

CHAPTER 5 MERGERS AND ACQUISITIONS

I. ENVIRONMENTAL, SOCIAL, AND GOVERNANCE STANDARDS

Relevant authorities: Ministry of Nature Resources and Environment (MONRE) and Ministry of Planning and Investment (MPI)

Issue description

In pursuit of ways to mitigate climate change and improve the sustainability proposition of their portfolios, Environmental, Social, and Governance (ESG) issues have made it to the top of the priority lists of the international investment community. New and rapidly sophisticating regulations in offshore markets, such as the European Union and other financial hubs like the United States, Singapore, and the Emirates, have also raised the bar for its less developed Eastern competitors. Foreign investors have simultaneously raised their expectations and are pining on Vietnam's take on the implementation of ESG.

As a rapidly developing country in Southeast Asia – reinforced by its unique geopolitical and geographic position within the ASEAN community – Vietnam has the chance to take the lead as a role model for its peers in the field of environmental protection and the improvement of the social fabric of the region. Additionally, its large and rapidly growing population of over 100 million people further emphasizes the country's responsibility to contribute to sustainability goals. This responsibility is particularly important in the context of foreign investment, especially through M&A activities. These investments have the potential to either support or hinder Vietnam's sustainability transition. As one of the countries most vulnerable to the consequences of climate change, it is crucial for Vietnam to prioritize sustainable practices in order to mitigate these risks.

Despite plenty of economic incentive, the Vietnamese regulations for ESG – meaning viable investment alternatives that account for the ESG requirements of offshore investment portfolios – do not match the demand that has been generated on the back of the global push for more sustainability in business, for example in project financing. If Vietnam does not learn how to compete with other – more ESG-friendly jurisdictions, it risks losing traction in the market and fall behind its competitors in attracting foreign money to further develop the country.

Potential gains/concerns for Vietnam

The Vietnamese regulatory environment for ESG-related issues is currently inconsistent and fragmented. Rolling out a comprehensive ESG framework would allow Vietnam to gain credibility in the race towards its ambitious net-zero-carbon commitment. Sustainability and “green transition” topics have become top priorities amongst the global investment community. Vietnam thus has the unique opportunity to exploit this trend, especially while regional peers are also grappling with their individual response to this surge of importance of ESG topics. However, as the ESG discussion is progressing across the globe and the Southeast Asia region, this window of opportunity is starting to close and may turn into a mid-term disadvantage for Vietnam if not addressed appropriately.

Recommendations

- Promote Vietnam as a destination for sustainable (and ESG compliant) investment in ASEAN, seizing the chance to distinguish itself as a preferable investment destination for European investors;
- Introduce framework for ESG that enables foreign investors to comply with requirements imposed by their respective home jurisdictions (e.g., the European Union);
- Raise awareness amongst private and public stakeholders (Vietnamese individuals and enterprises), regarding the importance of ESG standards in M&A investment;
- Incentivise ESG-friendly investment alternatives with appropriate subsidies or legal exemptions;
- Create or adopt a national rating system (and possibly, a regulatory approval requirement) for the “ESG-value” of certain investments;

- Provide strong and clear guidelines to steer foreign M&A investment towards Vietnam’s net-zero carbon goals;
- Promote best practices to encourage sustainable domestic (and inbound) investment; and
- Introduce reliable and internationally accredited ESG evaluation criteria, which can be verified through independent resources.

II. ECONOMIC CONCENTRATION CONTROL

Relevant authorities: Ministry of Industry and Trade (MOIT) and the Vietnam Competition Commission (VCC)

Issue description

Vietnam’s government has issued Decree 03, which regulates the functions, rights and duties, and organizational structure of the Vietnam Competition Commission (VCC).¹ The VCC was introduced by Vietnam’s new Law on Competition² (from the year 2018) and is designated to be the leading authority responsible for the supervision and management of competition matters in Vietnam.

The issuance of Decree 03 is thus an important milestone to supplement the new system, which provides further detail about the VCC’s purpose, its workings, and responsibilities. Based on this new guidance, the VCC will likely be able to increase the authorities’ efficiency in dealing with competition-related applications (or any violations thereof) in Vietnam. This is contingent on the successful amalgamation of the two previous authorities with separate competencies: the Competition Council and the Vietnam Competition and Consumer Authority.

Despite this step towards easing the related bureaucratic burden on M&A investors, there are still areas to be dealt, which are not explicitly addressed in the new regulations of Decree 03 and have yet to stand the test of practice.

