



## LEGAL UPDATE

### DECREE 71 ON CORPORATE GOVERNANCE FOR PUBLIC COMPANIES

Corporate governance for public companies in Vietnam was guided by the Ministry of Finance's (MOF) Circular No. 121/2012/TT-BTC (Circular 121) of on 26 July 2012. To align with the Law on Enterprises 2014, the Government issued Decree 71/2017/ND-CP (Decree 71) to replace Circular 121. Decree 71 is effective from 1 August 2017.

Decree 71 refers to more provisions in the Law on Enterprises than Circular 121 used to do and clarifies some points that caused or could cause confusion in Circular 121. It provides detailed guidelines on corporate Governance for public companies regarding the General Meeting of Shareholders (GMS), Board of Directors (BOD), Board of Controllers (BOC), prevention of conflict of interests; information disclosure and reporting.

The key provisions of Decree 71 are highlighted below.

#### 1. Additional rights of shareholders and GMS

In the Law on Enterprises 2014 and Decree 71 several rights and obligations of shareholders of public companies are defined. Decree 71 provides for some additional rights of the GMS. The GMS approves the company's internal governance policy rules, the establishment of personnel and payroll management teams (for listed companies); and the rights and obligations associated with preferred shares if any. It can also request the attendance of independent auditors at an annual GMS when there are qualified material opinions in the audited annual financial statements.

In case the public company is listed the GMS also will approve the establishment of personnel and payroll management teams.

Note that it is no longer allowed to collect written opinions from shareholders at an annual GMS.

#### 2. BOD

Decree 71 introduces requirements for the composition and structure of the BOD, as well as new tasks of the BOD, in addition to those provided in the Law on Enterprises.

#### 2.1 Composition

The BOD of a public company must be balanced in terms of the number of members having knowledge and experience in law, finance and business operations of the company; and gender; and should have at least 1/3 non-executive members.<sup>1</sup> In case a public company is *listed* at least 1/3 of the BOD members must be an independent member.

#### 2.2 Structure

In line with the Law on Enterprise, Decree 71 gives public companies the choice to put a *one-tier* (GMS, BOD and Director) or *two-tier structure* (GMS, BOC, BOD and Director) in place, which each have their respective requirements.

When the public company opts for the *one-tier structure* the BOD must:

- establish an internal audit committee under the BOD;
- have at least 1/5 independent members<sup>2</sup> and when the BOD has less than 5 members, 1 of them must be an independent member; and
- minimise the number of BOD members concurrently holding several executive titles of the company.

#### 2.3 Tasks

Decree 71 introduces some new tasks, rights and obligations for the BOD, which must nominate an independent member as the head of personnel and payroll management teams; and must formulate the corporate governance policy.

For the BOD of a *listed* public company new tasks, rights and obligations are introduced as well, as it:

- can establish teams to assist its operations including personnel and payroll management teams (for listed companies);
- must specify in detail the establishment of the teams and the duties of each of them, their members or the independent members in charge of human resources and payroll management; and
- must assign the independent members to assist the BOD in the human resources and payroll management

<sup>1</sup> Non-executive means that the BOD member cannot concurrently be the (General) Director, Deputy (General) Director, chief accountant or other managers provided under the company's charter.

<sup>2</sup> The conditions that an independent member of the BOD must fulfil are defined in article 151(2) of the Law on Enterprises.



activities in case the personnel and payroll management teams are not established.

### 3. Controllers and BOC

Additional requirements for controllers and the BOC; and additional rights for the BOC are introduced by Decree 71.

#### 3.1 Controller

A controller must meet the criteria and conditions specified in article 164(1) of the Law on Enterprises 2014 and the company's charter. Further to this, a controller may not work in the accounting and finance departments of the company, may not be a member or employee of the independent auditing firm that has been auditing the financial statements of the company over the last 3 years; and must be an auditor or accountant if he works in a listed public company in which the State holds more than 50% of the charter capital.

#### 3.2 BOC

The head of the BOC must be a professional auditor or accountant working full-time at the company. The BOC has the right to request BOD members, the Director and representatives of the independent auditing firm to answer issues raised by the controllers.

### 4. Conflict of interests

Like Circular 121, Decree 71 imposes restrictions on combining certain positions within a public company and contains requirements regarding transactions, loans and guarantees with the objective to limit conflicts of interest. Decree 71 also gives clarification on certain issues that were unclear or ambiguous under Circular 121.

#### 4.1 Incompatibility

Some incompatibility provisions Decree 71 are that as of 1 August 2019, BOD members cannot serve as a BOD member of more than 5 other companies; and as of 1 August 2020, the BOD Chairman cannot concurrently be the Director of the company. The exception that the GSM could approve this, as provided for in Circular 121 is no longer possible.

