Recommendations for Improvement of Laws and Regulations for Trademark Pricing Services in Vietnam

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Abstract

In Vietnam, there have been many obstacles and difficulties in pricing for trademark transfer. Firstly, there have been the legal drawbacks including the incompatibility, conflicts among the legal instruments governing the same issues, Vietnamese provisions of law being not consistent with international practices and standards, the vagueness of the provisions of law in respect to pricing and bases for price in trademark transfer and so forth that have challenged the application of law. Vietnamese laws have been lack of the provisions to prevent and enforce against transfer price by means of trademark transfer. Besides, the weakness of database infrastructure has considerably affected on the estimation of price in trademark transfer in Vietnam. Furthermore, the shortage of valuation experts who specialize in
trademark valuation has been also the big problem in consideration of price in trademark transfer. In order for successful commercialization of trademark, these encumbrances and challenges must be resolved as soon as possible. Research results show us that among vital challenges is quantifying brand asset that contributes to value of shareholders.

Keywords

JEL: O3, O30, O34.

Introduction

Nowadays, the intellectual property has played the essential roles in the existence and development of the enterprises. The enterprises has not only applied the methods to protect their intellectual property but also commercialized the intellectual property under their business strategies and aims. The intellectual property can be exploited in diversity of ways: direct exploitation of the intellectual property in production; transfer of intellectual property by means of intellectual property conveyance, licensing, technology transfer, franchising; using intellectual property as capital contribution or collateral. So, valuation of intellectual property has become the key to unlock the commercialization of intellectual property.

In practice, the invisibility accompanied by the interlacing features (economics, law and policy and so on) in the process of intellectual property valuation has made such valuation complicated. If the price for trademark transfer is estimated too high, the transferee will be unbeneftited and vice versa. If the price is true, neither does the government lose the tax revenue nor does the enterprise bear too much tax obligation. In fact, there have been some multinational enterprises making use of intellectual property to carry out the schemes of transfer price that cause the loss of tax revenue of the host country. Thus, the sound legal base for the valuation of trademark is necessary.

There have been few scientific works on valuation of trademark and pricing for trademark transfer until now. And, a comprehensive and full research on royalty pricing in Vietnam has not been gotten started for years.

The significance, complication in appraisal of royalty in trademark transfer, especially the legal and practical drawbacks in pricing in the intellectual property transfer contract urge us to select the subject “The legal base of intellectual property price fixing when transferring of trademark according to laws and ordinances in Vietnam”. With the above
urgencies, our research promises to benefit not only the parties involved in trademark transfer, the holders and relevant parties of intellectual property, but also the policy and law makers. The research will be the useful reference manual for researching, teaching at the training institutions and academies relating to intellectual property.

Moreover, the transfer pricing has become more and more usual between and among the affiliates of the multinational enterprises. Nowadays, the taxation agencies have paid great attention to this issue and the countries’ national laws have provided remedies for the transfer pricing relating to the international brand name. The transfer pricing was also mentioned by Doan Van Truong in the book “The collection of approaches applicable to valuation of intangible property, intellectual property, technology pricing and transfer pricing in the multinational enterprises”, Technical Science Publisher, 2011. The experiences of U.S.A, China, Australia,… and OECD have been introduced by him in this book. It can be acknowledged that Truong’s books contributed the precious information for the researcher to study on valuation of intellectual property including trademark. The study “Trademark valuation in the progress of modernization and industrialization in Vietnam” did take a quick view on transfer pricing as well.

The past research works of the project team leader and key team members related to questions under the Project Research:

