

NEW POINTS OF VIETNAM LEGAL FRAMEWORK THE PUSH OR CHALLENGE FOR M&A MARKET?

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Guidelines for Merger Filing

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1. Who must file a notification?
2. When must a notification be filed?
3. What is the criteria for approval of economic concentration?
4. What is the process to file a notification?
5. What are the consequences of violations?

Presentation Outline



Key Legislative Documents & Government Authorities

Law

- Law on Competition no. No. 23/2018/QH14 dated June 12, 2018
- Entered into force on July 1, 2019

Decree

- Government Decree 35/2020/ND-CP detailing a number of articles of the Competition Law dated March 24, 2020
- Entered into force on May 15, 2020

Competent Authority

- The National Competition Commission (“NCC”) (yet to be formed)
- Until then, the Vietnam Competition and Consumer Protection Authority (VCCA) under the Ministry of Industry and Trade

Who must file a notification?

- Enterprises (may include business organizations and individuals) participating in economic concentrations must file the notification before conducting the economic concentrations.
- Economic concentrations will be prohibited if they cause, or have the potential to cause, significant anti-competitive effects on the Vietnamese market.
- Forms of an economic concentration include:
 1. **Mergers**
 2. **Consolidations**
 3. **Acquisitions:** **direct or indirect** acquisition of a part or entire capital or assets which is **sufficient to control or influence** an enterprise or a business line of the target enterprise. E.g.: acquisition of Beerco Limited (HK) by Asia Breweries Limited (SGP) from International Beverage Holdings Limited (HK).
 4. **Joint ventures**

When must a notification be filed?



Notification Thresholds

Criteria	Thresholds
Total assets in the Vietnamese market in the preceding fiscal year	3,000 billion VND (ca. USD 130 million)
Total sales turnover or input purchase turnover in the Vietnamese market in the preceding fiscal year	3,000 billion VND (ca. USD 130 million)
Transaction value (for onshore transactions only)	1,000 billion VND (ca. USD 43 million)
Combined market share in the relevant market in Vietnam during the preceding fiscal year	20%

Thresholds for approval of economic concentration

Criteria	Thresholds
1	The combined market share of the enterprises is less than 20% of the relevant market; OR
2	The combined market share of the enterprises is 20% or more of the relevant market and the sum of squares of market share points of the enterprises after such concentration is less than 1,800 ; OR
3	The combined market share of the enterprises is 20% or more of the relevant market; the sum of squares of market share points of the enterprises after such concentration is more than 1,800 ; and the margin of the sum of squares of market share points before and after such concentration in the relevant market is less than 100 ; OR
4	The market shares of <ul style="list-style-type: none"> ➤ the enterprises having a relationship with each other in a chain of production, distribution or supply of a specified type of goods; or ➤ whose business lines provide mutual inputs or ancillary support to each other are less than 20% of total shares of each relevant market.

Definition and assessment of 'relevant market'

- A relevant market is defined as an inclusion of a **relevant product market** and a **relevant geographic market**.

RELEVANT PRODUCT MARKET

- the market where products and services that are regarded as **interchangeable or substitutable** in terms of their characteristics, uses and prices.
 - Characteristics: similarity of composition, physical and chemical nature, technical functions, side effects on users, user's absorbability, or the like.
 - Uses: their main uses are similar
 - Prices: the percent difference in these prices is not over 5% under similar transactional conditions. Sometimes,
- Additional criteria will be considered if the above is insufficient to conclude
- Special cases

RELEVANT GEOGRAPHIC MARKET

- a specific geographical area where available products or services are **interchangeable** or **substitutable** under similar competition conditions which are significantly distinguished from those conditions existing within neighboring geographic areas
- Criteria for determination of boundaries of geographic areas:
 - Areas where business stores of enterprises distributing relevant products and services located;
 - Business stores of other enterprises located in neighbouring areas close enough to the above areas for competition ability;
 - Shipping costs and time; Barriers to market entry and expansion;
 - Consumption habits; Required costs and time for consumers to buy these products and services.
- Criteria for geographical areas having similar competition conditions:
 - The increase of shipping costs and time does not exceed 10%
 - Existence of one of barriers to market entry and expansion: legislative barrier, financial barrier, consumption habits, business practice and customs, others.

Definition and assessment of 'relevant market'

Who must file a notification?

Potential issues

- Determination of **‘group of affiliated enterprises’**
- Extraterritorial control over offshore transactions

Group of affiliated enterprises

- A group of affiliated enterprises is a group of enterprises put under the **control or influence** of **another or other enterprises** in the same group or put **under the same management unit**.

Definition of 'control or influence':

- Ownership of more than 50% of the target's charter capital or total voting rights; or
- Holding the right to own or use more than 50% of the total assets of the target for one or all of its business lines; or
- One of the following rights to:
 - ❑ Appoint or dismiss, directly or indirectly, the majority or totality of the BOD, BOD chairman and the director/general director of the target ;
 - ❑ Decide on charter amendments; or
 - ❑ **Decide on important business matters of the target enterprise** (e.g. business activities, location and strategies; changes to business size or industry; forms and methods for raising capital; etc.)

Group of affiliated enterprises

- **Multiple ultimate parent entities:** unusual approach
 - ❑ Normally: single ultimate parent entity (Art.189 LOE 2014)
- **‘under the same management unit’:** unclear meaning
 - ❑ Would two companies with the same General Director be considered affiliated?
- **Interpretation of ‘control or influence’:**
 - ❑ The 3rd circumstance (***Decide on important business matters***): is the right to veto counted?
 - ➔ **Likely NOT**
 - ✓ It would be extremely difficult (if not possible) to list all affiliates of an enterprise
 - ✓ The calculation of the revenue/ total assets of the relevant parties to the economic concentration would be complicated
 - ✓ The first 2 circumstances are positive control
 - ✓ The language used is similar to the description of a parent-subsidary relationship under Article 189.1 of the Enterprise Law 2014, which is a positive control relationship

- The VCCA/NCC has jurisdiction over economic concentration transaction implemented outside of the Vietnamese territory
- **No mechanism** for the VCCA/NCC to enforce its decision beyond the border, e.g.:
 - Fine the offshore participants
 - Prohibit the merger
- International experiences:
 - Join international cooperation agreements (voluntarily)

Extraterritorial jurisdiction over offshore transactions

What is the process to file a notification?

Step 1: Receipt of documents (NCC will notify within 07 days about requirement for supplement and amendments. Parties will have 30 days to supplement and amend the Dossier)

Step 2: Preliminary Assessment (30 days from the date of receipt of full and due Dossier)

Step 3: Official Assessment (90-150 days from the date of result of Preliminary Assessment)

Step 4: Final Decision (on approval, conditional approval or prohibition)

- **Maximum fine:** 5% of the total turnover of the violating enterprises on the relevant market in the fiscal year immediately preceding the year of violation.
- **Other potential sanctions:** revocation of ERC, confiscation of material evidence, confiscation of profits earned from the violation
- **Further orders may be imposed on violators:**
 - Restructure their businesses;
 - Remove illegal provisions from a business contract or transaction;
 - Divide, separate or re-sell part or all of the capital contributions or assets formed further to an economic concentration;
 - Be subject to price control measures for the contracts of the enterprise formed further to an economic concentration.

What are the consequences of violations?

THANK YOU!

IDVNLAWYERS

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