#### 4.2 Control of a company

According to Circular 121 BOD members, controllers, Directors and other enterprise managers had to inform the BOD and the BOC of transactions between themselves and their related persons and companies, subsidiaries and

companies controlled by the public company. It was, however, not clear when a company was *controlled* by the public company. Decree 71 now clearly defines that this is the case when the public company controls *50% or more of the charter capital*.

#### 4.3 Loans, guarantees and other transactions

##### *Related persons*

Circular 121 contained provisions on loans and guarantees and to whom they could be provided and under what conditions. However, there were some ambiguities which have been clarified by Decree 71. The restriction on the provision of loans and guarantees by a public company only applies to the company's shareholders and the shareholders' related persons, and not to the public company's related persons (including subsidiaries). Therefore, intercompany and group loans and guarantees are allowed.

##### *BOD, BOC, GD, others and related persons*

Public companies are prohibited from providing loans and guarantees to the BOD members, the BOC, the Director, other managers, and related persons. Under Circular 121 the GSM could decide otherwise. This exception is no longer possible. However, Decree 71 provides that – on the condition that they are approved by the GSM – loans or guarantees can be granted to the BOD, the BOC, Director, other managers and the individuals and organisations related to them; the public company and organisations related to its shareholders are companies in the same group or companies operating in a group of companies including parent companies-subsidiaries, economic groups; and the relevant law specifies otherwise.

##### *Shareholders and related persons*

Decree 71 allows for exceptions depending on the nature of the *public company* as well as the *shareholders and related persons*. In case the public company is a credit institution it can provide loans and guarantees to:

- a. *shareholders and related persons being individuals;*
- b. *related persons being organisations* in case the public company and its shareholders' *related persons* are subsidiaries in the same company or companies operating under a group of companies including parent companies-subsidiaries, or economic groups; or the law specifies otherwise; and
- c. *shareholders being organisations and related persons being individuals* in case the shareholder is a subsidiary



whose shares or stakes are not held by the State and has contributed capital or purchased the shares of the public company before 1 July 2015.<sup>3</sup>

For the loan and guarantee listed under c it is important to note that approval needs to be obtained from the GMS or the BOD in accordance with the public company's charter.

#### *Parties to the transaction, value and approving entity*

Specific conditions apply to transactions between the public company and BOD members, controllers, Directors, other enterprise managers and their related persons, shareholders, authorised representatives of shareholders owning more than 10% of the common shares of the public company and their related persons; and enterprises related to the subjects specified in article 159(2) of the Law on Enterprises.

A distinction is made regarding the percentage of the total value of the transaction in relation to the total value of assets recorded in the latest financial statement in accordance with the company's charter:

- a. any transaction that has the total value of 35% needs to be approved by the *GMS*; and
- b. any transaction, or contract, that has a total value of 35% or less needs to be approved by the *BOD*.

## **5. Corporate governance**

### **5.1 Internal governance policy**

All public companies are now required to have an internal governance policy, which under Circular 121 was only compulsory for *large-scale or listed public companies*. The internal governance policy must contain guidelines on:

- a. how to conduct a GMS in accordance with article 140 of the Enterprise Law 2014 and the company charter;
- b. online meetings and casting votes online, which is new under the Enterprise Law 2014; and
- c. authorisation procedures and authorisation letters for shareholders.

Circular 95/2017/TT-BTC of 22 September 2017 of the MOF provides for a model internal governance policy. To be effective the internal governance policies must now be approved by the GMS; this used to be the BOD.

### **5.2 Corporate governance employee**

A public company must appoint at least one employee in charge of information disclosure or corporate governance. The requirements for this employee are as follows, the person must be a person with legal knowledge, may concurrently hold the position of Company Secretary, and must not concurrently work for an independent audit firm which audits the company's financial statements. More detailed rights and obligations for this position are defined in article 18 of Decree 71.

## **6. Disclosure requirements**

Some new disclosure requirements are introduced by Decree 71 and a public company must:

- a. show the salaries of the (General) Director and other managers separately in the annual financial statements of the company and reported at the annual GMS;
- b. report to the State Securities Commission and the relevant Stock Exchange Centre within 24 hours after the GMS approves the changes of the organisational structure;
- c. make publicly available the rights and obligations of preferred shares as approved by the GMS;
- d. disclose information regarding the registration of shareholders eligible to attend a GMS at least 20 days prior to the final registration date, which was 5 days under Circular 121; and
- e. disclose nominees for election of BOD members as well as BOC 10 days before the meeting, which was 7 days under Circular 121.

## **7. Reporting**

Each year, the BOD may request its independent members to report on the operation of the BOD which may be disclosed at the annual GMS.

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<sup>3</sup> This is specified in article 16(6) of Decree No. 96/2015/ND-CP of 19 October 2015 which specifies some articles of the Law on Enterprises 2014.