

# New M&A-related competition notification in Vietnam

The Law on Competition adopted by the National Assembly of Vietnam on 12 June 2018 took effect on 1 July 2019 (“LoC”). However, it took nearly 9 months for Decree No.35/2020/ND-CP, to be issued by the Government of Vietnam, on 24 March 2020 (“Decree 35”), guiding the implementation of the LoC. Decree 35 will take its full effect on 15 May 2020.

Under the LoC, *economic concentration* consists of:

- *Merger of enterprises;*
- Consolidation of enterprises;
- *Acquisition of an enterprise;*
- Joint venture between enterprises; and
- Other forms of economic concentration as stipulated by law.

However, in this paper, we talk about major points in relation only to notification of a *merger & acquisition* (“M&A”) transaction, in general, to be conducted in the territory of Vietnam, from the new competition law perspective:

## M&A Transaction

Under the LoC, *merger of enterprises* is defined as a transfer by one or more enterprise(s) of all of its lawful assets, rights, obligations and interests to another enterprise and at the same time the termination of the existence of the merging enterprise(s), while *acquisition of an enterprise* as a purchase by one enterprise of all or part of the assets of another enterprise sufficient to *control or govern* an enterprise or a business line of the acquired enterprise.

In an attempt to quantify the *controlling or governing* by an enterprise over another enterprise or a business line of

another enterprise, Decree 35 provides the following cases:

- The acquiring enterprise gains ownership of more than 50% of the charter capital of, or above 50% of the voting shares of the acquired enterprise;
- The acquiring enterprise gains ownership of or the right to use more than 50% of the assets of the acquired enterprise during all or one business line of the acquired enterprise; and
- The acquiring enterprise has one of the following rights, *including* (A) directly or indirectly decide the appointment, removal or dismissal of a majority or all of the members of the board of directors, chairman of the members' council, director or general director of the acquired enterprise; (B) decide the amendment of or addition to the charter of the acquired enterprise; and (C) decide important issues during business activities of the acquired enterprise comprising selection of the form of organization of business, selection of business lines and the geographical area and forms of business; selection to adjust the scale and the business lines; selection of the form and method of raising, allocating and utilizing business capital of such enterprise.

### **Prohibited M&A Transaction**

The threshold of 50% relevant market share provided by the former law has no longer in existence. Instead of that, *significant competition-restraining impact or ability to cause such impact* is now used as the ground to decide whether a M&A transaction is permitted or not. In brief, a M&A transaction shall be prohibited if it creates significant competition-restraining impact or ability to cause such impact in Vietnamese market.

### **Possible M&A Transaction**

Except for those prohibited on the ground as briefed above,

all other M&A transactions shall be possible in Vietnam, with or without further possible conditions and/or requirements, as further provided below.

### **M&A Notification**

While no notification is required to many others, a prior notification is mandatorily required in respect of any M&A transaction which falls in one of the following cases:

- Total assets in the market of Vietnam of the enterprise or group of affiliated enterprises of which such enterprise is a member was three (3) trillion VND (e. about USD127 million) or more in the financial year immediately preceding the year of proposed implementation of the M&A transaction;
- Total sales turnover or input purchase turnover in the market of Vietnam of the enterprise or group of affiliated enterprises of which the enterprise is a member was three (3) trillion VND (e. about USD127 million) or more in the financial year immediately preceding the year of proposed implementation of the M&A transaction;
- The transaction value of the M&A transaction is one (1) trillion VND (e. about USD42 million) or more; and
- The combined market share of the enterprises proposing to participate in the M&A transaction was 20% or more in the relevant market in the financial year immediately preceding the year of proposed implementation of the M&A transaction.

In all cases, the notification must be made prior to the implementation of the proposed M&A transaction. The National Competition Committee (“NCC”) has authority to receive the notification for appraisal.

It is noted that M&A transactions in banking, insurance and securities sectors conducted in the territory of Vietnam and

all M&A transactions conducted outside Vietnam, will be regulated by other regulations.

### **Preliminary Appraisal**

Within 30 days after receipt of a complete and valid notification, the NCC shall issue a notice of the results of its preliminary appraisal, notifying clearly whether (A) the M&A transaction is permitted to conduct or (B) it will be further subject to an official appraisal.

In brief, a M&A transaction will be permitted to conduct if it falls in one of the following cases, without need of an official appraisal:

- The combined market share of the enterprises proposing to participate in the M&A transaction is less than 20% in the relevant market;
- The combined market share of the enterprises proposing to participate in the M&A transaction is 20% or more in the relevant market and the extent of concentration (or total market share squares) of the enterprises after such M&A transaction in the relevant market will be less than 1,800;
- The combined market share of the enterprises participating in the M&A transaction is 20% or more in the relevant market, and the extent of concentration (or total market share squares) of the enterprises after such M&A transaction in the relevant market will be above 1,800 and the increase in the total market share squares of the enterprises in the relevant market both before and after the M&A transaction is less than 100; and
- The market share of the enterprises participating in the M&A transaction which have a relationship with each other in the chain of production, distribution and supply of a specified type of goods or whose business lines provide mutual inputs or provide ancillary support

to each other is less than 20% in each relevant market.

