



Session 1:

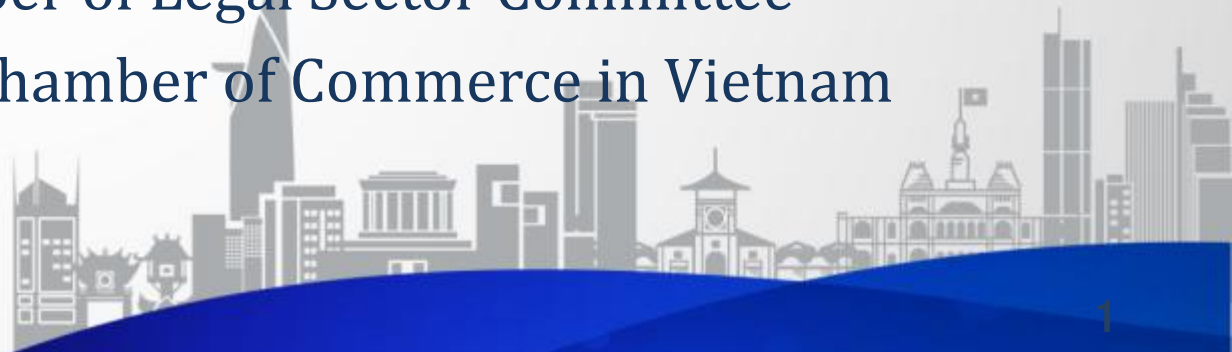
The growth of M&A market in the context of the European Union Vietnam Free Trade Agreement (EVFTA)

Presented by: Mr. Justin Gisz

Partner of Frasers Law Company

& Member of Legal Sector Committee

European Chamber of Commerce in Vietnam





1. The fact situation and positive views of M&A market





2019 Transactional FDI in Vietnam

- Foreign investors (share or capital purchases plus share subscriptions and capital contributions):
USD15.47 billion, from **9,842 transactions** (MPI).
- **Increase of 56.4%** as compared with 2018.





2020 YTD Transactional FDI Market in Vietnam

- Foreign investors (share or capital purchases plus share subscriptions and capital contributions), end of Q3 2020: **USD5.73 billion**, from **5,172 transactions** (MPI).
- **Decrease of 55%** as compared with end of Q3 2019.





M&A in Vietnam 2020 v 2019

- M&A transaction value (all transactions) 2019: **USD7.2 billion** (MPI).
- 2020 YTD (end of October): M&A transaction value and transaction numbers **down 50%**, as compared with end of October 2019 (MPI).





Global M&A 2020 v 2019

- 2019 end of Q2: **USD592.6 billion**, from **4,308 transactions** (Mergermarket).
- 2020 end of Q2: **USD308.9 billion**, from **2,630 transactions** (Mergermarket).
- Vietnam 2020 decline broadly consistent with global decline.





2020 YTD key M&A sectors in Vietnam

- Real estate.
- Banking & finance.
- Retail.
- Logistics.
- Agriculture.
- Pharmaceuticals.
- Broadly consistent with 2019.





Positive outlook

- Vietnam M&A deal value projected to reach up to **USD5 billion in 2021**, increasing to **USD7 billion in 2022** (2020 M&A forum).
- Expected key focus sectors in 2021 and 2022: Real estate, retail, telco, energy, infrastructure, pharmaceuticals, and education (2020 M&A forum).





Positive outlook

- M&A environment attractiveness index: Vietnam 2nd out of 50 ranked economies (Euromonitor).





Key challenges in 2021

- COVID-19.
- Domestic economy impacts.
- US political situation.
- US-China trade situation.





2. The prediction of investment situation of EU investors in Vietnam





Outlook and opportunities

- Impact of the EVFTA on M&A is likely to be positive, but gradual and not initially dramatic.
- Retail distribution: ENT abolished as from five years after entry into force.
- Energy: Electricity production, manufacture and distribution of gas and related products, production and distribution of steam and hot water – new commitments.





Outlook and opportunities

- Maritime transport services: JV percentage up from 49% to 70%.
- Internal waterways transport: JV percentage up from 49% to 51% (for Mode 3). No restriction (for Mode 1).
- New commitments in provision and transfer of financial data processing, and credit reference and analysis.





Outlook and opportunities

- Telco (non facilities-based): 75% foreign ownership allowed after five years (up from 65%).
- VPN services: 49% (with infrastructure), 70% (without infrastructure), after five years.
- “Favourable consideration” of up to 49% ownership of two joint stock commercial banks within the first five years.





3. EuroCham's proposals for M&A: To assist EU enterprises when investing in Vietnam.





Whitebook Recommendations 2020

- Continue to reduce conditional sectors.
- Abolish ENT altogether.
- Abolish M&A approvals altogether.
- Reduce discretionary decision-making powers of local licensing authorities.





Whitebook Recommendations 2020

- Improve clarity and consistency of M&A transactional implementation procedures.
- Reduce overall degree of State control of foreign currency exchange transactions (abolish DICA and IICA requirements).
- Facilitate faster and more efficient tax clearance processes.





Whitebook Recommendations 2020

- Revisit merger control notification thresholds under Decree 35 (implementing the Law on Competition).





Conditional sectors

- 2016 (Law 03/2016/QH14): Reduced LOI list of Conditional Sectors from 267 to 243.
- Amended Law on Investment (in effect 1 January 2021): Further reduces list of Conditional Sectors from 243 to 227. Introduces “negative list” approach.
- Implementing Decree will have two lists. Any sector not on either list will entitle foreign investors to be treated as domestic investors.
- Positive developments, but there is always room for improvement.





