LEGAL GUIDE TO MERGER CONTROL IN VIETNAM

2020

VENTURE NORTH LAW

This guidance provides an overview of “merger control” regulations in Vietnam. It will cover regulatory framework and authority, relevant trigger events and thresholds, notification requirements, procedures and timetable, substantive test, remedies, penalties, appeals.

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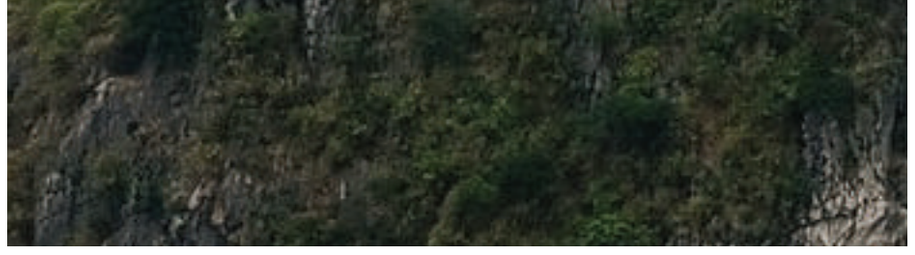


RELEVANT AUTHORITIES AND LEGISLATION

Who are the relevant authorities?

The National Competition Committee (NCC) is the principal regulatory authority in charge of reviewing a merger filing application. However, the NCC is not yet established and it is not clear when the NCC will be established. Technically, without the NCC, a merger filing cannot be made in full compliance with the Competition Law 2018. In practice, the Ministry of Industry and Trade (MOIT) is now in charge of accepting and reviewing merger filing.

In certain specific industries, the parties in a merger transaction may have to notify other competent authorities apart from the NCC. For instance, in the telecommunication sector, enterprises participating in an economic concentration having a combined market share from 30% to 50% of a telecommunication services market must notify both the management authority specialized in telecommunication and the NCC before conducting economic concentration.

What is the relevant legislation?

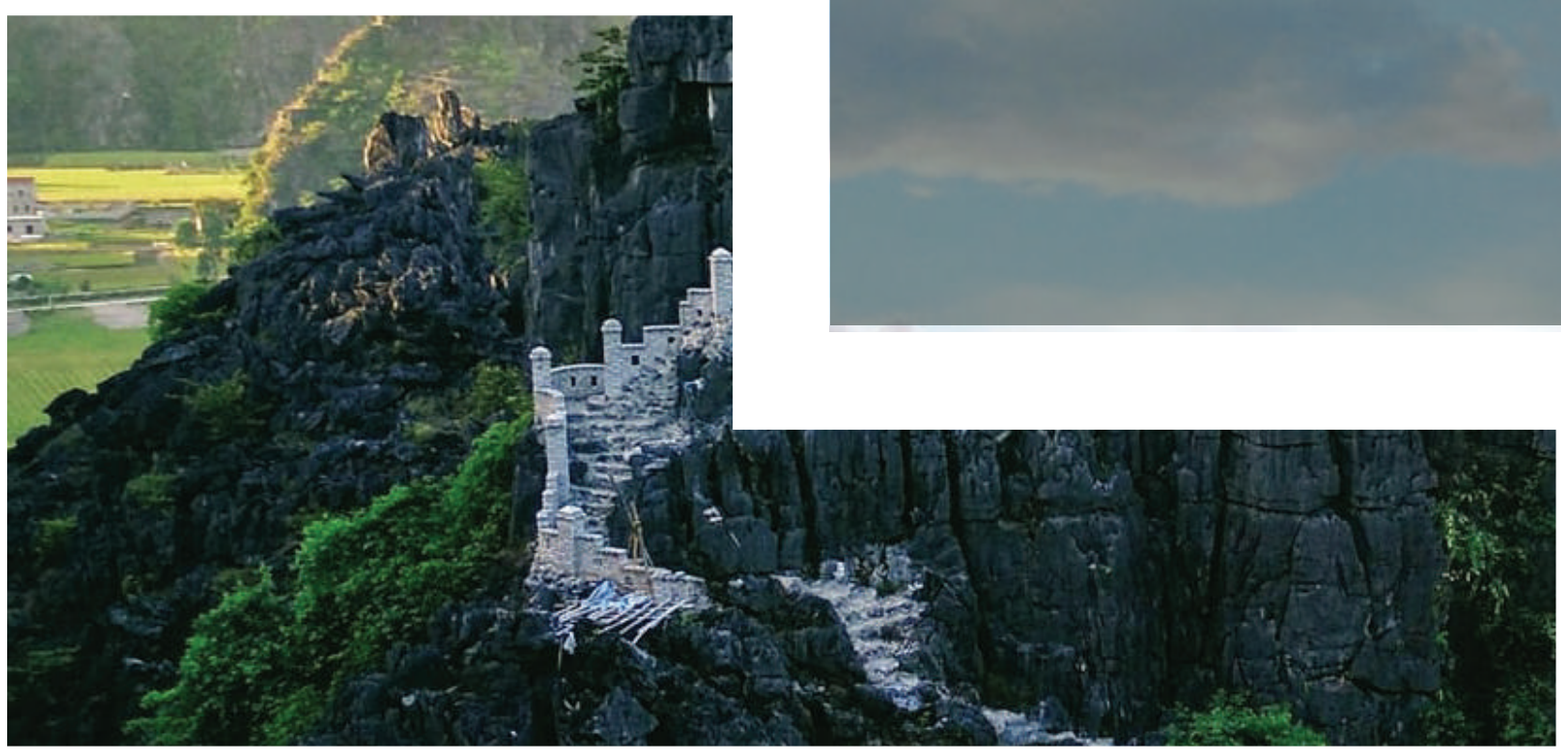
Merger control is principally governed by Chapter V of the Competition Law 2018, which prohibits the merger "causing the effect or being capable of causing the effect of significantly restricting competition in the market of Vietnam". In addition, notification thresholds and certain criteria for assessment of merger are specified under Chapter V of Decree 35/2020.