It is noted that if the NCC has not issued any notice of the results of its preliminary appraisal upon expiry of the said 30-day limit, the M&A transaction will then deem to be permitted to conduct.

### **Official Appraisal**

An official appraisal by the NCC normally takes 90 days from the date of notice by the NCC of the results of its preliminary appraisal. However, in complicated cases, the NCC may extend the time limit for its official appraisal, provided that in all cases the extension shall not exceed 60 days. In such case, the NCC shall notify the relevant enterprises of its extension.

In brief, the NCC shall consider the following key aspects when it conducts an official appraisal:

- *The significant competition-restraining impact or ability to cause such impact* by a M&A transaction, as well as possible measures to mitigate those;
- *The positive impact* by a M&A transaction, as well as possible measures to accelerate those; and
- The combined possibility of mitigation of competition-restraining impact and acceleration of positive impact of a M&A transaction, to come up with the final decision.

In respect of (a), to assess *the significant competition-restraining impact or ability to cause such impact* by a M&A conduct, the NCC shall have to consider the following aspects:

- The combined market share of the enterprises participating in the M&A transaction in the relevant market, both before and after the M&A transaction;
- The extent of concentration in the relevant market both before and after the M&A transaction, which is assessed

in order to determine the danger of creating or strengthening the market power of enterprises and the ability to increase coordination or collusion between enterprises in the relevant market;

- The relationship of the enterprises participating in the M&A transaction in the chain of production, distribution and supply of a specified type of goods or services or whose business lines provide mutual inputs and assistance, which is assessed to determine the ability of the parties after the M&A transaction to create superior competitive advantages as compared to other competitors aimed at preventing or excluding competition in accessing the market;
- The competitive advantage brought about by the M&A transaction in the relevant market, based on advantages regarding product characteristics, production and distribution chain, financial capacity, brand name, technology, intellectual property rights and other advantages of the enterprises after the M&A transaction compared to competitors in the relevant market, resulting in the risk of creating or strengthening the significant market power of such enterprises formed after the M&A transaction;
- The ability of an enterprise to raise prices or increase its profit margin after the M&A transaction;
- The ability of an enterprise after the M&A transaction to exclude or prevent other enterprises from accessing or expanding the market; and
- Particular factors in the industry or sector which the enterprises participating in the M&A transaction consider when such factors directly influence or significantly change the results of the assessment of significant competition-restraining impact or ability to cause such impact.

In respect of (b), to assess *the positive impact* by a M&A transaction, the NCC shall have to consider the following

aspects:

- The positive impact on development of the industry or sector and on science and technology in accordance with the State's strategy and planning (e. whether or not the M&A transaction will promote economic efficiency in terms of size and resources of the locality, industry, sector and society, in coordination with the objectives set out in the Government's or Prime Minister's approved strategy and planning for the development of industries and sectors; the level of application of scientific advances and technological improvements by the enterprise after the M&A transaction in order to improve productivity, quality and business efficiency in order to reduce costs, improve the quality of products and services or otherwise serve the interests of consumers and the community);
- The positive impact on the development of small and medium-sized enterprises ("**SMEs**") is considered on the basis of an assessment of the opportunities and favourable conditions brought about by the M&A transaction for SMEs to access and expand the market or to participate in production chains and distribution networks for goods and services; and
- Whether or not the enterprise after the M&A transaction strengthened the competitiveness of Vietnamese enterprises in the international market is assessed on the basis of the positive consequences of the M&A transaction in expanding the scale of production, domestic consumption and export of goods or services.

Upon the completion of an official appraisal, the NCC shall issue a decision, confirming clearly whether (A) the M&A transaction is permitted to conduct without any further conditions, (B) *the M&A transaction is permitted to conduct with certain conditions* or (C) the M&A transaction is prohibited.

It is noted that in respect of (B), the M&A transaction shall only be permitted to conduct after one or more of the following conditions (subject to the NCC's decision) is/ are satisfied:

- Split, separation or re-sale, has been made, in respect of a part of capital, assets of relevant enterprises participating in the M&A transaction;
- Buying and selling prices of services and commodities or other terms and conditions under relevant contracts to which merged/ acquired enterprise is a party, have been controlled, after the M&A transaction;
- Measures to mitigate competition-restraining impacts in the market, have been taken place; and
- Measures to accelerate positive impacts by the M&A transaction, have been taken place.

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