

## **FDI and M&A Legal Guidelines<sup>1</sup>: M&A in Vietnam**

### **PART 2. MERGERS & ACQUISITIONS (M&A)**

#### **A. M&A LAWS AND REGULATIONS & REGULATORY APPROVAL**

##### **1. What are the principal laws and regulations applicable to M&A transactions in relation to listed and private company in your jurisdiction? What are the major issues dealt with in such laws and regulations?**

There is no single legislation regulating M&A activities in Vietnam. M&A transactions implemented in Vietnam relating to Vietnam Targets (Vietnam M&A Transactions) are regulated by three key bodies of legislation, namely:

- a. the Law on Enterprises 2020;
- b. the Law on Investment 2020;
- c. the Law on Securities 2019.

Furthermore, in most situations, the execution of M&A transactions in Vietnam needs careful consideration of a number of other important pieces of law, such as:

- a. the Schedule of Specific Commitments in Services to the World Trade Organisation (the WTO Commitments);
- b. The Competition Law 2018;
- c. the Foreign Exchange Control Ordinance ;
- d. the Civil Code 2015.

In addition to the above, government agencies at central government, provinces, and centrally-run cities or district levels may under its own authority issue binding instruments.

**2. Are there any foreign investment review required for foreign buyers in M&A? If so, please give brief details (such as trigger threshold, relevant authority and timing requirements).**

The foreign investment review for foreign buyers in M&A in Vietnam is carried out by procedure for obtaining the approval on capital contribution, purchase of shareholding or purchase of a capital contribution portion (“**M&A Approval**”).

This procedure aims to review whether the foreign buyer satisfy the following conditions: (i) the market approach conditions applicable to foreign investors; (ii) the foreign investor must ensure national defence and security; (iii) the foreign investor must comply with the provisions of law on land regarding the conditions for receiving land use rights and conditions for using lands in islands and in border and coastal communes, wards and towns.

However, M&A Approval is only required to obtain if the acquisition of the buyers belongs to one of the following cases:

- (i) the capital contribution or purchase of shareholding or purchase of a capital contribution portion by the foreign investor results in an increase in foreign investor ownership in the economic organization or doing business in the market approach industry or trade subject to conditions applicable to foreign investors;
- (ii) The capital contribution or purchase of shareholding or capital contribution portion results in the foreign investor/s holding more than 50% of the charter capital of the economic organization in the following cases: increasing the ratio of charter capital ownership of foreign investors from 50% or below 50% to more than 50%, or increasing the charter capital ownership of foreign investors who already owned more than 50% of the charter capital in the economic organization;
- (iii) The foreign investor contributes capital to or purchases shareholding or purchases a capital contribution portion in an economic organization which has a land use right certificate for land on an island or on a coastal or border commune, ward or town or in another area which affects national defense and security.

The key agency is the Department of Planning and Investment (MPI).

The general timeline for such procedure is fifteen (15) working days from the date on which the relevant complete and full application dossier is received by the relevant authority.

**3. Are there any merger control required in M&A? If so, please give brief details (such as trigger threshold, relevant authority and timing requirements).**

Merger control is primarily regulated by the Law on Competition 2018, which forbids mergers that "have the impact or are capable of having the effect of considerably reducing competition in the Vietnamese market".

*(a) The concept of merger control*

From merger control perspective, Vietnam defines a term of "economic concentration". The enterprise involving in the economic concentration must notify the competent authority of economic contraction before closing.

"Economic concentration" is defined to be any of the following: merger of enterprise; a consolidation of enterprises; an acquisition of enterprises; and a greenfield joint venture between enterprises; or an economic concentration as stipulated by law.

The concept of "control" or "domination" is considered to be present in one of the following cases:

- i. the acquiring enterprise obtains more than 50% of charter capital or more than 50% of the total voting shares of the target (voting control criteria);
- ii. the acquiring enterprise obtains ownership of or the right to use more than 50% of the assets of the target concerning all or one business line of the target (asset control criteria);  
or

iii. the acquiring enterprise has one of the following rights over the target (other control criteria):

- the right to directly or indirectly decide on appointment or removal of the majority of managing officers of the target (e.g., board directors; chairman of members' council; general director of the target);
- the right to decide on amendment or supplement of the target's charter; and
- the right to make important decisions concerning the business operation of the target (e.g., selection of the form of the business organization; selection of industry, business line, business location, and business model; adjustment of business scope and business line; and selection of form and method of mobilizing, allocating, and utilizing the business capital of the target).

***(b) Competent authorities***

The National Competition Committee (NCC) is the principal regulatory authority in charge of reviewing a merger filing application<sup>1</sup>.

In certain specific industries, the parties in a merger transaction may have to notify other competent authorities apart from the NCC.

***(c) Trigger threshold***

The government provides a series of standards to evaluate if a merger filing is required, including a market share test, a "size-of-person" test, and a "size-of-transaction" test. The table below lists the specifics of each exam for each industry.