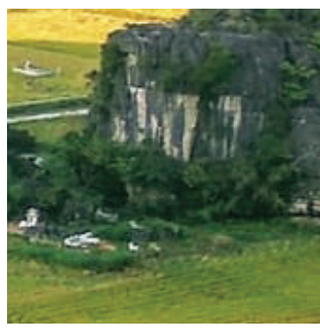
What are the applicable entities?

The Competition Law 2018 applies to "enterprises", which comprises of organisations and "individuals conducting business". It is not clear and quite unreasonable why "individuals conducting business" are subject to the Competition Law 2018. This concept may create confusion as to the entities obliged to apply for merger filing in an economic concentration. For example, one could argue that an individual not conducting business could be exempted from merger filing regulations. Therefore, a buyer being a non-conducting business individual could acquire control of a target to avoid merger filing requirements.

To put it in context, EU merger control regulations distinguish "persons" and "undertakings" as two different applicable entities in an economic concentration. The concept of undertaking under EU competition regulations is quite broad including any entity engaged in economic activity, that is an activity consisting of offering goods or services on a given market, regardless of its legal status and how it is financed. Meanwhile, US competition regulations use the word "entity" which includes any natural person, corporation, company, partnership, joint venture, association, joint-stock company, trust, estate of a deceased natural person, foundation, fund, institution, society, union, or club to determine the applicable entities.

TRANSACTIONS CAUGHT BY MERGER CONTROL LEGISLATION





Which types of transactions are caught by merger filing regulations?

The notification requirement applies to certain types of M&A transactions, which are described below:

- *merger which means "the transfer by one or more enterprise(s) of all of its lawful assets, rights, obligations and interests to another enterprise and, at the same time, the termination of the business activities or the existence of the merging enterprise(s)";*

- *consolidation which means "the transfer by two or more enterprises of all of their lawful assets, rights, obligations, and interests to form one new enterprise and, at the same time, the termination of the business activities or the existence of the consolidating enterprises";*

- *acquisition which means "the direct or indirect purchase by one enterprise of all or part of the capital contribution or assets of another enterprise sufficient to control or govern the acquired enterprise or any of its trades or business lines";*

- *joint venture which means "two or more enterprises together contributes a portion of their lawful assets, rights, obligations, and interests to form a new enterprise"; and*

- *other forms of economic concentration as stipulated by law. This item is an open-ended item and subject to further guidance of the authority.*

Unlike EU Competition regulations, except for an acquisition transaction, the Competition Law 2018 does not use "change of control on a lasting basis" as the criteria to determine whether an economic concentration transaction is subject to merger filing requirements in Vietnam. Instead, the Competition Law 2018 seems to adopt a "form over substance" approach by simply listing the types of transactions, which may be caught by the merger filing requirements without taking into account the business nature of such transactions. More importantly, the Competition Law 2018 and Decree 35/2020 does not include any express exemptions to transactions that usually do not have any anti-competitive impact and should not be subject to merger filing requirements. These transactions include:

- *An incremental purchase of shares by an acquiring entity that already controls the target entity. For example, a 65% shareholder acquires an additional 5% of voting shares in the target company;*

- *Internal restructuring transactions within companies under the control of the same ultimate parent from merger filing requirements. On one hand, intra-company restructuring may be subject to the filing if it falls into any of the transactions described above and the notification thresholds are met. On the other hand, it is arguable that intra-company restructuring does not change the control of such group over relevant market and it is unlikely to raise any anti-competition concerns, so it should be exempt from the notification requirements. While we support the latter view, in practice, the NCC still accepts and examines merger filing applications for internal restructuring transactions.*

  If the internal restructuring is an initial step stage in the whole acquisition transaction and such transaction is subject to merger filing requirements, the parties may consider describing the internal restructuring transaction as a transaction step in the notification of the whole transaction instead of submitting a separate notification for the internal restructuring;

- *Enforcement of mortgages of shares or assets by banks or other lenders which could give the banks or lenders control of target companies. Unlike Vietnam, the United States and EU merger filling regulations have certain exceptions in case of enforcement of security over shares. The United States merger filing regulations clearly provide that creditors and insurers are exempt from premerger notification in case of the acquisition of collateral in foreclosure or upon default of the debtor in a bona fide credit transaction. Similarly, under EU's Merger filing regulations, credit institutions or insurance companies could also be exempt from merger filing obligation if they only hold the shares on a temporary basis with a view to reselling them and satisfy other conditions regarding voting rights and management of the target.*

Parties to the above transactions would need to rely on the scope of application of the Competition Law 2018 to argue that these transactions have no anti-competitive impact in Vietnam's market and are therefore not regulated by the Competition Law 2018.

On the flip side, since the Competition Law 2018 does not use the change of control criteria, it may not capture certain types of transactions which could trigger merger filing requirements. These transactions could include:

- *an unincorporated joint venture, where two entities form a joint business through a contract (e.g., a production sharing contract); or*
- *a de-merger where a separate and independent entity is a spin-off from an existing entity; or*
- *an acquisition transaction, which does not constitute a "sale" or "purchase" of capital or assets.*

How is the concept of "control" defined?

The concept of "control" is defined under Decree 35/2020. Accordingly, the acquiring enterprise will establish "control" over the target or a business line of the target in any of the following circumstances:

- *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);*
- *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*

- *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).

