



SUMMARY REPORT

THE QUALITY OF CIRCULARS AND OFFICIAL DISPATCHES

with the Efficiency of Institutional Reform

Research Team

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In recent years, Vietnam has strongly promoted institutional reform and improved the business environment. The legal system for the business sector has undergone extensive changes toward greater openness and transparency. The Law on Investment (2014, 2020), the Law on Enterprises (2014, 2020), and the Civil Code 2015 – all of which play a pivotal role in the legal framework of enterprises, have exemplified breakthroughs and reformative thought, thereby creating a premise for related legal documents to "follow up". Activities to cut down and simplify business conditions, as well as compliance costs for businesses are carried out continuously. Significant measures have been enforced in 2016, 2018, and 2020 that require authorities to reduce business conditions and compliance costs for enterprises by 20-50%. However, one thing to note is how policy agencies have focused primarily on creating legal documents and decrees in their efforts to improve the business climate. Meanwhile, given the characteristics of the country's legal system, for a regulation to be realized, it largely depends on the provisions at the circular level, even so far as official dispatches. As a result, despite the highly progressive mindsets established within our laws and decrees, many issues and obstacles still arise during promulgation in the form of circulars and official dispatches, thus rendering reformative thoughts ineffective in reality.

Circulars and official dispatches serve as a conduit for bringing policies in the form of legislation, ordinances, decrees, and Prime Minister's directives to life. As the result, the quality of circulars and official dispatches have a significant influence on business operations, as well as the favourability of Vietnam's business and investment environment.

With the support of the Australian Department of Foreign Affairs and Trade (DFAT) in the Australia-Vietnam Economic Reform Program (the Aus4Reform Program), the Vietnam Chamber of Commerce and Industry (VCCI) has prepared this report on the topic of *"The Quality of Circulars and Official Dispatches on the Effectiveness of Institutional Reform"*.

This report identifies existing issues within circulars and official dispatches affecting production and commercial operations, along with proposals to enhance the quality of these documents in particular, and the larger official document system as a whole.



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THE QUALITY OF CIRCULARS

Overview of Existing Circulars

- Quantity: circulars account for more than 68 percent of the total number of legal documents dated from January 1st, 2016 to July 20th, 2020;
- The circular promulgation process is of less transparency than the promulgation process of decrees, laws, and ordinances. The drafting and promulgation of circulars is mainly processed by specialized ministry units, but legal documents at the decree level and beyond requires joint efforts by multiple Government agencies, therefore allow for a greater degree of control over quality and transparency;
- Circulars are subject to various restrictions in regulations e.g. prohibitions from promulgating business conditions and administrative procedures, and are limited to detailing articles and clauses from higher-level legal documents.

"Outstanding" issues within current circulars

CIRCULARS CONTINUES TO GOVERN BUSINESS CONDITIONS

Despite legal prohibition since 2005 on circulars regulating business conditions and the Government's review in 2016 to remove circulars regulating business conditions, it is not difficult to find circulars regulating business conditions in the Vietnam legal document system.

Aside from circulars that overtly govern business conditions (for example, in the financial-banking sector), there have also been circulars that govern business conditions from "behind the scenes", integrated into standards and technical regulations (for example, the pharmaceutical industry's "good practice" set of rules).

Barriers stemming from circular-level business conditions are bound to make the investment and business environment less favorable, for the drafting of which has not been closely monitored by government agencies nor the business community.

THE OVERISSUANCE OF CIRCULARS

The role of circulars within the system is irrefutable; in many circumstances, circulars is required for the promulgation of new rules (for example, circular promulgating administrative fees and charges; circular promulgating technical regulations and standards). However, there are numerous instances in which it is neither necessary to develop a circular, nor is the agency authorized to detail an implementation process, and yet a circular is still issued for regulatory purposes.

In certain industries, the implementation of the law is reliant on circulars (e.g., tax or banking) to a concernable extent. This raises further concerns about notorious "pipe laws" and "framework laws" coming into action, or that circular provisions are at higher effectiveness than the law's.