Abolish ENT altogether

- ENT has been hugely problematic for foreign investors in retail distribution to date (and hugely beneficial to domestic investors in retail distribution).
- EVFTA exempts foreign investors from EU states from the ENT as from five years after the EVFTA enters into force.
- ENT is highly detrimental to M&A (as well as FDI), insofar as foreign investors are concerned.
- The ENT serves as a very effective barrier to market entry and undermines the key principles of the WTO Commitments.
- Current indications are that the Government is unlikely to consider complete abolition of the ENT.





Abolish M&A Approvals altogether

- M&A Approvals are certainly an improvement on the confusing and difficult regime that preceded them.
- Scope of M&A Approval requirements has been clarified and narrowed under the Amended LOI (coming into force 1 January 2021).
- Nevertheless, M&A approvals still present major delay issues for transaction parties.
- Applications invariably take one to two months to prepare (depending on jurisdictional consular legalisation timeframes).





Abolish M&A Approvals altogether

- Different DPLs achieve differing degrees of punctuality in processing applications.
- Even low-value acquisitions and subscriptions need to go through these heavily bureaucratic processes.
- Difficult to see why post-completion notification would not suffice, with the pre-completion onus to be placed on the legal profession to ensure compliance.
- Current indications are that the Government is unlikely to consider complete abolition of M&A Approvals.





Reduce discretionary decision-making

- Key issue relates to business sectors that do not have specific foreign ownership allowances (under treaties or specific domestic laws).
- In practice, investment in such “non-specified” sectors is completely at the discretion of licensing authorities.
- If the “negative list” approach under the Amended LOI and its implementing Decree rolls out as hoped, this should in theory address this key issue.





Improve procedural clarity and consistency

- No doubt that major improvements have been made in recent years.
- Amended LOI significantly increases clarity and consistency.
- Differing discretionary interpretations and policy positions of different licensing authorities remains an issue.
- Form requirements remain an issue (such as consular legalisation and certified translation requirements).





Foreign exchange control

- Foreign currency inflow and outflow rules and procedures continue to present major issues in M&A transactions.
- The rules regarding DICA and IICA requirements remain unclear, as does the safety of direct payments between non-residents.
- Banks continue to find it necessary to conduct their own “mini-due-diligence” on M&A transactions, which causes delays and frustration.
- Different banks have different interpretations and opinions.





Foreign exchange control

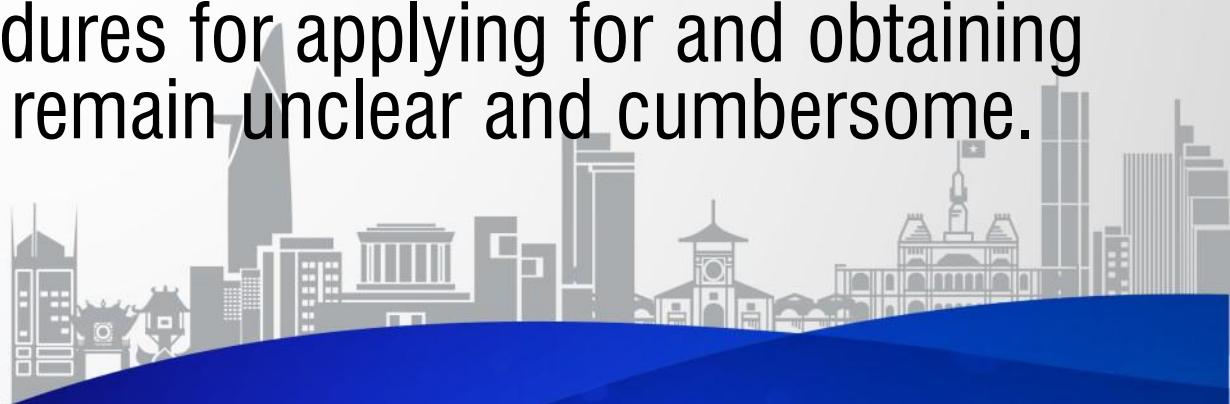
- M&A would be hugely benefitted and stimulated by the abolition of the strict foreign exchange controls that hinder efficient deal execution.
- Current indications are that the Government is unlikely to consider abolition of the strict foreign exchange control regime.





Tax clearance procedures

- Capital transfer tax declaration and payment rules and procedures remain cumbersome and unclear.
- “Self-assessment” regime is great in theory, but in practice banks still require official documents, issued by State tax authorities, which they can rely on for definitive evidence of “tax clearance”.
- Rules and procedures for applying for and obtaining DTA treaty relief remain unclear and cumbersome.





Tax clearance procedures

- Different tax authorities have different discretionary interpretations and policies.
- Difficult issue to solve.





Merger control

- Decree 35 (implementing the Law on Competition) has the potential to cause a massive increase in notifiable transactions.
- Only majority control acquisitions constitute regulated “economic concentrations”, which brings welcome clarity.
- However, the new Decree 35 thresholds are onerous (and apply to all new-entity JV formations, as well as majority control acquisitions).





Merger control

- Group assets in Vietnam (VND3 trillion).
- Group turnover (sales or input purchase) in Vietnam (VND3 trillion).
- Transaction value (VND1 trillion).
- Combined market share (20% in relevant market).
- (Different rules for credit institutions, insurers, and securities companies.)





Merger control

- No express distinguishing between intra-Vietnam concentration transactions and extra-Vietnam concentration transactions.
- Notification applications are currently taking around three to four months to process.
- MOIT / “legacy” VCA strongly resistant to foreign-invested market research suppliers.
- Serious impediment to many otherwise viable M&A transactions.





Merger control

- Key question: Article 1 of the Law on Competition. Are parties free to determine that no notification is required if they are satisfied that their concentration transaction is incapable of having any “...*competition-restraining impact on Vietnam’s market...*”?