While the voting control criteria are quite clear, many issues could arise from the asset control criteria or other control criteria. Regarding asset control criteria, it is not clear:

- *50% of the assets are calculated based on the asset value or the number of assets; and*

- *how an acquiring person could acquire the right to use 50% of the assets of the target company given that the definition of acquisition above only involves sale or purchase of assets.*

Regarding other control criteria, it is not clear whether the words "the right to make important decisions concerning the business operation of the target" could cover the scenario where the acquiring person only acquires "negative" control of the target company (e.g., by having veto rights on important matters of the target only). In practice, officials of the NCC have indicated in some private materials that it considers that other control criteria could capture a transaction where the acquiring entity only acquires negative control of the target. However, the practical views by NCC seem to be inconsistent with other provisions of the Competition Law 2018 and other laws. In particular,

- *the first two control criteria (voting control criteria, and asset control criteria) only involves positive control (more than 50% voting rights and more than 50% total assets). Therefore, logically, the third circumstance of other control criteria should also be a positive control circumstance;*

- *the language used to describe the third circumstance of control under merger control regulations is similar to the language used to the description of a parent-subsidiary relationship under Article 189.1 of the Enterprise Law 2014 which is a positive control relationship;*

- *the Vietnamese language of the concept control actually includes two words "**kiểm soát**" and "**chi phối**". The word "**chi phối**" usually denotes a positive control in the Vietnamese language. For example, under regulations on State-owned enterprises, "controlling shares" refer to a holding of more than 50% voting shares; and*

- *if the concept of control under Vietnam's merger rules includes negative control then the calculation of total revenue or total assets of the relevant parties to the economic concentration will become unduly complicated and inflated.*

What is "a group of affiliated enterprises"?

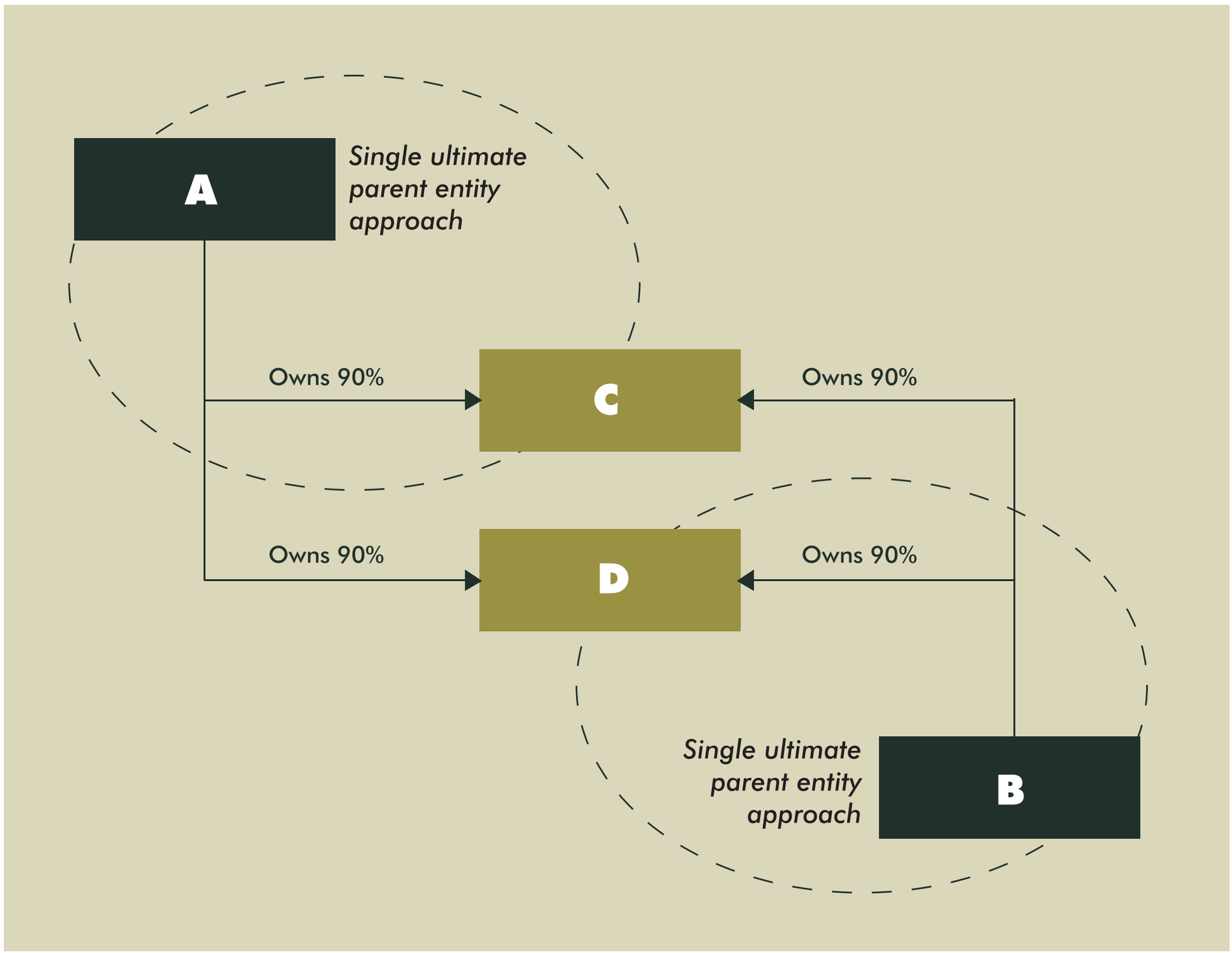
"Group of affiliated enterprises" is a concept used when calculating the relevant thresholds (e.g., market share or revenue) of an economic concentration. Decree 35/2020 defines that a group of affiliated enterprises means a group of enterprises that are jointly subject to control and governance by "one or more of the enterprises" within the said group, or which shares the same management.

The following issues may arise from the definition of a group of affiliated enterprises under Vietnamese merger control rules:

- *To determine whether an affiliate relationship exists, Decree 35/2020 refers to the control of one or more ultimate parent entities. This is an unusual approach since, in order to determine an affiliate relationship between two entities, only a single ultimate parent entity should be used. Both EU merger filing rules and US merger filing rules use the single ultimate entity approach.*

  Let's take an example for four companies A, B, C and in which A and B own 90% and 10% of C respectively and A and B own 10% and 90% of D respectively. Using a single ultimate parent entity approach then A is affiliated with C but not D (since A only owns 10% C) and B is affiliated with D but not C (since B only owns 10% C). But under the definition provided by Decree 35/2020, then C and D are affiliated with both A and B since A and B collectively own 100% C and D.