Tran Van Nam wrote a notable article “Capital contribution in intellectual property to enterprises in Vietnam: Practices and Difficulties” which was published in Bridge of Knowledge Review of National Politics Publisher. This article analyzed the aspects of provisions of law in connection with capital contribution in intellectual property. Capital contribution in intellectual property had been provided by and governed by 2005 Law on Enterprises and 2005 Law on Investment. However, in practice, the valuation of the intellectual property contributed to the enterprises, especially in the State owned business group, had not followed any rules, but the decision of the competent agencies who approved of the value of the enterprise. Additionally, the author discovered the conflict among the provisions of 2005 Law on Enterprises as well as 2005 Law on Investment and the provisions of accounting and taxation law. While the enterprises law had been recognizing the capital contribution in intellectual property, accounting law had not. So, brand name had not been accepted to fixed asset depreciation. What was pointed out in this article were the practical difficulties which the enterprises had been facing with and were hungry for the solutions in policy and practice.
In the doctoral thesis *Trademark exhaustion and Proposal for an improvement of Vietnamese Trademark Law*, Nguyen Nhu Quynh mentioned some issues in relation to trademark transfer pricing in American, European and Vietnamese law and practice. Trademark transfer pricing agreements resulting in competition constrains and the relationship among intellectual property law, competition law and contractual law in governing such agreements, among other things, were the main contents of this thesis. This book provides up-to-dateness of indigenous research works in comparison with ones from developed countries.

**Methodology**

Legal dogmatic: This method shall be used all through the whole of our project. This method includes description and analysis which are used to describe and analyze the different sources of law relating to pricing in trademark transfer such as legal instruments (legislations and administrative regulations), cases to help the readers understand pricing in trademark transfer and the recommendations to improve Vietnam’s provisions of law governing pricing in trademark transfer. This method will be useful to find the grounds for building the provisions of law and the competent authority’s decision including the court’s ones in pricing in trademark transfer in respect of the exhaustion of trademark.

Comparison: In addition to the legal dogmatic, the comparison shall be adopted in many parts of our project. In jurisprudence, the comparison means that two or more legal systems will be compared to find out the similarities and differences between/among these legal systems.

**Main Results**

**The Current Status of Vietnam's Legal Provisions on Intellectual Property Valuation, including Trademark**

Although intellectual property valuation in Vietnam took place before the promulgation of the Intellectual Property Law (2005), intellectual property valuation has not yet followed a standard. The current Vietnamese law on intellectual property valuation is not directly regulated but only refers to the principle of calculation (based on books) of property. In order to assess the value of intellectual property in Vietnam, it is necessary to make an overall assessment of the law on valuation of Intellectual Property assets in general and of trademark in particular.

1. **Laws and Regulations Document Relevant to Valuation of Intellectual Property Assets**

   1. National Assembly (2012), the 2012 Price Law;
2. National Assembly (2005), the 2005 Civil Code;
4. National Assembly (2006), Law on Technology Transfer in 2006;
5. Ministry of Finance (2013), Circular 45/2013 / TT-BTC dated 25 April 2013 guiding the regime of management, use and depreciation of fixed assets;


For enterprises, intellectual property acts as a measure of business efficiency, competitiveness and development potential of enterprises in the future. The valuation of intellectual property helps businesses to affirm their position and prestige in the market, while enterprises can commercially exploit the intellectual property in a convenient way.

Valuation is a type of professional activity that is both economic and technical, legal, and social. Value creation, existence and development associated with the formation, existence and development of the market. According to the provisions of law, the pricing is construed as follows:

- Valuation: Technology Transfer Law 2006 stipulates: "Technology valuation is technology valuation."
- The Price Law of 2012 stipulates: "Valuation is the determination by the competent State authority or the producer or trader of a price for goods or services."

Thus, asset valuation is understood as consulting, specifying the specific price level for each type of asset, which is the basis for activities of trading of goods and services on the market. For assets, goods and services with prices set by the State (the competent agencies), the specific prices of each type of property and goods are compulsory for all parties who participate in those transactions.

It should be noted that the valuation concept is not consistent with the concept of "Price appraisal". Clause 15, Article 4 of the 2012 Price Law stipulates: "Appraisal is the determination by agencies and organizations with price-appraising function of the value of money in accordance with the provisions of the Civil Code. with a market price at a certain place or time, for a certain purpose according to the valuation criterion in
accordance with Article 4, Clause 15. Thus, the price appraisal focuses on the
examination, authentication price of goods and services. Price appraisals are usually
conducted by price appraisers in accordance with the price appraisal criteria set by the
State.

From the above definitions, intellectual property valuation can be interpreted as a
valuation of a particular intellectual property at a given period of time, as a basis for the
transaction of buying and selling intellectual property on the market. At present, the
Vietnam law regulates intellectual property valuation in various fields.