Threshold	Threshold value
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<sup>1</sup> Article 33.1 of Law on Competition

	<b>Insurance</b>	<b>Securities</b>	<b>Banking</b>	<b>Other industries</b>
<b>Asset in Vietnam (i.e., size-of-person)</b>	VND15,000b/ USD650m	VND15,000b/ USD650m	20% of total assets of all credit institutions in Vietnam	VND3,000b/ USD130m
<b>Sale revenue or purchase costs in Vietnam (i.e., size-of-person)</b>	VND10,000b/ USD420m	VND3,000b/ USD130m	20% of total sale revenue (not purchase costs) of all credit institutions	VND3,000b/ USD130m
<b>Transaction value (i.e., size of transaction)</b>	VND3,000b/ USD130m	VND3,000b/ USD130m	20% of total charter capital of all credit institutions	VND1,000b/ USD43m
<b>Combined market share</b>	20% or more			

*(d) Merger filings timing requirement*

Vietnamese law prescribes a two-phase merger review process comprising: the preliminary review and the official review.

For the preliminary review, the time prescribed by law is within **30 days** from the receipt of the sufficient merger filing dossier.

For the official review, the review authority must complete the review within **90 days (or 150 days maximum in case of being extended)** from the date it decides that the transaction must be subject to an official review.

In practice, the process can take longer than the statutory timing prescribed by law as there is a certain prolonged time between the date of the filing and the date the authority confirms that the filing dossier is sufficient.

**4. Are there any other governmental and regulatory approvals required for foreign buyers in M&A? If so, please give brief details (such as trigger threshold, relevant authority and timing requirements)?**

Other than those listed in the answers to Questions # 2 and #3, there is none.

**B. M&A IN RELATION TO PRIVATE COMPANY**

**1. Are there any special rules in relation to the transferring of a business (compared with the simple share or asset acquisition)?**

Therefore, there is no special rule in relation to the transferring of a business in comparison with the share or asset acquisition.

However, under the Law on Investment, business transfer can be structured as a transfer of investment projects with the conditions as stipulated at law<sup>2</sup>.

Upon the transfer of the project, it is required that the transferor shall apply for the amendment of investment project at competent investment registration authorities to obtain approval on the change of investor information from the transferor to the transferee.

**2. Do labor unit, works councils and other stakeholders (other than the vendors of the target) play a role in M&A?**

***(a) Role of labor unit and works councils in M&A***

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<sup>2</sup> Article 46 of Law on Investment 2020

The equivalence of a labor unit or works council under the laws of Vietnam would be a grass-root level trade union of a company or a district trade union in case that company has yet to establish a grass-root level trade union.

In general, trade unions have few influence or authority whatsoever over an M&A transaction. They play no role in during the transaction, i.e., no approval or any sort is required from them for the share purchase agreements and shareholder agreements, etc..

However, during the post-closing or closing period of an M&A, certain labour matters might arise during the integration and involve the trade unions. For example, the change of internal labour rules requires the approval of the company's grass-root trade union that has been established<sup>3</sup>.

#### ***(b) Role of other stakeholders in M&A***

Depending on the governance instructions, the other stakeholders such as members/shareholders who may have the right of first refusal, or the constitution documents at the target providing certain rights, the loan terms with commercial banks for example, will need to be examined.

The law does provide certain statutory rights. for example, members of a multi-member LLC shall have the rights of first refusal in case a member transfers his contributed capital to a non-member party<sup>4</sup>. These statutory rights will definitely get examined.

### **3. What are the principle minority shareholder rights given by law?**

The Law on Enterprise 2020 provides several rights for (i) shareholder or group of shareholders that hold at least 5% of the ordinary shares (or a smaller ratio specified in the company's charter) and (ii) shareholder or group of shareholders that hold at least 10% of the ordinary shares (or a smaller ratio specified in the company's charter), especially:

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<sup>3</sup> Article 118.3 of the Labour Code 2019

<sup>4</sup> Article 52.1.b of Law on Enterprise 2020

***(a) Rights to information:***

A shareholder or group of shareholders in case (i) has the right to access, extract the minutes of meetings, resolutions and decisions of the Board of Management, mid-year and annual financial statements, reports of the Supervisory Board, contracts and transactions subject to approval by the Board of Management and other documents except those that involve the company's business secrets.

***(b) Rights to corporate governance***

Shareholder or group of shareholders in case (ii) has the right to nominate members of Board of Management and the Supervisory Board.

***(c) Other rights to protect its benefits:***

Shareholder or group of shareholders in case (i) can also protect its benefit by the right to:

- Request a General Meeting of Shareholders if the Board of Management seriously violates the shareholders' rights, obligations of executives or issues decisions ultra vires; or other cases prescribed by the company's charter;
- Propose additional issues to the General Meeting of Shareholders agenda;
- Request the Supervisory Board to investigate specific matters relevant to the company's administration;
- Request the court or an arbitral tribunal to cancel the resolution of General Meeting of Shareholders in part or in full if the content of resolution violates the law or company's charter or the procedures for convening the General Meeting of Shareholders and issuing decisions seriously violate the law or company charters, except for the cases it is ratified by 100% of the voting shares.



Besides, the above shareholder or group of shareholders also has other rights of ordinary shareholders.