QUALITY OF CIRCULARS: "ACCOMPLISHMENTS" ALONG WITH "SHORTCOMINGS"

The quality of circulars are assessed by criteria of consistency, openness, rationality, and practicality of regulations.

Accomplishments

Enterprises have noted a number of circulars for their practicality, which have provided favorable conditions and promote business activity (for example, Circular No. 29/2020/TT-BYT¹ of the Ministry of Health permitting the validity of the expired circulation registration certificate; Circular No. 16/2021/TT-NHNN² of the State Bank to facilitate new personal payment accounts by electronic transfer (eKYC).

¹ Circular No. 29/2020/TT-BYT dated December 31th, 2020 of the Minister of Health on amending, supplementing and repealing a number of legal documents promulgated and jointly promulgated by the Minister of Health.

² Circular No. 16/2021/TT-NHNN dated December 4th, 2020 of the Governor of the State Bank of Vietnam on amending and supplementing a number of articles of Circular No. 23/2014/TT-NHNN guiding the opening and use of payment accounts at payment service providers.

Shortcomings

Circulars as a whole have not yet been established on firm grounds, and implementation is still sluggish: where any circular provides inappropriate regulations, it will have a significant impact on businesses in the same industry/field, and if not invalidated in a timely manner, it could cause significant damage and/or difficulty for enterprises. There are cases of circulars having been repealed in the past e.g. Circular No. 15/2019/TT-BKHCH of the Ministry of Science and Technology on "National Technical Regulations on Stainless Steel"³ invalidated after around 8 months.

Another issue is that circulars contain provisions that conflict with and overlap those of other documents; typically seen in the form of: circulars that are inconsistent with decrees and laws (point b, clause 2 of Article 10 of Circular No. 24/2014/TT-BTNMT⁴ is inconsistent with the provisions of Clause 2, Article 77 of Decree No. 43/2014/ND-CP⁵); the Circular itself containing provisions that are inconsistent with one another (for example, point a and point b, clause 1, Article 5 of Circular No. 48/2019/TT-BTC⁶ have not yet reached an agreement on determining the object of provisioning for securities investments); inconsistency between Circulars (for example, Circular No. 60/2018/TT-BGTVT⁷ of Ministry of Transport and Circular No. 58/2020/TT-BCA⁸ of the Ministry of Public Security in the "Vehicle registration certificate issued by a competent authority").

Circulars may include provisions that are incompatible with the business situation, causing issues for enterprises (for example, identifying the wrong performer of obligations; creating a burden on compliance costs; unrealistic and difficult to implement; etc.,). These issues account for a greater proportion of the problems sent to the VCCI. Certain unsuitable provisions within circulars has received unfavorable responses from the business community (for example, Circular No. 40/2021/TT-BTC⁹ of the Ministry of Finance requiring e-commerce exchange platforms to submit tax declarations and pay taxes on behalf of individuals on schedule. Following feedback by the business community, this circular was amended through Circular No. 100/2021/TT-BTC¹⁰).

The regulations in circular do not ensure transparency (lack of detail, specificity, clarity or failure to maintain a consistent understanding among subjects of application). Typically, circular does not have any specific stipulation concerning process or procedures (for example, clause 5, Article 3 of Circular No. 30/2016/TT-NHNN¹¹ fails to stipulate the competent authorities determining the fault