Approach under Decree 35/2020



- *Decree 35/2020 uses the same "control" criteria (see 2.2), which is used to determine whether a filing threshold is triggered, to determine whether an entity is affiliated with another entity. If the notification thresholds under Decree 35/2020 were to cover negative (or minority) control (see 2.2), then it would be extremely difficult (if not possible) to list all affiliates of a company since a company will likely have negative control over more companies than positive controls. Decree 35/2020 is different from EU merger filing rules which do not use "control" criteria to determine whether an undertaking is affiliated of another undertaking when determining the group of affiliated enterprises.*

- *Decree 35/2020 also uses the criteria for sharing the same management to determine whether an affiliate relationship exists. However, Decree 35/2002 does not clarify what sharing the same management means. Technically, two companies that are not related to each other but share the same CEO could be considered as having an affiliate relationship under Decree 35/2020.*

Can the acquisition of a minority shareholding amount to a "merger"?

Maybe

What are the thresholds for application of merger control?

The Government provides a set of tests to determine whether a merger filing should be made, which includes market share test, "size-of-person" test, and "size-of-transaction" test without any exception. Details of each test for each industry are set out in the table below (US$ numbers are approximated):

Threshold	***Threshold Values***			
	Insurance	***Securities***	***Banking***	***Other industries***
Asset in Vietnam (i.e., size-of-person)	*VND15,000b/ USD650m*	*VND15,000b*	*20% of total assets of all credit institutions in Vietnam*	*VND3,000b/ USD130m*

Sale revenue or purchase costs in Vietnam (i.e., size-of-person)	*VND10,000b/ USD420m*	*VND3,000b/ USD130m*	*20% of total sale revenue (not purchase costs) of all credit institutions.*	*VND3,000b/ USD130m*
Transaction value (i.e., size of transaction)	*VND3,000b*	*VND3,000b/ USD130m*	*20% of total charter capital of all credit institutions*	*VND1,000b/ USD43m*
Combined market share	*20%*	*20%*	*20%*	*20%*

The transaction value test does not apply to foreign-to-foreign transactions.

Under the old Competition Law 2004, the Government only applies the "market share" test to determine whether a merger filing should be made. However, under Decree 35/2020, the NCC presumably has more testing tools for merger control than the competition authorities in EU(one), US (two), and China (one). Below is a non-exhaustive list of issues or problems arising from the filing thresholds provided under Decree 35/2020:

- *The size-of-person test takes into account assets, sale revenues, and purchase costs in Vietnam of affiliated companies of the party to the M&A transaction in question. However, unlike EU merger control regulations, Decree 35/2020 does not clearly exclude inter-company revenue or purchase between companies of the same group of companies although inter-company transactions are excluded from the calculation of market shares. It is also not clear whether a consolidated account of a group of companies should be used for the size-of-person test;*

- *Unlike EU merger control regulations, in case of an economic concentration involving only a part of a business, Decree 35/2020 does not exclude from the size-of-person test assets, revenues, or purchase costs of unrelated parts of the business which are not subject to the concentration. Decree 35/2020 also does not exclude assets, revenue, or purchase cost of the vendor in the concentration from the size-of-person test;*

- *The size-of-person does not exclude sale rebates, value-added taxes, or similar taxes from the calculation of revenue;*

- *The size-of-person test takes into account the purchase costs of the relevant company. This is a new criterion, which is not provided in the Competition Law 2018 and in fact not provided in US, EU, and China merger filing regulations. Taking into account the purchase costs of a company in a size-of-person test would make a company which is in the investment stage and has zero revenue (or market share) to be subject to the merger control requirement;*

- *Under Decree 35/2020, the size-of-transaction test is applied independently from the size-of-person test. As such unlike US merger filing regulations, which exclude small transactions conducted by a large corporation, transactions of any size (small or big) by an entity satisfying the size-of-person test will need to be reported to the NCC;*

- *In the size-of-person test, unlike US merger filing regulations, Decree 35/2020 also does not distinguish between acquiring entity and non-acquiring entity;*

- *It is not clear whether the location of an asset is determined by reference to the location of the owner of such an asset or the location of the asset itself;*

- *It is not clear how the size-of-person is calculated. For example, if A and B are about to undertake an economic concentration, it is not clear if the size-of-person test is met if:*

the total assets/total turnover of either A or B exceeds VND 3,000 billion; or	*the total assets/total turnover of neither A nor B exceeds VND 3,000 billion but the sum thereof exceeds VND 3,000 billion; or*	*the total assets/total turnover of A exceeds VND 3,000 billion and the total assets/total turnover of B also exceeds VND 3,000 billion.*

The draftsman of Decree 35/2020 seems to use interpretation (i) but nothing ensures that the NCC will adopt such interpretation;

- *It is not clear how the size-of-transaction test is conducted. For example, it is not clear if the NCC will require the parties to submit a fair-market value estimate of transaction; and*

- *The size-of-person test does not address M&A transactions in technology sector where data and users may be more important than revenue and assets.*

Does merger control apply in the absence of a substantive overlap?

Yes. The merger control regulations have specific provisions dealing with a vertical merger between companies operating in different but related industries.

Would transactions between parties outside Vietnam (offshore transactions) be caught by merger control legislation?

