

Client Alert

September 2010

New Price Control Circular: Price Registration Requirement Extended to Private Enterprises; Lack of Concrete Quantitative Measures for the Application of Price Stabilization Mechanism

Circular No. 122/2010/TT-BTC¹ on pricing, issued by the MOF on 12 August 2010 and made official by publication in the Official Gazette of 6 September 2010, contains fresh regulations related to price stabilization, price registration, and price declaration requirements, and expands the scope to private enterprises. Taking effect from 1 October 2010, the new Circular is designed to amend and supplement Circular No. 104/2008/TT-BTC, which guides various decrees of the Government that implement certain provisions of the Ordinance on Prices.

1. Same Products subject to Price Stabilization but Broader Conditions and Lack of Concrete Quantitative Measures for the Application of Price Stabilization Mechanisms

Circular No. 122 does not add any new products or services to those already subject to price stabilization under Circular No. 104. Rather, it merely combines the list of products and services subject to price stabilization under Decree No. 75/2008/ND-CP² and under Decision No. 116/2009/QĐ-TTg³. Please see the list of products subject to price stabilization in Annex 1 below.

However, Circular No. 122 substantially changes the conditions under which price stabilization measures would be applied. In particular,

Baker & McKenzie (Vietnam) Ltd.
12th Floor, Saigon Tower
29 Le Duan Blvd
District 1
Ho Chi Minh City
Socialist Republic of Vietnam
Tel: +84 8 3829 5585
Fax: +84 8 3829 5618

Baker & McKenzie (Vietnam) Ltd.
Hanoi Branch Office
13th Floor, Vietcombank Tower
198 Tran Quang Khai Street
Hoan Kiem District, Hanoi
Socialist Republic of Vietnam
Tel: +84 4 3825 1428
Fax: +84 4 3825 1432

- ¹ Circular No. 122/2010/TT-BTC Amending and Supplementing Circular No. 104/2008/TT-BTC dated 13 November 2008 by the Ministry of Finance Guiding the Implementation of the Government's Decree No. 170/2003/ND-CP of December 25, 2003, Detailing the Implementation of a Number of Articles of the Ordinance on Prices and Decree No. 75/2008/ND-CP of June 9, 2008, Amending and Supplementing a Number of Articles of the Government's Decree No. 170/2003/ND-CP of December 25, 2003, Detailing the Implementation of a Number of Articles of the Ordinance on Prices.
- ² Decree No. 75/2008/ND-CP of June 9, 2008, Amending and Supplementing a Number of Articles of the Government's Decree No. 170/2003/ND-CP of December 25, 2003, Detailing the Implementation of a Number of Articles of the Ordinance on Prices.
- ³ Decision No. 116/2009/QĐ-TTg of September 29, 2009, Supplementing the List of Products Subject to Price Stabilization.

while Circular No. 104 specifies concrete quantitative conditions for the application of price stabilization measures, Circular No. 122 does not.⁴ This lack of specificity could allow the authorities subjective discretion in applying the price stabilization mechanism.

Specifically, under Circular No. 122, any of the following general conditions can trigger the price stabilization mechanism:

- (i) a price increases excessively as compared with prices of inputs, or with prices of imported products due to enterprises' or individuals' incorrect calculation of price constituents (production costs, cost prices, transportation costs, profit, etc.) in accordance with the policy regime, economic-technical norms, and regulations on valuation of prices issued by the State's responsible authorities;
- (ii) the price reduces in an unreasonable manner as compared to the production costs and cost prices calculated on the basis of the policy regime, economic-technical norms, and regulations on valuation of prices issued by the State's responsible authorities;
- (iii) the price groundlessly increases or reduces while price constituents do not fluctuate in such cases as natural disasters, fires, epidemics, enemy sabotage, economic and financial crisis, temporary imbalance of supply-demand, or groundless rumours fabricated falsely with regard to increased or reduced prices; or
- (iv) the price increases or reduces in an unreasonable manner due to abuse by business organizations or individuals of their monopoly position, or by monopolistic syndicates speculating in goods or services, as determined pursuant to the Law on Competition and related legal instruments.

2. More Products and Services Subject to Price Registration

Under Circular No. 122, products subject to price registration include those within the list of products subject to price stabilization, plus coal, textbooks, and paper, including paper for printing, newspaper printing and writing.⁵ In which, liquefied gas and milk subject to price registration are clarified as liquefied petroleum gas - LPG, and formula milk powders used for children under six (6) years old respectively.⁶ In addition, there are two exceptions: (i) human-use preventive and curative medicines are subject to price declaration according to joint guidance of Ministry of Health, Ministry of Trade and Industry and Ministry of Finance; (ii) post and telecommunications services are subject to price registration according to guidance of the Ministry of Information and Communications.