3. Legal Status of Intellectual Property Valuation

At present, regulations on intellectual property valuation still have many inadequacies,
specifically:

First, there is a lack of consistency in the understanding of the term "intellectual
property".

The 1995 Civil Code is the first legal document regulating intellectual property rights in
Vietnam. Accordingly, subjects of intellectual property defined in this Code include:
copyright objects (literary, artistic, scientific works); Objects of industrial property rights
(inventions, utility solutions, industrial designs, trademarks, appellations of origin of
goods and other objects prescribed by law). Following this Code, the 2005 Civil Code and
the 2005 Intellectual Property Law continue to be supplemented and improved upon the
provisions on the subject matter of intellectual property rights.

However, Accounting Standard No. 04 on intangible fixed assets issued in 2001 uses
incorrect terms in comparison with the provisions of the 1995 Civil Code as well as the
provisions of international law. Intellectual property such as computer software, patents,
patents, copyrights, trademarks.

Secondly, the legal provisions are inconsistent when the classification of intellectual
property into intangible fixed assets for valuation and the value of enterprises.

According to Accounting Standard No. 04, only a number of objects of intellectual
property rights are considered as intangible fixed assets such as inventions, copyrights or
marks (in case such marks are not created). However, Article 4(2) of the Ministry of
Finance's Circular No. 45/2013 / TT-BTC stipulates that all objects of intellectual
property rights (including copyright, industrial property rights, rights with plant varieties)
are considered as intangible fixed assets and hence the basis for valuing and calculating the value of enterprises.

In addition, according to the Circular 127/2014 /TT-BTC, the brand value (including trademarks and trade names) is included in the value of enterprises when being equitized. However, in Accounting Standard No. 04, it is not stipulated that the trademark is a fixed asset to be included in the value of the enterprise.

Third, the pricing methodology is inconsistent.

The Pricing Criteria 13 provides for methods of determining intellectual property value in a cost approach including cost of renewable and alternative cost method. However, according to the current legal documents on accounting or SOE equitization, the value of intellectual property is mainly calculated by the historical cost method (cost past).

The value of intellectual property is determined by the total cost of developing the plus the cost of establishing the right and expense for maintaining the effect on that intellectual property. For example, the value of a patent is the total of the actual costs spent on creating that patent; Branded values are actual costs directly related to the purchase of a trademark; Brand value includes the actual costs of "inventing, building and protecting trademarks and trade names".

As stated in Accounting Standard 04, expenses such as establishment expenses, staff training expenses and advertising expenses arise in the pre-operation period of newly established enterprises... is not included in determining the value of intellectual property.

Meanwhile, under the provisions of Circular 127/2014 /TT-BTC, the brand value of equitized enterprises is determined on the basis of actual costs for the creation and protection of trademarks and trade names. During the operation of the enterprise, including the cost of establishment of enterprises, the cost of training staff, the cost of advertising, to promote products, to introduce the company. The inconsistency in determining the types of costs when conducting valuations between the above-mentioned legal documents gives rise to an incomprehensible and misleading way of applying the cost method to asset valuation.

Fourth, lack of regulations on intellectual property valuation when investing capital contribution by intellectual property rights to establish enterprises.
In Vietnam, the contribution of capital, joint venture by intellectual property (mainly capital contribution by brand) takes place prior to the provisions of law. Since the 1990s, multinational corporations have approached the Vietnamese market through joint ventures, mergers, acquisitions and mergers with domestic firms.

Practices in joint ventures between Vietnamese enterprises and foreign enterprises show that Vietnamese enterprises usually only pay attention to the value of land use rights and tangible assets, without counting to the intangible assets such as intellectual property. To date, there is no guideline on the contribution of capital by trademark.

Determining the value, transferring the right to use intellectual property, contributing capital to joint ventures, linking ... the value of intellectual property for enterprises of all economic sectors is still an empty.

