**ANNEX 1: LEGAL ANALYSIS FOR CASH POOLING**

1. background

Cash pooling is a banking structure in which the balances of accounts of different entities within a group will be collected or “concentrated” at one designated account, namely, the header account. The balance of the header account may be used to offset cash deficits with cash surpluses between entities participated in the pool[[1]](#footnote-1), facilitate the investment activities of the group as well as reduce the interest expenses existing in the system of multiple accounts. The main benefit of cash pooling structure is to optimise the finance of the group as a whole.

Cash pooling has been accepted in several countries such as Singapore, Hong Kong, Australia Indonesia or Malaysia. The pooling control between countries may be different due to their foreign exchange regulation but in general, the domestic notional and physical cash pooling is allowed. Currently, there is not any clear legal basis with respect to cash pooling structure which prevents credit institutions to provide such product in Vietnam. The following section will explore the current relevant regulation to prove that such structure is not prohibited under the law of Vietnam and the SBV may consider approving and issuing an official guidance on the provision of the cash pooling products by credit institutions either as an independent banking product or through entrustment lending services.

1. relevant regulation under vietnamese law
   1. *Banking activities under Credit Institution Law 2010*

Under Article 8.2 of Law no. 47/2010/QH12 on Credit Institution passed by the National Assembly of Vietnam on 16 June 2010 (**Credit Institution Law 2010**), any entity other than a credit institution is prohibited from having banking activities. The banking activities include regular provision of lending services for the profit purpose but there is no further explanation on “regular provision” and “profit purpose”. However, the balance transfers between accounts of entities within a group may should not be viewed as lending for the profit purpose and hence, not a banking activity.

* 1. *Lending activities under the Enterprise Law and the Civil Code*

Under Article 7.2 of Law no. 68/2014/QH13 passed by the National Assembly of Vietnam on 26 November 2014 on Enterprises, a company has the right to select forms and methods of raising, allocating and utilizing capital. Furthermore, there is no restriction on companies from borrowing from or making loans to other companies. This implies that companies may borrow from or make loans to other companies if this is not clearly prohibited by law (i.e. without the profit purpose as this purpose causes the lending activities to fall within the restriction of Article 8.2 of the Law on Credit Institutions as mentioned above.

In addition, the Civil Code which governs civil relationship in Vietnam allows the assetss owner to conduct any acts with respect to its own assets as long as such acts “are not contrary to the law of Vietnam, do not cause damages to or adversely affect the interest of the country, the nation or the public, or the lawful rights and interests of other persons[[2]](#footnote-2). As above-mentioned, the purpose of cash pooling is to maximise the usage of available capital[[3]](#footnote-3) of the group in its day-to-day activities and such usage does not cause any damages to the interest of the country, the public or any other persons. The group of entities uses the cash pooling product as a mean of capital allocation and utilization to optimize its finance. As such, it should not be understood as a banking activity within the definition under Credit Institution Law 2010.

Specifically, the Civil Code allows lending between individuals and/or entities under lending contracts. The maximum interest rate of such lending must not exceed 20% per annum.

* 1. *Permitted lending activities of entities which are not credit institutions*

Besides, under Article 6.2 of Decree no. 222/2013/ND-CP dated 29 January 2015 on cash payment issued by the Government and Article 4.1 of Circular no. 09/2015/TT-BTC providing guidance on financing transactions of enterprises under Article 6 of Decree No. 222/2013/ND-CP, an entity other than credit institution is permitted to borrow from or provide loans to another non-credit institution entity in one of the following methods:

* Payment by cheque;
* Payment by authorized payment orders – transfer orders; or
* Other appropriate non-cash payment methods under the law.

The existence of lending activities of non-credit institution entities is recognized and such activities are not subject to value-added tax under VAT Law.[[4]](#footnote-4) Ministry of Finance explains further as “the singular lending activities of tax payers other than credit institutions which are not for profit purposes and regular provision”. For example, VC Joint Stock Company has some free cash which has not been used for its business and decides to lend that amount to T Company for a term of 6 months. The interest received by VC Joint Stock Company in such case is not subject to the value-added tax.[[5]](#footnote-5)

In addition, under Article 23.1 of Law no. 69/2014/QH13 on management and utilization of the State’s investment capital in the enterprise’s manufacturing and business activities passed by the National Assembly of Vietnam on 26 November 2014, the state-owned enterprises have the right to take loans from entities other than credit institution. This right is also embedded in the finance management procedure of major State-owned groups like Vietnam Electricity[[6]](#footnote-6) or Vietnam National Oil and Gas Group[[7]](#footnote-7). So, the lending activities between non-credit institution entities for the purpose of capital mobilization have clearly been permitted under the law of Vietnam in some circumstances.

1. Conclusion

As the current law of Vietnam does not clearly prohibit the lending activities between non-credit institution entities and the cash pooling structure is solely for the purpose of capital optimisation within a group of entities (not for the profit purpose), such structure should be recognized and regulated to clear out the uncertainty. It is suggested that the Government may consider issuing a decree to clearly allow, regulate and implement cash pooling between the companies in a group without the profit purpose.

1. *Susan Hillman (2011) “ Notional vs. Physical Cash Pooling Revisited’, International Treasurer assessable at:* [*http://www.treasuryalliance.com/assets/publications/cash/Treasury\_Alliance\_Notional\_Physical\_Pooling\_Revisited.pdf*](http://www.treasuryalliance.com/assets/publications/cash/Treasury_Alliance_Notional_Physical_Pooling_Revisited.pdf) *(assessed on 3 November 2017)* [↑](#footnote-ref-1)
2. *Article 160.2 of Civil Code no 91/2015/QH13 passed by the National Assembly on 24 November 2015 (****Civil Code 2015****)* [↑](#footnote-ref-2)
3. *The balance in accounts of entities falls within the definition of assets under Article 105 of Civil Code 2015* [↑](#footnote-ref-3)
4. *Article 5.8(b) of Consolidated paper no. 01/VBHN-VPQH of Law value-added tax issued by the Office of National Assembly dated 28 April 2016 (****VAT Law****)* [↑](#footnote-ref-4)
5. *Article 4.8(b) of Consolidated paper no. 13/VBHN-BTC Circular guiding the implementation of law on value-added tax and Decree no. 209/2013/ND-CP issued by the Government on the detailed regulation and guidance on the implementation of law on value-added tax dated 15 May 2017 issued by Ministry of Finance* [↑](#footnote-ref-5)
6. *Article 6 of Finance Management Procedure attached to Decree no. 10/2017/ND-CP on the issuance of finance management procedure of Vietnam Electricity and amendment, supplement of Article 4.4 of Decree no. 209/2013/ND-CP dated 9 February 2017 issued by the Government* [↑](#footnote-ref-6)
7. *Article 6 of Finance Management Procedure attached to Decree no. 06/2015/ND-CP on the issuance of finance management procedure of the parent company of Vietnam National Petrol and Oil Group dated 13 January 2015 issued by the Government* [↑](#footnote-ref-7)