The implementing Decree 35³ proposes strict thresholds, which are inadequate to allow small-scale M&A deals to proceed without bureaucratic hurdles. This represents a deterioration of the circumstances under the previous Law on Competition 2004⁴. Because the Law on Competition 2018 and its implementing Decree 35 do not provide any exemptions for ‘economic concentration’, the system seems too rigid to effectively achieve its justified goals – i.e., protecting the local market from any overpowering offshore competition, driven by offshore funds.

In the global context of M&A laws, well-established examples of such exemptions provide for efficient economic concentration control and competition supervision, while allowing M&A investors to plan according to clear-cut regulations. Such exemptions may include, for example, corporate re-organisation transactions within corporate groups and transactions in relation to which the underlying economic concentration substance has previously been considered and cleared by the competition authorities. The existing economic concentration control notification rules are, therefore, too broad and unspecified. This – combined with extremely low thresholds for “economic concentration” – leads to a lot of complications on the practical side of Vietnamese M&A.

The system of economic concentration control (without any viable exemption), in combination with the painfully low thresholds for the “economic concentration” label under Vietnamese competition laws, therefore, is a strong counter-argument when considering the viability of M&A transactions.

Potential gains/concerns for Vietnam

Vietnam has begun adjusting the prevalent economic concentration control regiment in recent years, including attempts to create more streamlined and speedy procedures, and reducing the required bureaucracy when filing

1 Decree 03/2023/ND-CP dated 10 February 2023 of the Government, has taken into effect on April 1, 2023, replacing Decree 07/2015/ND-CP of the Government on the functions, rights, duties, and organizational structure of the Competition Commission and Decision 24/2015/QĐ-TTg of the Prime Minister promulgating the organizational and operational rules of the Vietnam Competition Commission (Decree 03).

2 Law 23/2018/QH14 dated 12 June 2018 of the National Assembly on Competition (Law on Competition 2018).

3 Decree 35/2020/ND-CP dated 24 March 2020 of the Government elaborating on several articles of Law on Competition (Decree 35)

4 Law 27/2004/QH11 dated 3 December 2004 of the National Assembly on Competition (Law on Competition 2004).

for M&A approval. In addition to this, further clarity in the area of antitrust/competition law regulations (particularly in the context of economic concentration control) will be an essential step on Vietnam's roadmap.

Vietnam's efforts in this venue are already yielding positive results, as Vietnam is receiving some of the largest regional inbound PE and VC investments seen over the past years. Vietnamese start-up companies alone secured cumulative funding of US\$413 million in the second quarter of 2023.⁵ To build on this growing momentum, Vietnam can benefit from the rigorous implementation of existing regulations, reducing authoritative discretion in licencing procedures, and promoting further clarity of the governing laws would make a significant contribution to Vietnam's investment proposition.

Because Vietnam is often a piece of a larger mosaic of transactions within a group of companies (e.g., in regional or global company restructuring), it is often the owner's largest concern. Due to the existing Vietnamese regulations on economic concentration control, Vietnam is often left out of the equation, or simply seen as "problematic", when considering certain kinds of cross-border M&A.

International best practice and standards require the definition of clear thresholds and the compliance with statutory approval deadlines. As long lingering uncertainties in procedural requirements are sided by unpredictable delays in obtaining necessary approvals, the Vietnamese M&A market cannot reach its next level of maturity. To provide the required service level to host internationally competitive M&A transactions, Vietnam should also consider increasing the dedicated resources on all levels of the administration to guarantee smooth and speedy processing of dossiers and efficient communication between competent government agencies and investors.

Recommendations

- Consider an exemption of internal corporate group re-organizations from the economic concentration control regime;
- Consider raising the threshold amounts under the relevant economic concentration control regulations which trigger notifiable transactions;
- Consider clarifying how the VCC interprets or calculates the merger filing notification thresholds in typical transactions based on VCC's database by way of conferences or guidance;
- Consider clarifying terms of the antitrust/competition law to provide clear and unequivocal thresholds for inbound investments; and
- Upskill staff and increase headcount at the relevant authorities (e.g., the VCC) to bolster resources for an increase in caseload.

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⁵ "Vietnamese start-ups raise \$413mn for Q2 total funding", Tuoi Tre News, 16/8/2023. Available at: <https://tuoitrenews.vn/news/business/20230816/vietnamese-startups-raise-413mn-for-q2-total-funding/74996.html>, last accessed on 13 September 2023.