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- 3 Circular No. 15/2019/TT-BKHCH dated November 15th, 2019 of the Minister of Science and Technology promulgating the "National Technical Regulation on Stainless Steel".
 - 4 Circular No. 24/2014/TT-BTNMT dated May 19th, 2014 by the Minister of Natural Resources and Environment on regulations on cadastral records.
 - 5 Decree No. 43/2014/ND-CP dated May 15th, 2014 of the Government guiding the implementation of the Land Law.
 - 6 Circular No. 48/2019/TT-BTC dated August 8th, 2019 of the Minister of Finance guiding the setting up and handling of provisions for devaluation of inventories, losses of investments, and receivables claims and warranties for products, goods, services and construction works at the enterprise.
 - 7 Circular No. 60/2018/TT-BGTVT dated December 21th, 2018 of the Minister of Transport on amendments to Circular 35/2016//TT-BGTVT stipulating the maximum rates for road use services in road construction investment projects for business purposes.
 - 8 Circular No. 58/2020/TT-BCA dated June 16th, 2020 of the Minister of Public Security stipulating the process of granting and revoking vehicle registration and license plates of road motor vehicles.
 - 9 The Minister of Finance issued Circular No. 40/2021/TT-BTC on June 1st, 2021 of the Minister of Finance issued guidelines on VAT, PIT, and tax management for family and individual businesses.
 - 10 Circular No. 100/2021/TT-BTC of the Minister of Finance dated November 15th, 2021, updates Circular 40/2021/TT-BTC governing value-added tax, personal income tax, and tax management for family and individual businesses.
 - 11 Circular No. 30/2016/TT-NHNN dated October 14th, 2016, issued by the Governor of the State Bank of Vietnam amending and supplementing a number of Circulars on the provision of payment service and payment intermediary services.

in the case there is a complaint from customers with an intermediary payment service provider, which process and procedures are for the competent authority to identify the fault); circulars do not provide a definition for a new concept (for example, Circular No. 21/2018/TT-BGDĐT¹² lacks of definition for "native speakers"); circulars use qualitative concepts (for example, Circular No. 22/2018/TT-BNNPTNT¹³ uses the term "appropriate" when stipulating the participants' requirements for joining programs designated for training and obtaining certificates of competency and qualifications for masters, chief engineer and engine ratings); circulars do not give accurate and clear references (for example, Circular No. 34/2013/TT-BCT¹⁴ does not provide accurate and proper references to the list of software, hardware, and electronic products as prescribed by the Ministry of Information and Communications for "items recorded on all materials" that Foreign Direct Investment (FDI) enterprises in Vietnam have not been authorized for distribution).

The exact validity period of documents is another significant obstacle towards the implementation process (for example, it is unclear whether Circular No. 04/2007/TT-BTM¹⁵ is still valid or not).

Circulars issued following the effective date of decrees and laws

In principle, regulatory decrees, laws, and circulars are to be drafted and promulgated at the same effective date as corresponding decrees or laws, in order for regulations within decrees/laws to immediately take effect. There are a number of circulars that cannot meet this principle, thus resulting in difficulties for implementation due to the lack of guiding regulations (for example, Circular No. 20/2017/TT-BYT¹⁶ guides the Law on Pharmacy but was promulgated after 07 months from the effective date of the Law on Pharmacy in 2016).

Government agencies' responses to the issues in the Circular

For issues that elicit strong reactions from the business community, ministries will quickly compose and issue other Circulars to correct the bottlenecks (for instance, Circular No. 15/2019/TT-BKHCHN¹⁷, Circular No. 40/2021/TT-BTC¹⁸ prompt termination of effect; issue revision).

For minor inadequacies that do not attract public attention, the revision of regulations will depend on the plans of drafting and issuance legal documents of the ministries.