4 Circular No. 122, Article 2.2.1.

5 Post and telecommunication services are also subject to price registration according to guidance of the Ministry of Information and Communications.

6 Article 7.1.1, Circular No. 122.

Circular No. 122 broadens the scope of certain products subject to price registration as compared to that under Circular No. 104. For example, while Circular No. 104 only requires price registration for certain types of chemical fertilizers, plant protection drugs, salt, and rice; Circular No. 122 is subject to all types of chemical fertilizers, plant protection drugs, salt, paddy, and rice to price registration requirement.

The new circular, however, no longer requires the price registration for (i) clean water for industrial production, business and service activities; and (ii) air fares for domestic flights outside the list of those subject to fare bracket determination by the State.

3. Private Enterprises Must Register Prices or Face Sanctions for Non-compliance

One of the most significant changes between Circular No. 104 and the new Circular No. 122 is the extension of price registration requirements to private enterprises. Circular No. 104 only imposed price registration obligations on companies with more than 50% State capital in their charter capital. The new Circular, however, imposes price registration obligations on all types of enterprises, including private enterprises.

Except for goods and services whose price registration are handled by specialized management ministries, Circular No. 122 tasks the MOF and the provincial People's Committees to periodically announce the list of enterprises that are subject to price registration obligation.⁷ It, however, does not detail when and how regular such lists will be announced.

Circular 122 requires that price registration needs to be conducted in three circumstances: (i) before the enterprises first sell new products into the market, (ii) before adjusting prices of existing products, or (iii) at the request of State competent authorities. Accordingly, from 1 October 2010, *i.e.*, the effective date of Circular No. 122, enterprises that are put on the MOF or provincial lists, or otherwise specifically requested by authorities, must conduct price registration before they first sell their products into the market or before they adjust the current price of their existing products.

Depending on enterprises' specific business activities, registration of specific prices will be required. For example, enterprises that engage in both wholesale and retail businesses must register both wholesale and retail prices; enterprises that are simultaneously importers and exclusive distributors must register import prices, wholesale prices, and recommended retail prices.⁸

In the application for price registration, enterprises must disclose their production costs, selling expenses, enterprise management expenses,

⁷ Second paragraph of Article 7.4.1 and second paragraph of Article 7.4.3, Circular No. 122.

⁸ Circular No. 122, Article 7.2.1.

and expected profit (among other information).⁹ Authorities can require enterprises to explain and re-conduct the price registration if the price registration application includes “unreasonable price constituents”.¹⁰

If an enterprise sells, at its own initiation, goods or services at higher than the registered price without registering such higher price, the authorities may require the enterprise to continue selling the goods or services at the original registered price.

Non-compliance may result in sanctions. The following additional penalties may apply: (1) suspension of the prices the enterprise is using; (2) requisition of a selling price stipulated by the competent authority; (3) collection of the differences in price to compensate the relevant clients (if it is possible to specify the clients), or to contribute to the government budget; (4) recommendation for revocation of the certificate of satisfaction of conditions for business and the business licenses, and/or (5) criminal sanctions.¹¹ A draft decree was issued in August 2010 for comment; it details the new penalty scheme being proposed.

4. Fewer Products Subject to Price Declaration

While Circular No. 104 lists (i) cigarettes of domestic production and consumption and (ii) imported and domestic motor cars for transport of no more than 15 persons as products subject to price declaration,¹² Circular No. 122 removes these products from the list.

5. Possible WTO Concerns

The new Circular has raised concerns regarding Vietnam’s WTO commitments – specifically Article III of the WTO/GATT rules on Non-Discrimination Between Vietnamese and Foreign Products (National Treatment):

- (i) GATT Article III.9 places a positive obligation on Vietnam to avoid to the fullest extent the prejudicial effects caused to the interest of contracting parties supplying imported products when applying internal maximum price control measures. Imports are likely to need adjusted prices more often than domestically-produced goods because there are more variables, such as exchange rates and shipping costs. Circular No. 122 contains several vague provisions, such as the unquantifiable terms used to describe the conditions when price stabilization measures would be applied. Such provisions could enable the authorities to act at their discretion in applying price control measures under Circular No. 122, which could expose Vietnam’s trading partners to prejudicial application.