Transactions between parties outside Vietnam (offshore transactions) may be subject to Vietnamese merger control regulations. This is because:

- *Competition Law 2018 applies to an economic concentration that has or may have a competition-restraining impact on Vietnam's market. In addition, unlike the Competition Law 2004, Competition Law 2018 expressly applies to "related" foreign organisations; and*

- *the notification thresholds provided by Decree 35/2020 expressly cover the case where the parties to the transaction are not located in Vietnam (see 2.6). In particular, an offshore transaction may be subject to notification requirement under Vietnamese laws where a party to the transaction or its affiliates have assets, sale revenue, or purchase costs in Vietnam and the transaction triggers any of the applicable notifying thresholds.*

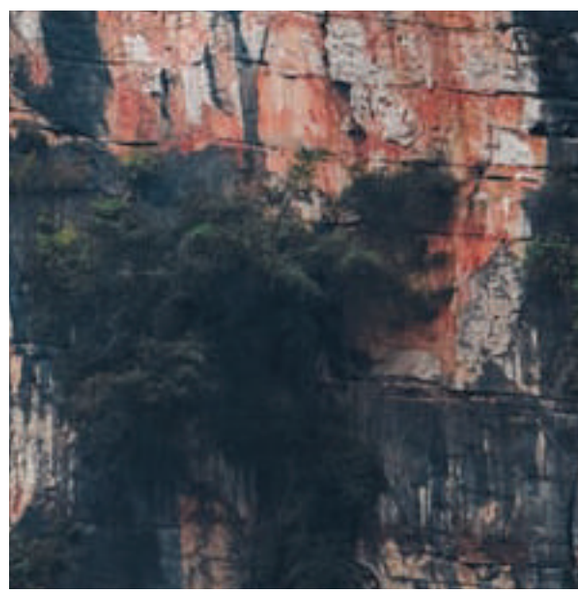
Please describe any mechanisms whereby the operation of the jurisdictional thresholds may be overridden by other provisions.

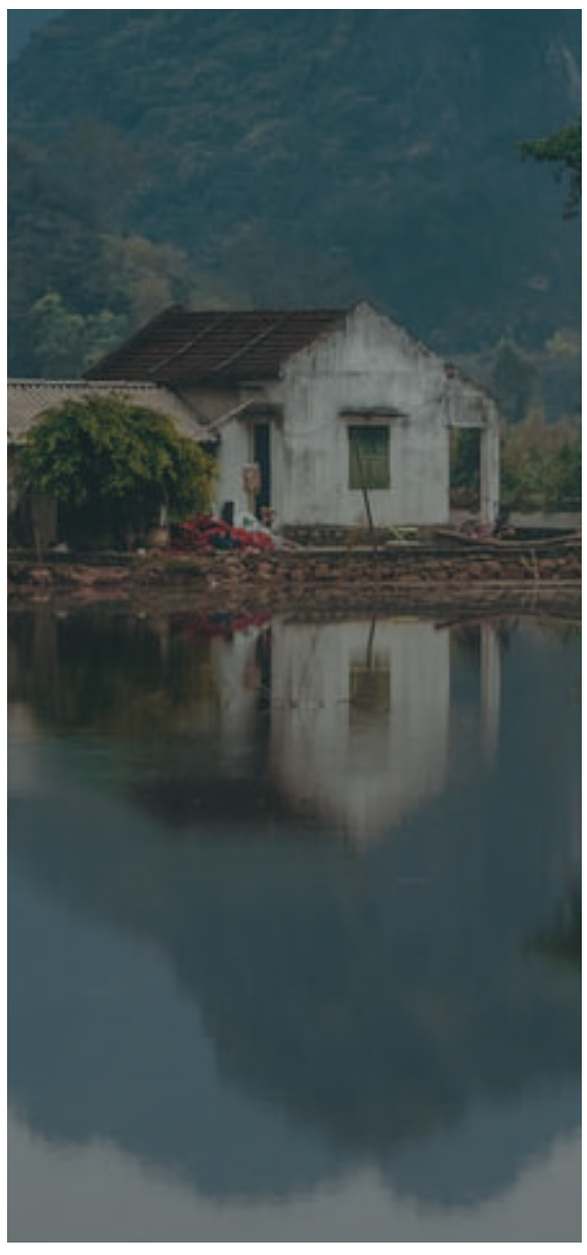
There is no exception under the notification thresholds provided in Decree 35/2020 for a foreign-to-foreign transaction that has no impact on Vietnam market. In other words, unlike US competition regulations, under Decree 35/2020, a foreign-to-foreign transaction with insufficient nexus with Vietnam commerce may still need to be reported to the NCC.

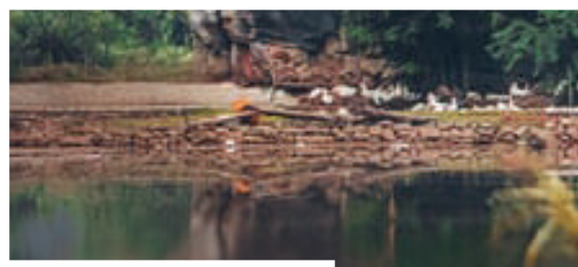
Decree 35/2020 does not contain any exemption to the filing thresholds. As a consequence, in practice, instead of focusing on control of anti-competitive mergers, the merger control mechanism under Decree 35/2020 operates like a licensing mechanism where any transaction triggering a notification threshold must be notified and approved by the NCC.

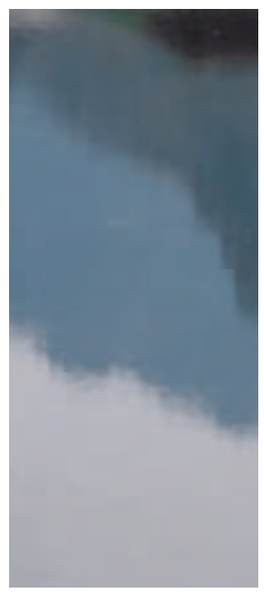
Where a merger takes place in stages, what principles are applied in order to identify whether the various stages constitute a single transaction or a series of transactions?

