credit institutions and foreign bank branches which use an inter-banking electronic payment system shall be conducted via such system with a High Value Payment Order pursuant to SBV regulations.

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The Circular also provides the contents of information for database recording, key information on transaction certificates, and contracts for implementing transactions.

Lending Transactions

Credit institutions or foreign bank branches are permitted to lend and borrow from one another in order to temporarily cover deficits in compulsory reserved funds or payment capacities, and short-term capital balance, with the maximum loan period being less than one year. Accordingly, Circular 21 does not allow mid or long-term loans conducted between credit institutions or foreign bank branches as provided in the previous provisions.

The transactions shall be conducted in VND or in a freely convertible foreign currency in accordance with the law, and interest rates on loans shall be stipulated by the two parties. In the case of any abnormal developments, however, the SBV shall regulate the rates. The interest rate for penalties shall be a maximum of 150% of the interest rate applicable to the loan stated in the loan contract, or a maximum of 150% of the interest rate which the lender currently applies to other loans of the same term on the inter-banking market at the time of transferring such overdue debts.

Repo of Valuable Papers Transactions

Tradable valuable papers may comprise: State Bank bills of exchange; Government bonds; Government guaranteed bonds; local government bonds; valuable papers issued by credit institutions and foreign bank branches (including valuable papers issued by credit institutions and foreign bank branches themselves) in accordance with SBV regulations; various types of bills of exchange, promissory notes and bonds issued by other organisations. Finance leasing companies, however, are permitted to repo State Bank bills of exchange and Government bonds only.

Valuable papers may be issued in VND or in freely convertible foreign currencies, and shall be permitted to be transferred. Valuable papers that are issued in VND may be traded in VND. For those papers issued in a foreign currency, they may be traded in that foreign currency; if using VND denominated papers, the relevant parties will stipulate the exchange rates in line with SBV regulations on foreign exchange rates.

The minimum period for a repo is one day and the maximum period is less than one year. Interest rates will be agreed upon by the relevant parties. The purchase prices shall be calculated in accordance with the formula provided in Circular 21.

The repo process is also regulated by Circular 21, where the basic procedural steps are set out. One notable provision in this Circular is that the transfer of listed valuable papers shall be conducted in accordance with the rules of the trading floor where the valuable papers are listed.