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Developments in merger control rules in Vietnam

Vietnam is a wonderful country, full of wonderful people, with a rapidly developing economy that persistently grows at world-leading rates. Vietnam is also a fascinating, challenging, and rewarding legal jurisdiction for M&A lawyers.

There are many things for which Vietnam has made itself noteworthy as a jurisdiction during the last 20 years, but sophisticated competition laws and enforcement practices are not foremost among them.

The current Law on Competition was enacted in 2004, as a condition precedent to Vietnam's accession to the WTO, prior to which competition law was essentially non-existent in Vietnam. During the period since WTO accession, the degree of importance afforded to competition law and its enforcement in Vietnam has

been modest, in comparison with many other jurisdictions worldwide.

From a merger control perspective, Vietnam to date has been a remarkably relaxed jurisdiction. 'Economic concentration' transactions (including mergers, joint venture formations, and some acquisitions) (**Economic Concentrations**) have to date been subject to merger control obligations if two or more parties to the Economic Concentration collectively enjoy $\geq 30\%$ '*... combined market share...*' in any '*... relevant market...*'.

Any Economic Concentration giving rise to any '*... combined market share...*' of $\geq 30\%$ but $< 50\%$ requires notification to and approval of the Vietnam Competition Authority (**the VCA**). Any Economic Concentration giving rise to any '*... combined market share...*' of $\geq 50\%$ in any '*... relevant market...*' is prohibited absolutely. The concept of '*... relevant market...*' is vague and capable of wildly divergent interpretation, a fact which is frequently exploited by parties wishing to avoid VCA notification obligations.

The VCA generally takes a passive stance in relation to merger control matters and has rarely been known to investigate M&A transactions of its own accord. Except in the most high-profile M&A transactions, it is generally straightforward to obtain from the VCA informal 'comfort letters', stating that no notification is necessary.

As of June 2018, the general competition law landscape in Vietnam, as outlined above, may be on the cusp of significant change.

In June 2018, the National Assembly passed a new Law on Competition, which will come into force on 1 July 2019. Although in many respects the new law does not constitute radical overhaul of the existing law, the changes which it will introduce from a merger control perspective are significant, and may potentially be harbingers of a new era of importance and enforcement rigour in relation to merger control in Vietnam.

Under the new law, merger control notification obligations and absolute prohibitions are no longer determined by only by reference to specific percentages of '*... combined market share...*' within '*... relevant markets...*'. Given the flaws inherent in the existing '*... combined market share...*' tests, the move away from the existing regime may reasonably be regarded as being a positive change.

On the other hand, it is relatively clear that the number of M&A transactions likely to trigger notification obligations and/or potentially to be prohibited absolutely will increase significantly.

From an absolute prohibition perspective, Economic Concentrations will be prohibited absolutely if they will '*... cause or possibly cause substantial effects in restraint of competition in any Vietnam market...*'.

The new law sets out relatively detailed guidance as to what factors the VCA may consider in applying the concept of '*... substantial effects in restraint of competition...*'. '*Combined market share...*' is now merely one of a lengthy list of factors. Ultimately, however, the new law leaves it to the discretion of the VCA to interpret and apply the key concept of '*... substantial effects in restraint of competition...*', within guidelines which will be set out in a future implementing Decree.

In relation to notification obligations, there are now four key triggering factors, namely:

- the total asset value in Vietnam of any one or more of the participants in the Economic Concentration;
- the total revenue generated in Vietnam by any one or more of the participants in the Economic Concentration
- the transaction value of the Economic Concentration; and/or

- combined market share within '*... relevant markets...*' of the participants in the Economic Concentration.

The new law specifies that the government will legislate value thresholds in respect of each of the four abovementioned notification trigger categories, which will be used to determine whether or not notification is necessary. The draft implementing Decree which has been circulated by the government for comment (and which is subject to amendment at any time up until its official issuance by the government) contemplates the following value thresholds in relation to the first three notification trigger categories, namely:

- in relation to asset value in Vietnam: \geq VND500 billion (approximately USD22 million);
- in relation to revenue generated in Vietnam (during the most recent financial year preceding the Economic Concentration): \geq VND1,000 billion (approximately USD44 million); and
- in relation to the transaction value of the Economic Concentration: \geq VND500 billion (approximately USD22 million).

In relation to the fourth notification trigger category (combined market share), the draft implementing Decree provides that the VCA will conduct official inspections where (amongst other specified scenarios) the combined market share in any '*... relevant market...*' of the participants in the Economic Concentration is \geq 20%, provided that the market share of any one participant is $<$ 10%. The draft Decree does not, however, provide any indication as to how the law will treat combined market shares of \geq 20% where no participant enjoys $<$ 10%. It is reasonable to anticipate that this anomaly will be addressed in the next iteration of the draft Decree issued by the Vietnamese government.

Two key results of these new rules seem likely.

Firstly, the number of M&A transactions clearly requiring notification to the VCA is likely to increase, due to the material broadening of the potential triggers for notification. The comparatively low value thresholds contemplated by the draft Decree are also a material factor in this regard, in light of the constantly increasing values of business interests and M&A transactions in Vietnam.

Secondly, more M&A parties are likely to be inclined to approach the VCA for its informal opinion, even where none of the specified notification thresholds is triggered by their proposed Economic Concentration. Given that Economic Concentrations '*... caus[ing] or possibly caus[ing] substantial effects in restraint of competition in any Vietnam market...*' are prohibited, it would seem to be reasonable to question whether or not parties will be able to gain sufficient comfort simply by determining that the specified notification thresholds have not been triggered. The new law is unclear as to the merger control status of Economic Concentrations which do not trigger the specified notification obligations but do (or which may potentially) fall within the very broad concept of '*... caus[ing] or possibly caus[ing] substantial effects in restraint of competition in any Vietnam market...*'.

Please do not hesitate to contact the author for further details in relation to current and future merger control rules in Vietnam, using the contact details set out below.

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