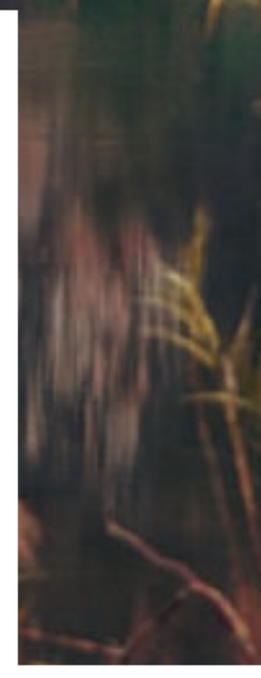
Competition Law 2018 does not specifically regulate a merger that takes place in stages. Therefore, in theory, an economic concentration, which takes place in stages, or an economic concentration, which involves different entities of the same group companies could be subject to multiple notifications to the NCC. In practice, the NCC is open to receive a single merger notification covering all stages or all entities of an economic concentration that takes place in stages or involves different entities.











NOTIFICATION AND TIMETABLE

Where the notification thresholds are met, is notification compulsory?

The notification appears to be compulsory if:

- *the intended transaction belongs to the types of transactions subject to merger control; and*
- *notification thresholds are triggered.*

That said, if the parties consider that the proposed transaction apparently has no anti-competitive impact in Vietnam's market, the parties may rely on the scope of application of the Competition Law 2018 to argue that no merger filing is required for such transactions.

Is there a deadline for notification?

At the latest, the merger notification must be submitted before closing the transaction.

Please describe any exceptions where, even though the jurisdictional thresholds are met, clearance is not required.

Decree 35/2020 does not contain any exemption to the filing thresholds.

Where a merger technically requires notification and clearance, what are the risks of not filing? Are there any formal sanctions?

Failure to make a required merger filing may result in an administrative penalty of up to 5% of total revenue of each violating enterprise in the relevant market in the year preceding the violation.

As discussed in 3.7.4, there is a waiting period during which the authority will review the filing. After such period, approval is granted or the transaction is automatically permitted. In the event parties complete the transaction before such waiting period expires, parties may be subject to penalty of up to 1% of total revenue of each violating enterprise in the relevant market in the year preceding the violation.

If the parties complete the transaction which is later determined by the authority to be prohibited, besides monetary penalties of up to 5% of total revenue, parties are required to split the consolidated/merged company, to sell the acquired assets, or will be put under control of the authority with respect to sale price and contractual terms and conditions, the enterprise registration certificate of the consolidated company and joint venture will be withdrawn.

Where a merger technically requires notification and clearance, what are the risks of not filing? Are there any formal sanctions?

Failure to make a required merger filing may result in an administrative penalty of up to 5% of total revenue of each violating enterprise in the relevant market in the year preceding the violation.

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Is it possible to carve out local completion of a merger to avoid delaying global completion?

No, if the offshore transaction triggers a notification threshold. This is because there is no exemption to the notification thresholds provided in Decree 35/2020.

At what stage in the transaction timetable can the notification be filed?

Article 34.1 of the Competition Law 2018 provides that a merger notification should include draft of the agreement or draft memorandum of understanding regarding the economic concentration. This provision suggests that the notification can be filed as early as signing of the term sheet or MOU of the transaction.

There is an argument that since the Competition Law 2018 refers to a "draft" agreement or a "draft" MOU, the parties are not allowed to execute the agreement or the MOU before making the relevant notification to the NCC. This argument relies on the restrictive view that a draft agreement cannot be an executed agreement. In addition, this argument is not reasonable since parties to a transaction are usually not willing to spend time and effort to make a merger filing if they do not have a deal evidenced at least by a signed term sheet.

What is the timeframe for scrutiny of the merger by the merger authority? What are the main stages in the regulatory process? Can the timeframe be suspended by the authority?

In summary, at law, the process could take up to 40 days for the NCC to provide approval at the preliminary review stage and up to 200 days for the NCC to provide approval at the "official" review stage. During the preliminary stage, there is a deemed approval if the NCC fails to respond within 30 days from receipt of the application (see 3.7.5). In practice, it usually takes two to three months to get approval at the preliminary stage. During its review, the authorities usually require parties to prove that their determination and calculation of market shares are correct.

No	Procedures	Timeline	Note
1	*Parties' submission of merger filing dossier to NCC (in practice, MOIT until NCC is established).*	*Before the closing of the transaction.*	*To avoid delay in the timeline, parties should submit the notification as soon as the MOU or term sheet is prepared.*
2	*NCC's acknowledgment of receipt of the proper application.*	*7 working days from receipt of dossier.*	*In practice, the NCC may delay the commencement of the preliminary review period by delaying issuing an acknowledgment of the full and valid application.*
3	*Parties' amendment/ supplement of the dossier according to NCC's notice (if any)*	*30 days from the date of the NCC's notice.*	*If parties fail to amend and supplement the dossier as required by NCC, NCC will return the dossier, and parties must restart merger filing.*
4	*NCC's preliminary review*	*30 days from the date receiving valid dossier.*	*NCC will issue notice confirming that the transaction can be implemented or further investigation is required. If no notice is issued, the NCC is deemed to have approved the transaction, and the transaction can be implemented.*
5	*NCC's official appraisal (if NCC notifies parties of the further investigation)*	*90 days (for normal case) or 150 days (for complex case) from the date of notice.*	*NCC can request parties to provide further information/ documents twice during its appraisal. The timeframe will be suspended until the parties provide NCC with information. In practice, the authority often requests further information so this step can be prolonged.* *NCC's decision will confirm one of the following: (i) the transaction can be implemented, (ii) the transaction is subject to conditions, or (iii) the transaction is prohibited. This decision will be sent to parties within 5 working days from the date of the decision.*

The authority does not have the right to suspend the review process. However, the time that the parties take to supplement the documents or information requested by the authority is not counted against the review time by the authority.

On the part of the applicants, there are no procedures or steps for the parties to a transaction to withdraw or suspend the notification.

Is there any prohibition on completing the transaction before clearance is received or any compulsory waiting period has ended? What are the risks in completing before clearance is received?

