

LEGAL UPDATES

June 2022

What's new this month?

Mandatory e-invoicing
in Vietnam: Prepare
for 1st July 2022

Ratchet principle in
CPTPP: Remarks for
foreign investors



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- Contributed by Benjamin Yap Soon Tat and Dang Thi Tuong Vi -

Significant regulations of mandatory e-invoicing and noteworthy remarks of Ratchet principle in CPTPP

to be aware of from July 2022

The highlights of this June's legal updates are Decree No. 123/2020/ND-CP of the Government dated 19 October 2020 and Circular No. 78/2021/TT-BTC of the Ministry of Finance dated 17 September 2021, and Official Letter No. 2538/BCT-DB of the Ministry of Industry and Trade dated 11 May 2022. In brief, those legal documents have contributed to develop legal framework for mandatory e-invoicing that comes into force as of next July or highlight an important principle under CPTPP, to which Vietnam is a signatory.

Mandatory e-invoicing in Vietnam: Prepare for 1st July 2022

All businesses in Vietnam will be mandated to use electronic invoice as of this 1st July, a timeline which was contemplated by Law No. 38/2019/QH14 on Tax Administration from 2019. Consequently, there will be some significant changes to e-invoicing regulations by Decree No. 123/2020/ND-CP of the Government (“**Decree 123**”) and Circular No. 78/2021/TT-BTC of the Ministry of Finance (“**Circular 78**”) which will come into effect on the same date.

Mandatory e-invoicing

There are two types of mandatory e-invoicing: usage of e-invoices with or without tax authority’s code. Particularly:

- E-invoices with tax authority’s code: for almost all the businesses, except those using e-invoices without tax authority’s codes below.
- E-invoices without tax authority’s code: for
 - (i) enterprises doing business in: (1) electricity, (2) oil and gas, (3) post and telecommunications, (4) clean water supply, (5) credit finance, (6) insurance, (7) health/medical, (8) e-commerce, (9) supermarket, (10) trade, (11) airway, roadway, railway, seaway and waterway transportation; OR
 - (ii) enterprises satisfying the following conditions: those enterprises (1) have transacted or will transact with tax authorities via electronic means, (2) develop information technology infrastructure, have accounting software system to create, search, store in accordance with the laws and regulations and transmit e-invoice data to buyers and tax authorities.



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It is important that e-invoice with tax authority’s code will be mandatory in any case for enterprises of high tax risk and those which have voluntarily registered to use this kind of e-invoice.

Registration of e-invoice usage

For using e-invoice, enterprises must register through e-invoice service providers or through web portal of the Vietnam General Department of Taxation (as the case may be).



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Note that in case enterprises must cease to use e-invoices (e.g., termination of tax code, business suspension, upon the authority’s detection on the enterprise’s usage of e-invoices to sell smuggled, banned or counterfeit goods, etc.), they may be required to comply with procedures for settlement of violations as the case may be before they are allowed to continue using e-invoices.

Authorization of e-invoice issuance

Decree 123 and Circular 78 develop regulations on authorization of e-invoice issuance with several significant changes.

Accordingly, enterprises are entitled to authorize solely their affiliates to issue e-invoices, instead of any third party. Such affiliates must be eligible to use e-invoices and not be subject to cease of e-invoice usage as mentioned above.

Enterprises and its authorized affiliates may notify customers of authorization of e-invoice issuance by way of posting on their websites or publicly announcing on the mass media.

Ratchet principle in CPTPP: Remarks for foreign investors

The Comprehensive and Progressive Agreement for Trans-Pacific Partnership (“**CPTPP**”) which has officially taken effect for Vietnam from 14 January 2019, constituted a broad and wide free trade area around the Pacific Rim. Aiming at promoting trade liberalisation by higher standards, CPTPP sets out significant provisions in Clause 1(c), Article 9.12 of Chapter 9 on Investment and Clause 1(c), Article 10.7 of Chapter 10 on Cross-Border Trade in Services, called the “Ratchet principle”.

This principle relates to the List of Non-Conforming Measures (“**NCM List**”) which a member state of CPTPP – such as Vietnam – reserved certain contents. For example, Vietnam has reserved some rights and restrictions in relation to the Most-Favoured-Nation principle as well as telecommunication, banking and distribution services.

Ratchet moving forward

The Ratchet principle means in case a member state unilaterally modifies such reservation contents (regardless of amendments de jure or de facto) in a more favourable way for other CPTPP member states’ investors entering its market, once given, it shall not subsequently withdraw or make the same more restrictive.

For example, if a foreign investor from CPTPP member states is permitted to contribute 49% charter capital of joint-venture in basic telecommunication services attached to the network infrastructure in Vietnam, then any amendment thereto must be a higher figure. Furthermore, once a greater ratio is given, the 49% ratio shall no longer be applied as previously.

Vietnam’s obligation to comply with Ratchet principle

As a flexibility gesture dedicated from other CPTPP member states, Vietnam’s obligation to comply with the Ratchet principle was postponed to three years upon entry into force of CPTPP (i.e., 14 January 2019). As of 14 January 2022, this principle has been applied mandatorily to Vietnam for service-investment field.

Recently, the Ministry of Industry and Trade has issued Official Letter No. 2538/BCT-DB dated 11 May 2022 noting the Ratchet principle to other central and provincial State agencies of Vietnam. These State agencies are encouraged to exercise greater caution when issuing, amending and/or enforcing prevailing regulations, given that withdrawal of the same may not be permitted and trigger unexpected disputes.



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Safeguard for foreign investors

Foreign investors from other CPTPP member countries (e.g., Australia, Brunei, Canada, Chile, Japan, Malaysia, Mexico, New Zealand, Peru, Singapore) should be aware of the Ratchet principle which purports to protect their legitimate interests when doing business in Vietnam.

In case of any dispute in relation to Vietnam’s violation of the Ratchet principle, foreign investors may seek dispute resolution by any investor-state dispute settlement (ISDS) mechanism provided by CPTPP (e.g., consultation and negotiation, or thirty-party procedures such as good offices, conciliation, mediation, and – especially – initiating lawsuits with international arbitration).

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