## **C. M&A IN RELATION TO LISTED COMPANY**

### **1. What are the principal methods of acquisition?**

Shares of the listed companies are registered and deposited at the Vietnam Securities Depository Centre. The acquisition of the listed company can be done by purchasing its shares through the following methods:

- Purchase the issued shares from existing shareholders through share purchase agreement or trading on stock exchanges;
- Share subscription through a tender offer or private placement .

In addition, according to the Law on Securities, the foreign investor can also make investments on the Vietnamese stock market in the following forms<sup>5</sup>:

- Directly investing and trading in the Vietnamese securities markets;
- Indirectly investing in Vietnamese securities market through fund management firms or branches of foreign fund management firms in Vietnam.

### **2. In what circumstances (if any) is a mandatory bid obligation incurred?**

Under the “mandatory bid obligation”, a party that acquires the majority of shares in a company is required to offer to buy out the shares of the remaining shareholders. Under the Law on Securities, when the tender offer has been made for all voting shares of the target company, if the bidder acquires 80% or more of the shares of a public company, it must buy the remaining shares of the same type of other shareholders (if they so request) at the bid price within 30 days.

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<sup>5</sup> Article 138 of Decree No. 155/2020/ND-CP

However, there are no squeeze-out rights that can force the remaining shareholders to sell their shares.

Otherwise, unless an exemption is granted by the general meeting of shareholders,<sup>6</sup> a tender offer is required in the following cases:

- A shareholder and related parties directly or indirectly lead to ownership of at least 25% of the voting shares of a public company.
- A shareholder and related parties holding 25% or more of the voting shares intend to continue purchase of more voting shares that will result in their direct or indirect shareholding reaching or exceeding each threshold of 35%, 45%, 55%, 65% and 75% of total voting shares of the target company.

### **3. Is there a minimum price at which the offer must be made?**

#### *(a) Tender offer price*

According to Decree 155/2020/ND-CP (“**Decree 155/2020**”), the offer price must not fall below the average reference price of the last 60 trading days before the application is submitted and must not fall below the highest buying price of the tender offers of shares/closed-end fund certificates of the target company/target investment fund during this period.

#### *(b) Off-market price*

It is possible for buyers to enter into direct agreements with sellers to acquire shares in listed company, as opposed to simply purchasing such shares "on market" from anonymous sellers via the HOSE or HNX systems. Such "off-market" or "direct agreement" acquisitions are, however, subject to "trading band" restrictions, pursuant to which, if the purchase price to be paid falls outside of the allowable "trading band", specific State Securities Commissions (“SSC”) approval must be obtained in order for the transaction to be implemented.

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<sup>6</sup> Article 35.1 of Law on Securities 2019

#### **4. How can the function of the board of directors of the target impact a proposed acquisition?**

Vietnamese law charges the senior management of the company with fiduciary duties, faithful defence of corporate interest, loyalty and confidentiality in general. The general duties also include certain specific regulations preventing the misuse of influential positions and insider trading.

In case of asset purchase, according to Article 167.2 of LOE, the Board of Directors has power over any business combination or sale that is worth less than 35% of the firm's total asset value (or a lesser proportion specified in the company charter).

In case of a tender offer, the board of the target must inform its shareholders of its opinion about the tender offer.

Directors and managers must also declare the details of companies in which they own shares and companies in which their related parties own more than 35% equity interest. The declaration must be conducted within seven working days of the date of the relevant interest arising. A business combination involving either of the companies must be approved by the shareholders or the board, as the case may be.

#### **5. What key documentation is needed in the acquisition?**

There are many types of documents to be prepared during a typical M&A transaction, among them are:

##### ***(a) Non-disclosure Agreement***

The buyers make a preliminary evaluation based on publicly accessible information before contacting the potential target. The buyers then contact the target and indicate an interest in purchasing or subscribing to the target's stock. Before beginning the due diligence process, the parties sign a Non-disclosure Agreement that spells out their secrecy commitments throughout the transaction.

### ***(b) Legal due diligence report***

Foreign investors must be prepared to deal with such scenarios and have patience when doing due diligence. Vietnamese sellers and Vietnam Targets are frequently hesitant to spend money on professional advisors to help them manage the due diligence process, but Foreign Investors should insist on the involvement of professional advisors on the seller/Vietnam Target side, which will invariably result in a far more effective and efficient due diligence process.

### ***(c) Transaction documents***

Merger agreements, share purchase or subscription agreements, and asset transfer agreements are all examples of transaction documents of corporate combinations.

## **6. Do acquisition documents require pre-approval by any regulatory body prior to publication?**

The agreements signed between the parties of a transaction do not require pre-approval before signing. However, in case a transaction document is required to be submitted together with an application for registration and approval at the competent authority, the competent authority might reject the application in case it finds the transaction document to be inappropriate. In such case, the application submitter would need to adjust the documents accordingly.

### ***Disclaimer:***

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<sup>i</sup> *The series on the investment and M&A laws in the member countries of RCEP are launched by DeHeng Law Offices. In each article of the series, a leading local law firm is invited to offer an overview of investment and M&A laws in the jurisdiction.*

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