Yes, the parties are not allowed to complete an economic concentration before the competition authority has (or is deemed to have) approved the transaction. Failure to comply could result in administrative penalties, and unwinding of the transaction.

Where notification is required, is there a prescribed format?

Yes, there is. A notification dossier must comprise the following documents, all of which should be in Vietnamese:

- *Notification of the proposed merger in the standard form issued by the NCC. At the moment, parties must use a notification form issued by MOIT until NCC is established and issue a new form;*

- *Draft contracts or MOU regarding the transaction;*
- *A valid copy of each party's enterprise registration certification or equivalents;*
- *Each party's financial statement for the last two consecutive years preceding the notification year or for the period starting from the time of establishment to the time of notification in case of a newly-established enterprise with the confirmation of audit institution in accordance with laws. It is arguable that audited financial statement is not compulsory in case law of country where a party resides or operates does not require its financial statement to be audited. This should be the case because auditing financial statement burdens the relevant parties and prolongs the transaction timetable;*
- *List of parent companies, subsidiaries, member companies, branches, representative offices, and other affiliated entities (if any) of each party;*
- *List of all types of goods and services in which each party is currently conducting business;*
- *Information about market share in the relevant sector of each party for two consecutive years immediately preceding the year of notification;*
- *Remedies for overcoming the ability to cause competition-restraining impact by the merger; and*
- *Report on assessment of the positive impact of the economic concentration and measures for enhancing such impact.*

Is there a short form or accelerated procedure for any type of merger? Are there any informal ways in which the clearance timetable can be speeded up?

There is no short form or accelerated procedures for any type of economic concentration. In the past, the NCC's officials are open to informal discussion about merger filing. But with the increasing number of filing and the NCC's limited resources, the time available for informal discussion or clarification with the authority may become limited in the future.

However, transactions that fall into the following "safe habours" are more likely to get quicker approval by the authority:

Types of merger	*Combined market shares*	*Total market shares squares after the merger (HHI)*	*Increase in the total market share squares (before and after merger)*
Horizontal mergers	*<20%*	*Not applicable*	*Not applicable*
	≥20%	*<1800*	*Not applicable*
	≥20%	*>1800*	*<100*
Vertical mergers	*<20%*	*Not applicable*	*Not applicable*

Who is responsible for making the notification?

All parties to the transaction are responsible for filing a notification together with supporting documents to the authority.

Are there any fees in relation to merger control?

There is no filing fee applicable to a merger filing in Vietnam.

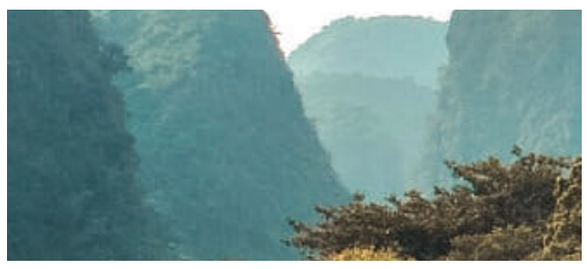
What impact, if any, do rules governing a public offer for a listed business have on the merger control clearance process in such cases?

Vietnam merger control regulations do not have separate rules for dealing with a public (or tender) offer of shares in a listed company.

Will the notification be published?

A notification will not be submitted at the time of filing. However, all effective decisions of NCC regarding the merger (including the result of the notification) will be published in a period of 90 consecutive days on the website of NCC, except for contents in relation to state secrets and trade secrets of a company. At the moment, information of some transaction which is subject to merger filing in accordance with Competition Law 2018 has been published on http://vcca.gov.vn/. However, the only name of concerned parties and summary of transaction will be posted on such website.

SUBSTANTIVE ASSESSMENT OF THE MERGER AND OUTCOME OF THE PROCESS



What is the substantive test against which a merger will be assessed?

The substantive test against which an economic concentration will be accessed is to determine whether an economic concentration "causes or is able to cause a significant competition-restraining impact on the market or not". The NCC will assess the restrictive impact and/or positive impact of an anticipated merger according to the following factors:

- Combined market shares of the involved parties in the relevant market;
- Level of concentration in the relevant market before and after the economic concentration;
- Relationship of the involved parties in the chain of production, distribution, and supply of a certain type of goods/services or their business lines which are inputs or complementary to each other.
- Competitive advantages brought by the merger;
- The ability to increase price or return on sales ratio after merger;
- The ability to exclude or prevent other enterprises from accessing or expanding the market;
- Other relevant special factors in the industry, sectors of the merger;
- Positive impact on the development of industries, sectors, and science and technology in accordance with the State strategies and master plans;
- Positive impact on the development of small and medium-sized enterprises; and
- Enhancement of the competitiveness of Vietnamese enterprises in the international market.

To what extent are efficiency considerations taken into account?

The NCC is required by law to take into account efficiency considerations when reviewing a merger filing including the following:

- The development of the industry, science, and technology in accordance with the State's strategy and master plan;

- The development of small and medium-sized enterprises; and
- The competitiveness of domestic enterprises in the international market.

However, the role and importance of each efficiency consideration in the decision-making process of the authority is not clear.

Are non-competition issues taken into account in assessing the merger?

Yes, some non-competition issues (e.g., promoting national champion, implementing State's master plan) are taken into account in assessing an economic concentration.

What is the scope of involvement of third parties in the assessment process?

During the assessment process, the NCC can consult with management authorities of the relevant industry, sector in which the parties are operating; and relevant enterprises, organizations, and individuals. However, it is not clear to what extent third parties could access the documents and information of the parties. The involvement of third parties could materially affect the final decision of the NCC on the merger because such third parties may provide information relating to determination of relevant market and market share.

What information gathering powers does the merger authority enjoy in relation to the scrutiny of a merger?

At law, the NCC has the authority to request the parties to an economic concentration to provide information and documents. The NCC also has the right to consult other parties or authorities.