Fifth, the absence of regulations on trade names and other types of intellectual property, as well as lacking of consideration of trademarks created by enterprises have caused disadvantages for enterprises in the process of valuation, merger and acquisition of securities. Thus, there are inconsistencies between the regulations on SOE accounting and SOE equitization in determining the value of intellectual property as trademarks or trade names. This makes each company, each auditing company have different views and behaviors. Using the past cost method to determine the value of intellectual property will cause losses to businesses that own large amounts of intellectual property in joint ventures, joint ventures, mergers and acquisitions.

A Glance on Vietnamese Economy and Its State-Owned Enterprises Equitization Process

1. Overview on Vietnamese Economy

The enormous reforms made over the past 20 years have significantly changed the social – political – economic environment in Vietnam. Above all, it is the reform in the economic mindset in the society, transferring from the centralized planned economy, into socialist-oriented market economy; performing the industrialization and modernization; diversifying and multilateralizing foreign economic relations; and doing globalization.

The radical reforms brought about impressive social – economic results. According to the report of the Government at the ninth session of the 11th National Assembly, made on the Vietnamese economy in the period 2001 – 2005 and development plan in the period 2006 – 2010, Vietnamese economy has witnessed considerable development during 2001 – 2005, by accomplishing almost all the targets (17 out of 19) set by the National Assembly for the period.\(^1\)

\(^1\) GDP increased by 7.5% per year – achieved the goal
With regard to the report of the Government, the 11th National Assembly at the 9th session passed the Resolution determining the development plan in the period of 2006 – 2010.\(^2\)

By January 2008, all the targets of 2006, 2007 have been accomplished at the exceeding average calculated for the whole period.\(^3\)

As regards the remarks by local and international experts, Vietnamese economy is entering the important growth phase, which may last for a couple of years. Therefore, it is possible to accomplish all the targets set for the period 2006 – 2010, exceeding the plan.

Hereunder are some major economic targets in the past period, envisioning to 2020. In order to clarify the development potentials of Vietnamese economy in the future, brief information about the current development situation of Thailand economy is given as follows:

Table 1 Some major economic indication in Vietnam

<table>
<thead>
<tr>
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<th>Average GDP growth rate/year (percent)</th>
<th>Per capita income (US dollars)</th>
</tr>
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<tbody>
<tr>
<td></td>
<td>Vietnam</td>
<td>Thailand</td>
</tr>
<tr>
<td>2001</td>
<td>6.8</td>
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<tr>
<td>2002</td>
<td>7.1</td>
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<tr>
<td>2003</td>
<td>7.3</td>
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<tr>
<td>2004</td>
<td>7.8</td>
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<td>2005</td>
<td>8.4</td>
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<tr>
<td>2006</td>
<td>8.2</td>
<td>5.0</td>
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<tr>
<td>2007</td>
<td>8.4</td>
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<tr>
<td>2008 – 2010</td>
<td>8-9</td>
<td>4-5</td>
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<tr>
<td>2011 – 2020</td>
<td>7-8</td>
<td>4-5</td>
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<tr>
<td>2020 onwards</td>
<td>5-7</td>
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(Source: Statistics until 2005 according to the report of Asia Development Bank; the remains are based on the forecasts of experts collected via Internet)

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\(^2\) GDP in 2010 at constant price was 2.1 times higher than that in 2000. The GDP growth rate reached 7.5 – 8% per year, aspiring for above 8% per year. GDP per capita at current price reached around 1,050 – 1,100 USD.

- Industry structure in GDP: the agriculture section as of 15-16%; the industry and construction section as of 43-44%; the services section as of 40-41%
- Export turnover raised by 16% per year.
- The mobilizing ratio of GDP into the budget reached 21-22%.
- Annual social investment capital constituted 40% of GDP.

\(^3\) GDP of Vietnam in 2006 at constant price was estimated to raise by 8.17% compared to 2005; in which the agriculture, forestry and fishery section increased 3.4%; the industry and construction increased 10.37%; the services section increased 8.29%. In the total 8.17% growth, the agriculture, forestry and fishery section contributed 0.67 points percentage; the industry and construction contributed 4.16 points percentage, and the services section contributed 3.34 points percentage.

