

Vietnam Competition Law on Merger Filing

Competition Law 2018

On 12 June 2018, the National Assembly adopted the Law No. 23/2018/QH14 on competition (the “**Competition Law**”). The Competition Law takes effect from 01 July 2019 and is guided in details by Decree 35/2020/ND-CP dated 24 March 2020 of the Government (“**Decree 35**”) which took effect from 15 May 2020. Significant issues regarding economic concentration under Vietnam competition framework are laid out below.

Scope of application

The Competition Law applies to (i) local and foreign enterprises operating in Vietnam, (ii) professional associations operating in Vietnam and (iii) relevant domestic and foreign organisations and individuals.¹ Even though the Competition Law does not provide definition regarding “relevant foreign organizations and individuals”, Decree 35 provides further that both onshore and offshore transactions would be subject to Competition Law and its relevant guiding regulation.²

Forms of economic concentration

Under the Competition Law, economic concentration includes one of the following forms:³

- 1.1 a merger of enterprises: A merger of enterprises means the 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 business activities or the existence of the merging enterprise(s).
- 1.2 a consolidation of enterprises: A consolidation of enterprises means the transfer by two or more enterprises of all of their lawful assets, rights, obligations and interests to form one new enterprise and, at the same time, the termination of the business activities or the existence of the consolidating enterprises.
- 1.3 an acquisition of enterprises: An acquisition of enterprises means an acquiring enterprise directly or indirectly acquires all or part of the capital contribution or assets of the acquired enterprise and such acquisition is sufficient for the acquiring enterprise to control the acquired enterprise or any business line of the acquired enterprise. Pursuant to Article 2.1 of

¹ Article 2 of Competition Law.

² Article 13.3 of Decree 35.

³ Articles 29 of Competition Law.

Decree 35, the acquired enterprise or any business line of the acquired enterprise would be considered as being ‘controlled’ by the acquiring enterprise if the acquiring enterprise obtains

- (a) the ownership of more than 50% of the charter capital or voting shares in the acquired enterprise;
- (b) the ownership, or the right to use, over 50% of the assets of the acquired enterprise or over 50% of the assets of at least one business line of the acquired enterprise; or
- (c) one of the following powers over the acquired enterprise including (x) the direct or indirect power to decide on the appointment or dismissal of majority or all members of the Board of Management, the Chairman of the Members’ Council, and/or the (General) Director of the acquired enterprise; (y) the power to decide amendment to the charter of the acquired enterprise; or (z) the power to decide important issues during business activities of the acquired enterprise comprising selection of the form of organization of business, selection of business lines and geographical areas 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.

1.4 a joint venture between enterprises: A joint venture between enterprises means two or more enterprises together contribute a portion of their lawful assets, rights, obligations and interests to form a new enterprise.

1.5 other forms of economic concentration stipulated by laws.

Under the Competition Law, it remains unclear whether an internal restructuring, particularly when it is arranged offshore and where it results in no change to the competition environment before, during and after, such internal restructuring, would be considered as an economic concentration or not under the Competition Law and Decree 35. On the surface, this internal restructuring could fall into item (iii) above. However, since this internal restructuring does not cause, does not result in, and does not affect, and does not change anything in the competition environment in Vietnam, either before, during or after such internal restructuring. This is a critical issue for understanding and compliance with Vietnam competition regulations.

Economic concentration transactions subject to merger filing

Enterprises participating in an economic concentration must notify the National Competition Committee (“NCC”) prior to carrying out the economic concentration (normally referred to as “**Merger Filing**”) if such economic concentration reaches any of the following thresholds:⁴

⁴ Article 13.1 of Decree 35.

- 1.1 the total asset value in Vietnam of the participating enterprises, or the total asset value of the group of affiliates in which such participating enterprises is a member, reached VND3 trillion (approx. USD130 million) or more during the last fiscal year preceding the year of the concerned economic concentration;
- 1.2 the total sales revenue or purchase turnover in Vietnam of the participating enterprises, or the total sales revenue or purchase turnover of the group of affiliates in which such participating enterprise is a member, reached VND3 trillion (approx. USD130 million) or more during the last fiscal year preceding the year of the concerned economic concentration;
- 1.3 in case of on-shore transactions, the transaction value of the concerned economic concentration is VND1 trillion (approx. USD43 million) or more; or
- 1.4 the combined market share of the participating enterprises is 20% or more in any relevant market during the last fiscal year preceding the year of the concerned economic concentration.

While providing the specific threshold amounts, it remains unclear whether an internal restructuring is subject to Merger Filing or not. Take a simple example: the parent of one holding company in Singapore, which holds a majority share in a Vietnamese listed company that holds 20% or more in the relevant market, creates a new layer by establishing one new company in Singapore, and transfer all its equity in the holding company to this new company. The answer here is not clear if such transfer/acquisition would be subject to Merger Filing under Decree 35. This is a critical issue for understanding and compliance with Vietnam competition regulations.

Merger filing procedure

The review of the Merger Filing would be subject to a two-phase process carried out by the Vietnam competition authority, including a preliminary review and an official review as follows:

- 1.1 Preliminary review: The NCC shall conduct a preliminary evaluation of the Merger Filing, which would take up to 30 days from the receipt of a “complete” application dossier.⁵ After conducting the preliminary evaluation, the NCC either (a) allows the economic concentration to be conducted; or (b) decides the economic concentration to be subject to an official evaluation. Upon the expiry of such 30-day-period, if the result of the preliminary review is not issued by the NCC, the proposed transaction will be “deemed as cleared”.⁶ This preliminary review is a new mechanism provided under the Competition Law and Decree 35 as a gate keeper to filter the unnecessary filings. However, as it is just newly introduced into Vietnam competition framework, parties should pay more attention on the

⁵ Article 36.2 of Competition Law.

⁶ Article 36.3 of Competition Law.

actual implementation of such preliminary review to see if this mechanism is actually welcomed in practice.

- 1.2 **Official review:** The official evaluation of the Merger Filing may take up to 90 days from the issuance of preliminary evaluation decision (which could be extended up to 60 days depending on the complexity nature of the Merger Filing).⁷ Throughout the official evaluation process, the NCC would assess, among others, assessment of significant competition restraint impacts and positive impacts of the proposed transaction to decide on whether (a) the economic concentration may be conducted; (b) the economic concentration is approved with certain conditions; or (c) the economic concentration is prohibited.⁸ During the evaluation of the economic concentration, the NCC has the right to consult with the relevant State authorities and other enterprises, organizations and individuals.

Prohibited economic concentration

The Competition Law prohibits economic concentrations which cause or have the ability to cause the effect of significantly restricting competition in the Vietnam market.⁹ At laws, the NCC has the authority to assess the effect or the ability to cause the effect of significantly restricting competition of a economic concentration transaction by taking into account several criteria, including combined market shares, concentration on the relevant market, relationship among parties of the economic concentration, competition advantages arising from the economic concentration, possibility of price increase or profit margin increase after the economic concentration, possibility of eliminating competitors or preventing development of competitors in the relevant market, and other specific factors of the relevant sectors, to determine the effect or the ability to cause the effect of significantly restricting competition of the economic concentration.¹⁰

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⁷ Article 37 of Competition Law.

⁸ Article 41.1 of Competition Law.

⁹ Article 30 of Competition Law.

¹⁰ Article 31.1 of Competition Law.