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- 12 Circular No. 21/2018/TT-BGDĐT dated August 24th, 2018, issued by the Minister of Education and Training on promulgating the regulation on organization and operation of foreign language and computer training centers.
 - 13 Circular No. 22/2018/TT-BNNPTNT dated November 15th, 2018, issued by the Minister of Agriculture and Rural Development on regulations on crew members and fishing vessels.
 - 14 Circular No. 34/2013/TT-BCT dated December 24th, 2013, of the Minister of Industry and Trade publicizing the roadmap for the trading of goods and activities directly related to the trading of goods by foreign-invested enterprises in Vietnam
 - 15 Circular No. 04/2007/TT-BTM dated April 4th, 2007, issued by the Minister of Trade guiding the import, export, processing and liquidation of imported goods and consumption of products of foreign-invested enterprises provided for in the Government's Decree No. 108/2006/ND-CP dated September 22th, 2006, which details and guides the implementation of a number of Articles of the Investment Law.
 - 16 The Minister of Health issued Circular No. 20/2017/TT-BYT on May 10th, 2017 to guide the Law on Pharmacy and Decree 54/2017/ND-CP on pharmaceuticals and medicinal ingredients subject to special control.
 - 17 Circular No. 15/2019/TT-BKHCHN dated November 15th, 2019 of the Minister of Science and Technology promulgating the "National Technical Regulation on Stainless Steel".
 - 18 The Minister of Finance issued Circular No. 40/2021/TT-BTC on June 1st, 2021, offering guidelines on VAT, PIT, and tax management for family and individual businesses.

Reasons and recommendations

REASONS

The process of drafting and issuance is not transparent: the majority of ministries only consult on a draft version, meanwhile the revision and receptiveness to the recommendations of businesses are unknown to them until the document is issued.

Inadequate impact assessment: the impact assessment of regulations and assessment of administrative procedures in circulars have not been conducted in a thorough and competent manner.

Controlling the issuance of business conditions, administrative procedures in the Circular remain problems: since 2005, the prohibition on the Circular promulgating business conditions has come into effect, yet there are still Circulars promulgating this form of regulation. This shows that the enforcement control mechanism on the authority to issue business conditions in the Investment Law is not yet effective.

The Law on Promulgation of Legal Documents restricts the promulgation of administrative procedures through circulars, but exceptions are permitted when authorized by law. This enables circulars to continue issuing administrative procedures, a type of regulation with a substantial influence on enterprises.

The process of receiving and handling problems from circular is not truly transparent: in many cases, enterprises do not know how to handle complaints regarding circulars' problems. The enterprise's proposal acceptance or rejection is not made public. This greatly reduces the confidence of enterprises and prevents them from reflecting on problems, even though it is an important source of information for amending and improving the quality of legal documents.

RECOMMENDATIONS

- *Increasing the transparency of the circular drafting process* by publishing draft versions and response explanations.
- *Unifying criteria on business conditions:* as a basis for the drafting agency to identify the types of regulations that are allowed to be regulated, as well as the basis for supervisory organizations and agencies;
- *Controlling the authorization for regulatory circulars* directly from the specialized laws;
- *Improving the quality of impact assessment reports*, in which enterprises must be consulted and surveyed for new policies which make significant impacts on enterprises;
- *Ensuring transparency regarding the regulations governing the receipt of complaints from enterprises*, in particular information regarding the handling of enterprises' complaints during the reviews of legal documents by State agencies.



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THE QUALITY OF OFFICIAL DISPATCHES

Status of Official Dispatches in Application of the Law

STILL EXIST OFFICIAL DISPATCHES CONTAINING LEGAL NORMS

The official dispatch is not a legal normative document, therefore, it cannot be used to issue legal regulations. In fact, however, there are still a significant number of official dispatches that contain legal regulations. When there is no decree and/or circular detailing the implementation of a legislation, this type of official dispatch is most frequently used. For example, Official Dispatch No. 8909/BKHDT-PC¹⁹ of the Ministry of Planning and Investment has guided the receipt and handling of documents and procedures in accordance with the provisions of the Law on Investment 2020; Official Dispatch No. 1902/BYT-QLD²⁰ of the Ministry of Health guiding the implementation of Resolution No. 30/NQ-CP of the Government, etc.

STATUS OF OFFICIAL DISPATCHES - DEBATABLE ISSUES

Lack of consensus among State agencies

There are varying interpretations among State agencies when applying regulations in legal documents to specific situation, resulting in confusion during implementation as well as ample obstacles for enterprises. For instance, the same type of imported items is classified as "cosmetic goods" by the customs authority, but as "medical equipment" by the drug administration agency.