The proportion of the industry and construction section increased from 40.97% in 2005 to 41.52% in 2006; that of the services section increased from 38.01% to 38.08%; and that of the agriculture, forestry and fishery section decreased from 21.02% down to 20.40%. The total flow of imported goods in 2006 was estimated to reach 84 billion USD, increasing 21% compared to last year; in which exports increased 22.1%, and imports increased 20.1%; GDP for the first 6 months in 2007 increase 7.87%, more than that in 2005, 2006; in which the increase rate in quarter I was 7.69%; in quarter II was 8%. Growth in the agriculture, forestry and fishery section was 2.67%; in the industry and construction was 9.88%; and in the services section was 30.4%.

Exports and imports of goods in the first 6 months in 2007 were estimated to reach 49.69 billion USD; increasing 25.2% compared to the same period last year; in which exports rise was 19.4%, and imports rise was 30.4%.
2. Equitization Process of State-Owned Enterprises in Vietnam

Equitization is a short form of the transformation of SOEs into joint stock companies in Vietnam. The equitization program started in Vietnam in 1990-1991 and was officially launched in 1992 and was promoted in 1996.

![Equitization Process in Vietnam](source: Government Report)

**Figure 1 The Equitization process in Vietnam**

The number of SOEs has fallen sharply from 6,000 in 2000 to 652 in 2015 (source: Nhu Bui, Equitization process in Vietnam, accessed from Linkedin, June 2017)

*IPO of SOEs in the past five years has not been as successful as expected.* In the period of 2011 - 2015 and the first 9 months of 2016, 426 enterprises had sold the initial share capital (IPO), but only 60% (254 enterprises) sold their shares as planned. On average, the State still holds 81% of charter capital in the enterprise.

*For the 1st quarter of 2017: only 6 SOEs IPO in the first quarter of 2017 (4 on HNX and 2 on HSX). Although the results of IPO in the first quarter of this year are quite modest and not as expected, but this is the first quarter of the year which is not sprint period for equitization in the year.*

Looking beyond the next three quarters, there are plenty of SOE IPOs attracting a lot of investor interest. These are large scale enterprises with high competitive advantage, even have a dominant market share in the industry such as Petrolimex (IPO in April already), PV Oil, Vinafood 2, Rubber Group ... With strong determination and direction from the Government, the equitization process is expected to accelerate and achieve much fruit for the rest of 2017.
LICOGI was one of State-Owned Enterprises, has been transformed a joint stock company recently. In the next part, there will be fact and figures on LICOGI branding process, conducted by FAVI Company in 2008. FAVI is also demanded to carry out its assessment of some important SOEs, for example Viglacera, Constrexim, Habeco, VNsteel, Nasco, etc.

Discussion and Conclusion

The Positive and Shortcomings of Vietnamese Laws and Regulations about Valuation of Intellectual Property Including Trademark

There is now a widely accepted global brand valuation standard (ISO 10668) and the International Valuation Standards Council has produced a broader standard on the valuation of Intangible Assets including brands. Trademark/Brand valuations are regularly relied upon by accountants, auditors, tax specialists, lawyers, licensing managers, lenders and investors who are always financially literate and enquiring (source: David Haigh, Chief Executive Officer, Brand Finance plc; Foreword, Brand Finance Vietnam 50 September 201).

Although intellectual property valuation in Vietnam took place before the promulgation of the Intellectual Property Law (2005), intellectual property valuation has not yet followed a benchmark. The current provisions of Vietnamese law on intellectual property valuation are almost not directly regulated, only refer to the principle of calculation, based on booking of intangible property which includes intellectual property. In order to assess the value of intellectual property in Vietnam in the coming time, it is necessary to identify shortcomings of the regulations on valuation of intangible assets in general and intellectual property in particular.

At present, the provisions on intellectual property valuation are still inadequate.

First, there is a lack of consistency in the understanding of the term "intellectual property". The Accounting Standard No. 04 on intangible fixed assets issued in 2001 uses incorrect terms in comparison with the provisions of the Civil Code as well as the provisions of international law on types of Intellectual property such as computer software, invention, patents, copyrights, trademarks.

