

New Regulation on DICA in Vietnam

Different regulations on foreign direct and indirect investment are still found in many laws and legal documents in Vietnam, though the concept of direct or indirect investment has been no longer used in the Law on Investment 2014. Foreign exchange control regulations are not an exception. At the moment, the twin Circular 19/2014 and Circular 05/2014 are in existence providing different foreign exchange control to foreign direct and indirect investment in Vietnam. It is understood that the most recent issue of Circular 06/2019 by the State Bank of Vietnam (SBV) on 26 June 2019 aims to provide better supports to foreign investors, and keep it better updated with the change provided by the Law on Investment 2014, in respect of foreign direct investment in Vietnam. Circular 06/2019 will take effect on 6 September 2019, replace Circular 19/2014 and amend references made in Circular 05/2014 to the concept of foreign indirect investment.

This paper highlights significant changes of Circular 06/2019 that foreign investors should be aware and noted.

1. Foreign invested enterprises, which must open an direct investment capital account (DICA), include, among others, (1) enterprises which are first incorporated by, among others, foreign investors and obtain Investment registration certificates (IRC), (2) enterprises which are first incorporated by Vietnamese investors but are later acquired by foreign investors who own 51% or more of their charter capital, and (3) enterprises which are first incorporated and existing under specific functional laws (such as laws on securities, insurance) where foreign investors own 51% or more of their charter capital (collectively, DICA enterprises). This means that no DICA is required to open by ones

disqualified the conditions of a DICA enterprise (e.g. its foreign ownership is less than 51%), and in such case foreign investors of disqualified DICA enterprises are required to open their indirect investment capital account (IICA) in accordance with Circular 05/2014. It is noted that under Circular 19/2014, enterprises under (2) are not required to open a DICA if they do not have IRCs, while no DICA requirement is found applicable to enterprises under (3).

2. The DICA is used by a DICA enterprise to handle, among others, fund transfers for not only primary share/ capital contributions by shareholders/ owners of the DICA enterprise when it is first incorporated but also secondary share/ capital contributions/ payments when the DICA enterprise increases its charter capital or there is any share/ capital transfer by any shareholder/ owner.

In principle, a DICA enterprise may have more than a DICA, each of which could be opened for a currency in use (e.g. Vietnamese Dong or any (freely-convertible) foreign currency). All DICAs must be opened with a licensed bank. When a transfer is required to make through the DICA, the bank with which the DICA is opened, may request various supporting documents in order to allow the transfer. In comparison with Circular 19/2014, this requirement under Circular 06/2019 does not make change but provide DICA enterprises with more guidance for their compliance.

3. Domestic loans of a DICA enterprise are no longer required to be disbursed through the DICA, while foreign loans are not necessarily conducted through DICA in all cases. This is a significant change under Circular 06/2019 as it appears that under Circular 19/2014 all loans should be disbursed through DICA.

4. Under Circular 06/2019, it is clear that only payment for cross-border transfer of capital in a DICA enterprise between a resident and a non-resident needs to be affected

through DICA. Under Circular 19/2014, it is not clear but arguable that payment for a transfer of capital even between two non-residents should also be made via DICA.

5. Under Circular 06/2019, it is clear that only payment for transfer of capital in a DICA enterprise between two non-resident entities can be denominated and paid in foreign currencies. In all other cases, payment for transfer of capital in a DICA enterprise must be denominated and paid in Vietnamese Dong. Under Circular 19/2014, it is arguable that in all cases, payments should be made in Vietnamese Dong.

6. Circular 06/2019 requires a DICA enterprise to close DICA(s) if it no longer satisfies the conditions of a DICA enterprise (e.g. its foreign ownership goes down to less than 51%). In such case, the foreign investors will be required to open an IICA for their transfer of capital. It is noted that Circular 19/2014 is silent on such requirement.

In addition, this paper identifies few points that may need to have a consensus in their implementation as they are not clear under Circular 06/2019:

7. In respect of pre-investment capital by foreign investors in Vietnam, Circular 06/2019 requires foreign investors to provide all evidences of capital transferred to Vietnam, expenditures spent in Vietnam and their compliance with Vietnamese laws on among others, foreign exchange control, investment and accounting. However, it is unclear under Circular 06/2019 on how pre-investment capital first transferred by foreign investors through their normal payment account opened in Vietnam should then be recorded as their legal contribution to the charter capital of a DICA enterprise when it is incorporated as it were made through DICA in a normal case as required by Circular 06/2019.

8. Circular 06/2019 requires a DICA enterprise to close its DICA in the case as given in point 6 above. However, it is

not clear under Circular 06/2019 on how a transfer should be made from DICA which is opened in the name of the DICA enterprise to IICA which is opened in the name of the foreign investors. In addition, as given in point 1 above, it appears that Circular 06/2019 will request such enterprise to re-open its DICA again when it satisfies all conditions of a DICA enterprise (e.g. its foreign ownership exceeds 51%) on one day in the future. In such case, it is doubted whether it is necessary to have such request to close DICA as given above, and it is unclear again on how a transfer should be made from IICA which is opened in the name of the foreign investors to DICA which is re-opened in the name of the DICA enterprise.

9. Circular 06/2019 provides that in case where DICA is closed because the DICA enterprise is dissolved or bankrupt or its legal status is changed as a result of transfer of its project(s), foreign investors in such DICA enterprise may be entitled to use their normal payment account opened in Vietnam to affect their remittances. However, it appears that Circular 06/2019 (like Circular 19/2014) does not contemplate the case where a DICA enterprise is converted into a Vietnamese company as a result of transfer by foreign investors of all their shares/ capital in the DICA enterprise to Vietnamese investors. In fact, this silence under Circular 19/2014 can be interpreted in different ways. Some argue that DICA can still be maintained until foreign investors get all their proceeds and legal incomes through DICA. Some other argue that DICA cannot be maintained in such case, and as a result, foreign investors can only get their proceeds and legal incomes through either IICA or a normal payment account if so opened and maintained by them in Vietnam.

As noted above, Circular 06/2019 amends some references made in Circular 05/2014 to the concept of foreign indirect investment in Vietnam, by removing the phrase "but not directly participate in management, administration of enterprise", which used to help identifying it from foreign

direct investment in Vietnam as provided by the former laws. However, it appears that the phrase is still found remained somewhere in Circular 05/2014./.