



Update on Vietnamese commercial banks

A recent ratings report showed only one commercial bank in Vietnam with an A rating. It is therefore no surprise that the Vietnamese government wishes to improve its commercial banks and has taken numerous steps to do so over recent years. It fired its latest salvo in July 2009 when it issued Decree 59 on their organisation and operation, the bulk of which deals with the management of commercial banks. The decree does not seek to regulate foreign bank branches, which are regulated by Decree 22. This briefing will discuss Decree 59 in more detail.

Among a wide range of other factors that are touched on later in this briefing, Decree 59 establishes or re-affirms some principles that apply to the ownership of shares in joint stock commercial banks:

- the total number of shareholders of a joint stock commercial bank must be at least 100;
- the total par value of dividend preference shares must not exceed 20 per cent of the bank's charter capital; in addition, members of a bank's board of management, the board of controllers, the general director and other persons occupying managerial and executive positions (together, the management personnel) may not purchase dividend preference shares issued by that bank;
- management personnel appear to be allowed to buy ordinary shares and preference shares (other than dividend preference shares) issued by the bank. The right to dispose of such shares is limited by the requirement that they retain at least 50 per cent of the total number of shares that they owned when they were elected by the general meeting of shareholders or appointed by the board of management;
- the ownership limitation applicable to individuals is now 10 per cent of the charter capital of a bank (previously 15 per cent);
- the ownership limitation applicable to organisations is now 20 per cent of the charter capital (previously 30 per cent);
- the ownership limitation applicable to shareholders and their related parties is also now 20 per cent of the charter capital (previously 30 per cent);
- foreign ownership restrictions remain the same as set out in Decree 69 of the government dated 29 April 2007 (see *Indochina Notes*, June 2007);
- the governor of the State Bank of Vietnam (SBV) must provide prior written approval of:
 - transactions of purchase and sale of significant shareholdings (defined as 'a level of shareholding of 5 per cent or more of the voting share capital of a bank'); and
 - transactions of purchase and sale of shares that result in a current significant shareholder no longer being a significant shareholder and vice versa;
- purchases of shares (and bonds) in a joint stock commercial bank must be paid in full in one instalment; and
- there is an explicit obligation for 'a shareholder who is entrusted with authority to invest on behalf of any other organisation or individual' to disclose to the bank information about the true owner of the relevant shares. A failure to disclose the true ownership will give the bank the right to suspend the shareholder's rights regarding the relevant shares. Unfortunately, this leaves several questions unanswered. For example, although it seems to allow shareholders to invest in joint stock banks on others' behalf (itself a fuzzy concept in a country which has no general law of trusts) provided that disclosure is made to the bank, it gives no explicit guidance about how such structures would be affected by the ownership limitations imposed in Decree 59.

Joint venture and 100 per cent foreign-owned banks

Joint venture banks and 100 per cent foreign-owned banks face a number of ambiguities. Decree 59 covers them under ‘any matters not regulated in Decree 22 of the government dated 28 February 2006’, (this being the main Vietnamese legislation on joint venture banks and 100 per cent foreign-owned banks). Elsewhere, however, Decree 59 imposes detailed requirements on the managerial organisation of joint venture banks and banks with 100 per cent foreign-owned capital. (These include a requirement for 100 per cent foreign-owned banks that operate as one-member limited liability companies (LLCs) to follow the same managerial organisation as those 100 per cent owned by the state.)

Corporate governance of commercial banks

Decree 59 is an effort to modernise the management framework that applies to commercial banks in the wake of the new regulatory landscape following the Law on Enterprises, which is cross-referred to throughout the decree. For instance, the procedure applicable to the declaration of related interests by members of the board of management must follow article 118 of the Law on Enterprises.

In keeping with the basic organisational framework set out in the Law on Credit Institutions (the parent law of Decree 59), the management of a commercial bank includes:

- the board of management, consisting of between three and 11 members, at least half of whom have to be non-executive and independent members (of which at least two must be independent);
- the board of controllers, consisting of at least three members, at least half of whom must be full-time members.
- the general director, who is appointed by the board of management, of which he or she may be (but does not need to be) a member; and
- other assisting sections.