Second, the legal provisions are inconsistent when the classification of intellectual property into intangible fixed assets for valuation and the enterprise value. Circular 45/2013 / TT-BTC of the Ministry of Finance provides that all objects of intellectual
property rights (including copyright, industrial property rights, plant variety rights) are considered Intangible fixed assets and hence the basis for valuing and calculating the value of the enterprise. The Accounting Standard number 4 has fewer than these IP objects. According to Circular 127/2014 / TT-BTC, the brand value (including trademark and trade name) is included in the value of the enterprise when equitized. However, in Accounting Standard No. 04 does not define the brand as a fixed asset to be valued and calculated into the enterprise value.

Third, the pricing methodology is inconsistent.

The Valuation Criteria 13 provides methods of determining the value of intellectual property in a cost approach including the cost of renewable and alternative cost methods. However, according to the current legal documents on SOE accounting or equitization, the value of intellectual property is mainly calculated by historical cost method (pass cost). As stated in Accounting Standard 04, expenses such as establishment costs, staff training costs and advertising expenses incurred in the pre-operation period of newly established enterprises, expenses for The study period ... is not included in determining the value of intellectual property.

However, according to the Circular 127/2014/TT-BTC, brand value of equitized SOEs is determined on the basis of the actual costs of creating and protecting trademarks and trade names in the course of operation of enterprises. The cost of establishing a company, the cost of staff training, the cost of advertising and propaganda at home and abroad to advertise, introduce products, introduce the company, and so on. Determining the types of costs when conducting valuation among the above legal documents creates an incomprehensible and misleading way of applying the cost method to the valuation of intellectual property of enterprises in the course of business.

Fourth, lack of regulations on intellectual property valuation when mobilizing capital contribution to establish enterprises by intellectual property rights. The practice of joint ventures between Vietnamese enterprises and foreign enterprises shows that Vietnamese companies pay attention to the value of land use rights and tangible assets without considering intangible assets such as intellectual property. To date, there is no guideline on the capital contribution and the contribution of the value of the right to use the trademark, as there are still many different opinions and there is no assessment of all problems arising in reality.

Fifth, the Vietnamese Accounting Standards No. 04 Trademarks formed within enterprises are not recognized as intangible fixed assets. The failure to consider
trademarks created by enterprises is an intangible fixed asset which causes many obstacles and disadvantages for enterprises in the process of valuation, M & A and securities issuance. Thus, there are inconsistencies in determining the value of intellectual property as trademarks and trade names between the regulations on enterprise accounting and SOE equitization. This makes each audit company have a different view and behavior. If using the past cost method to determine the value of intellectual property would cause damage to businesses that own large amounts of intellectual property in joint ventures, joint ventures, mergers and acquisitions.

Some Concluding Remark on Branding Assessment and Trademark Valuation in Vietnam

- Among these challenges is the importance of recognizing brand asset as a strategic asset and make more investment in their brand (companies) to have more competitiveness in Asian region.

Among vital challenges is quantifying brand asset that contributes to value of shareholders. There is an index - called BSI which means Brand Strength Index, in the context that man companies not aware of brand and its role in business performance.

Among Vietnam banks, for example, Vietinbank has improved from 59 to 63 over 100 (in brand communication program) by BSI and rating was enhanced from A to A+.

Recommendation for Enacting of Laws and Regulation on Pricing of Intellectual Property Including Trademark

Raising Awareness of Trademark Creation and Valuation for Business Community

Importance of trademarks (Brand) for the business community should be identified with several manners as follows:

- Among forms of intellectual properties brand is the most important value. And it is accounting for abt 50%-70% total intangibles value for a brand driven business
- Vietnam represents about 1% of the ASEAN intangible value.

A Critical Issue: To Enact a New Regulation on Pricing of Intellectual Property Including Trademark

It is a right time for The Price Management Department (Ministry of Finance) to assume the prime responsibility for and coordinate with the concerned agencies in directing,
guiding and inspecting the provisions in the price-appraising standards issued together under a Circular on Vietnamese Valuation Criteria No. 12 about corporate valuation. This standard should clearly prescribe and guide the implementation of enterprise valuation for purposes of purchase, sale, enterprise conversion, merger, capital contribution, profit distribution, dispute settlement and others. This Circular also is regarded as a legal corridor for any price appraisers, price-appraising enterprises and other organizations and individuals conducting price appraisal activities according to the provisions of the Vietnamese Price Law.

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