⁹ Circular No. 122, Appendix 4.

¹⁰ Circular No. 122, Article 7.5.1.

¹¹ Circular No. 122, Article 6.5.

¹² Circular No. 104, Appendix 1C.

- (ii) The application of Circular No. 122 may be incompatible with GATT Article III.4, which requires imported products to be accorded treatment no less favorable than that accorded to like products of national origin. This provision has been interpreted to cover not only laws or regulations that directly govern the conditions of sale or purchase of a product, but also any laws or regulations that might adversely affect the conditions of competition between imported and domestic products. Foreign goods, by nature of being foreign and imported, are affected by more cost variables, such as exchange rate changes or world cost or pricing changes. Because imported products are significant in the market and their high prices are more likely to result in them being deemed to have “unreasonable price constituents”, the requirement to explain and revise, at the authorities request, such price constituents is likely in practice to be imposed more on imported products than on domestic like products. If so (and this would need to be seen in the implementation of the new measures), this adverse effect on imported goods may constitute a *de facto* violation of GATT Article III.4.

Similarly, the application of Circular No. 122 may be incompatible with GATT Article III.1, which requires that domestic laws and regulations should not be applied to imported or domestic products so as to afford protection to domestic production. Therefore, once the measures have been applied, any evidence showing that price control mechanisms are to protect domestic production could constitute a violation under this provision. The list of enterprises subject to price registration announced by authorities may serve as good evidence in this regard.

For further information:

Yee Chung Seck

Partner

Baker & McKenzie (Vietnam) Ltd.

Vietnam offices

Tel: +84 8 3829 5585

yeechung.seck@bakermckenzie.com

James Lockett

Special Counsel

Baker & McKenzie (Vietnam) Ltd.

Hanoi Office

Tel: +84 4 3825 1428

james.lockett@bakermckenzie.com

ANNEX 1 – PRODUCTS AND SERVICES SUBJECT TO PRICE STABILIZATION

1. Petrol and oil;
2. Cement;
3. Construction steel;
4. Liquefied gas;
5. Chemical fertilizers;
6. Plant protection drugs;
7. Veterinary drugs: foot-and-mouth disease vaccine; avian influenza vaccine; and antibiotics of Oxytetracycline, Ampicilline, Tylosin and Enrofloxacin;
8. Salt;
9. Milk;
10. Edible sugar (white sugar and refined sugar);
11. Paddy and rice;
12. Human-use preventive and curative medicines on the Health Ministry's list of major curative medicines used at healthcare establishments;
13. Charges for transporting passengers by rail, for hard-seat tickets;
14. Animal feeds: maize, soybean and soybean oil cakes;
15. Industrially manufactured animal feed (both domestically produced and imported), including:
 - Complete mixed feed, concentrated feed for raising pigs and chicken;
 - Mixed feed pellets for raising catfish, ba sa fish (No. 5) with weight from 200 gr/fish to 500 gr/fish;
 - Mixed feed pellets for tiger prawns (No.05) with weight between 10gr/prawn to 20gr/prawn;
16. Other goods and services as provided by the provincial People's Committees.

This client alert provided by Baker & McKenzie (Vietnam) Ltd. is intended to provide our clients, and other interested parties, with an overview of the recent legal changes in the relevant area for information purposes only. The information contained in this client alert does not constitute legal advice or legal opinion, and should not be regarded as a substitute for detailed advice in individual cases. The information, as referred to in this client alert, is based on the laws, regulations, notifications, practice and policy at the time of its production. The laws, regulations, notifications, practice and policy may change from time-to-time and, therefore, the use of this client alert must be taken with due care. You are strongly advised that no use should be made of the information in this client alert without prior consultation with Baker & McKenzie (Vietnam) Ltd.. No portion hereof may be reproduced or transmitted, by any means, without the prior written permission from Baker & McKenzie (Vietnam) Ltd.. All rights reserved.

Baker & McKenzie (Vietnam) Ltd. is a member of Baker & McKenzie International, a Swiss Verein with member law firms around the world. In accordance with the common terminology used in professional service organizations, reference to a "partner" means a person who is a partner, or equivalent, in such a law firm. Similarly, reference to an "office" means an office of any such law firm.

©2010 Baker & McKenzie (Vietnam) Ltd. All rights reserved.

This may qualify as "Attorney Advertising" requiring notice in some jurisdictions. Prior results do not guarantee a similar outcome.