In addition, joint stock commercial banks also need to hold a general meeting of shareholders, which, as with any other shareholding company, is the bank’s highest decision making body.

Decree 59 sets out in considerable detail various standards and qualifications that apply to members of a commercial bank’s management and also deals with such issues as automatic loss of status, removal or dismissal and suspension.

Time limits for compliance with Decree 59

The standards and qualifications that Decree 59 imposes on members of management are more stringent than those previously imposed under the predecessor decree (Decree 49 of the government dated 12 September 2000 (Decree 49)). Banks have up to 24 months from the effective date of Decree 59 to come into line with the new standards and qualifications (although in some cases these must be implemented on each election or appointment of a member of management following the effective date of Decree 59).

Banks also have up to 24 months to comply with the new limits on ownership discussed above. All other provisions of Decree 59 must be complied with from its effective date.

Financial reporting and audits

Commercial banks must make annual reports to the SBV within 90 days of the end of their financial year and must make public their financial statements within 120 days of the end of a financial year. Commercial banks must also select an independent auditor who meets SBV requirements at least 30 days prior to the end of their financial year.

Special control and bankruptcy of commercial banks

Decree 59 also includes sections dealing with special control and bankruptcy of commercial banks. (Special control is a regime under which the SBV appoints a special control committee to a bank experiencing financial difficulties, to attempt to restore its business operations to a healthy state.)

Banks have an obligation to report to the SBV if they are ‘in danger of being unable to make payments to clients’. If such a report is received, the governor of the SBV may

make a decision to place the bank under special control if:

- it is in danger of becoming insolvent;
- irrecoverable debts of the bank may render it insolvent; or
- accumulated losses of the bank are more than 50 per cent of the amount of its charter capital or its paid up funds.

Decree 59 offers no guidance as to how to decide whether a bank is in danger of becoming insolvent. However, both Decision 215 of the SBV dated 23 June 1998 (an older regulation on special control which is only expressed to apply to joint stock commercial banks) and a draft circular on special control, which the SBV has circulated in recent years provide some more specific metrics for gauging the danger of a bank becoming insolvent.

The special control period continues until:

- the SBV issues a decision withdrawing the bank's license because the special control regime has not been successful in remedying the bank's difficulties;
- the bank remedies the matters that caused it to be placed under special control and returns to normal activities;
- the bank is restructured in accordance with law prior to the expiry of special control; or
- a competent state body declares the bank bankrupt in accordance with the law on bankruptcy.

In each case the termination of special control appears to require the decision of the governor of the SBV.

The imposition of a special control regime will not be announced to the public; this will not please those market participants who have entered into International Swaps and Derivatives Association (ISDA) agreements with Vietnamese banks.

The details of the special control regime are subject to further implementing regulations of the SBV. It is to be hoped that these will contain some clarity on the ability of counterparties of the relevant bank to set-off and net and on the extent to which the special control committee will be able to cherry-pick contracts of the bank.

The section of Decree 59 that deals with bankruptcy is short on detail. It essentially refers the bankruptcy of a bank to the Law on Bankruptcy, which states that its

applicability to 'enterprises... operating in the sectors of finance, banking and insurance' is subject to further implementing regulations. These do not yet exist.

Decree 114, dated 3 November 2008, deals with the application of the Law on Bankruptcy to enterprises conducting business in the insurance, securities and some other finance sectors, but does not cover banks. The government has circulated a separate draft decree intended to cover its application to credit institutions, which includes banks. This contains numerous modifications of the application of the Law on Bankruptcy to credit institutions.

However, it is not currently clear when this draft decree will be issued. It is possible that the government or the SBV has delayed its issuance, given the recent economic climate. Alternatively it may be that the government and SBV feel that in practice the financial difficulties of banks will always be handled under the special control regime. (It is arguable, but not entirely clear, that the commencement of bankruptcy proceedings against a bank under special control would require a decision of the governor of the SBV, although it is not clear how this squares with the requirement for a special control regime not to be made public.)

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