Lack of reliability

There are varying interpretations among State agencies when applying regulations in legal documents to specific situation, resulting in confusion during implementation as well as ample obstacles for enterprises. For instance, the same type of imported items is classified as "cosmetic goods" by the customs authority, but as "medical equipment" by the drug administration agency.

Lack of reliability

Some official dispatches from State agencies contain unreliable information, making it difficult for enterprises to determine the proper course of action. For instance, an enterprise sends an official dispatch to the management agency requesting guidance on whether it is permitted to conduct this activity and receives an official dispatch confirming that it is permitted to do so without a license. But when the enterprises implement according to those guidance, they are sanctioned for operating without a license by the local inspector.

¹⁹ Official Dispatch No. 8909/BKHDT-PC dated December 31th, 2020 of the Ministry of Planning and Investment on the implementation of the Law on Investment

²⁰ Official Dispatch No. 1902/BYT-QLD dated April 13th, 2017 of the Minister of Health guiding the implementation of Resolution No. 30/NQ-CP dated March 7, 2017 of the Prime Minister.

Unsatisfactory quality

Implicit content: the content of the instructions is generic, making it impossible for businesses to determine in which direction they should carry out their activities. For example, Official Dispatch No. 1946/TCTS-PCTTr from the Directorate of Fisheries, dated September 13th, 2019²¹.

The content is clear but inaccurate: State agency explanations are unconformable to exist in regulations, causing operational challenges for businesses. For example, Official dispatch No. 4065/TCHQ-TXNK, issued by the General Department of Vietnam Customs dated August 17th, 2021, provides incorrect guidance regarding the provisions of Decree 134/2016 ND-CP.

Irregular response periods

In many cases, State agencies response quickly to questions from businesses; nevertheless, there were also many cases in which businesses had to wait a long time or did not receive responses from the agencies to which they sent questions.

Recommendations

To absolutely prevent the official dispatch from promulgating legal norms, a more effective control mechanism over the official dispatch's content is necessary.

There should be a mechanism to increase the responsibility of State agencies in handling and responding to business problems.

It is necessary to put responding official dispatches of the State agencies at the forefront of these agencies' e-portal. It would be a good source seeking information about the application of the law to similar cases, as well as a way of monitoring response activities and answering State agencies' questions.

²¹ Official Dispatch No. 1946/TCTS-PCTtra dated September 3, 2019, issued on answering some entanglements in the implementation of the Fisheries Law and its guiding documents.



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RECOMMENDATIONS

LIMITING THE ISSUANCE OF REGULATORY CIRCULARS

The overissuance of regulatory circulars (even if they are not authorized or possibly specified in higher-value legal documents) has complicated our country's legal system and lowered the quality of these legal documents. Therefore, it is necessary to restrict the over-promulgation of regulatory circulars. This must be reflected in documents as fundamental as decrees, and an effective monitoring mechanism must be in place.

ENFORCING LEGISLATIVE RESTRAINTS ON CIRCULAR-LEVEL DISSEMINATION OF BUSINESS CONDITIONS AND ADMINISTRATIVE PROCEDURES

In specialized laws, it is essential to pay close attention to the authorization of regulatory circulars, to prohibit the authorization of circulars to promulgate regulations that fall under the category of business conditions, and to minimize the authorization of regulations on administrative procedures.

ESTABLISHING A MECHANISM TO DETERMINE THE RESPONSIBILITY OF AGENCIES ISSUING DOCUMENTS THAT CAUSE DAMAGE TO ENTERPRISES

The failure to assign responsibility to issuing agencies has possibly led to the negligence on quality for the above documents, which in turn generates a significant impact on the business activities, and cumulatively has enormous effects on the investment environment. Therefore, a mechanism to determine the responsibility of agencies issuing documents that cause damage to enterprises is necessary.

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