During the regulatory process, what provision is there for the protection of commercially sensitive information?

The NCC is obliged to keep information and materials provided by parties confidential in accordance with law. However, certain information may be made public when the NCC's decision is issued. In recent guidance, the MOIT requires the parties to a transaction to submit a request stating contents and information which need to be kept confidential by the MOIT. Presumably, if the parties do not make a request for confidentiality, then the MOIT is not obliged to keep the notification confidential.

How is the "relevant market" defined?

Article 3.7 of Competition Law 2018 defines the relevant market to mean "market of goods or services which are interchangeable in terms of characteristics, use purpose and price in specific geographical areas with similar competitive conditions and which areas are significantly different from neighbouring geographical areas". Accordingly, the relevant market is determined based relevant product market and the relevant geographic market.

The determination of "interchangeability" of goods or services must satisfy all of following criteria:

- Goods or services are regarded as interchangeable in term of characteristics if they have, among others, the same or similar characteristics, composition, physical or chemical properties, technical features, side effects, absorption capacity of users;
- Goods or services are regarded as interchangeable in term of use purpose if such goods or services have the same main use purpose; and
- Goods or services are regarded as interchangeable in terms of their price when their price differs by no more than 5% in similar transaction conditions.

The geographical market is determined based on the following factors:

- the business location of enterprises participating in distribution of the relevant goods or services;
- he business establishments of other enterprises located in neighbouring geographical areas are close enough to the geographical area prescribed in sub-clause (a) above to compete with relevant goods or services in such geographical area;
- Costs of transporting the goods or of providing the services;
- Time/duration for transporting the goods or providing the services;
- Barriers to market entry or market expansion;

- Consumer habits; and
- Costs and time for customers to purchase the goods or services.

There are more criteria to determine the interchangeability of goods and services in case the above-mentioned factors are not sufficient to reach a conclusion (e.g. rate of change in the demand for a type of goods or services when there is a change in the price of another type of goods or services, costs and time required for customers to switch to buying or using other goods or services, consumer habits, etc). Moreover, the NCC can use a random sample test method during its assessment to consider the interchangeable nature of goods and services in terms of price.

Due to the broad range of criteria without any specific explanation as listed above, the relevant market determined by parties in its application may be different than those decided by the NCC later. In practice, the NCC may request parties to submit additional information and support material with reliable sources (like reports of a government agency or independent survey).

How is market share defined and calculated?

Under Article 10 of Competition Law 2018, the market share of a party to an economic concentration will be determined based on one of the following factors: (a) turnover from sale, (b) turnover of input purchase, (c) quantity of goods or services purchased, or (d) quantity of goods or services sold. The market share of a company is calculated based on market share of its group of affiliated enterprises.

There are some problems arising from this calculation:

- The NCC may, at its discretion, decide the method to calculate the market share, which could result in an unpredictable calculation result of the combined market shares.
- In case the NCC decides to determine market share by turnover, it is not clear how to calculate the purchase cost or sale revenue of the parties. This issue is similar to problems arising from calculation of the size-of-person test; and
- The market share of a company is calculated based on the market share of its group of affiliated enterprises. As discussed above, there is uncertainty in the determination of a “group of affiliated enterprises” which may lead to different results of market share.

REMEDIES, APPEALS, AND ENFORCEMENT

How does the regulatory process end?

Under Vietnam merger control, the regulatory process ends when:

- the NCC approves (or is deemed to approve) the transaction without any condition; or
- the NCC approves (or is deemed to approve) the transaction with certain conditions; or
- the NCC disapproves the transaction.

In short, unlike the US merger regime, the Vietnam merger regime is an approval process rather than a clearance process whereby the parties to a reportable economic concentration must secure the NCC's approval (or deemed approval) before proceeding to closing of the transaction.

Where competition problems are identified, is it possible to negotiate "remedies" which are acceptable to the parties?

No, Vietnam merger control regulations do not provide for an official mechanism where the parties to an economic concentration can negotiate with the authority about the applicable remedies where competition problems are identified. However, under the Competition Law 2018, at the time of making the relevant submission, the parties may actively propose remedies to address competition concerns raised by the transaction. Moreover, early practice indicates that the parties may unofficially discuss with NCC during NCC's review of submission and NCC's request for additional information (if any).

To what extent have remedies been imposed in foreign-to-foreign mergers?

Technically, the NCC may impose remedies or conditions on a foreign-to-foreign transaction. However, we are not aware of any case where the NCC exercises this right. Presumably, this is because there is no clear practical mechanics for the NCC to impose its penalties to parties to a foreign-to-foreign transaction.

At what stage in the process can the negotiation of remedies be commenced? Please describe any relevant procedural steps and deadlines

The law is not clear about the ability of the parties to negotiate with the authority. However, as noted above at the time of making the relevant submission, the parties may proactively propose remedies to address competition concerns raised by the transaction that the parties can identity.

If a divestment remedy is required, does the merger authority have a standard approach to the terms and conditions to be applied to the divestment?

No. Although divestment is a remedy contemplated by the Competition Law 2018, there is no official or unofficial guidance relating to divestment remedy.

Can the parties complete the merger before the remedies have been complied with?

No, if the NCC requires the remedies to be complied before closing of the transaction. Under the Competition Law 2018, the NCC has the discretion to decide which remedy will be applied and the timing for such remedies to be complied with.

How are any negotiated remedies enforced?

At law, parties to an economic concentration must comply with remedies on their own. No report on compliance with NCC's decision is required to submit to NCC. However, NCC can impose a penalty for any failure to comply with remedies if the NCC discovers any non-compliance. Such administrative penalty is up to 0.3% of the total turnover of each violating party earned from the relevant market in the financial year preceding the year in which the violation is committed.

Will a clearance decision cover in general ancillary restrictions?

No, in general. Technically, ancillary restrictions (e.g., a non-compete agreement) agreed by the parties is not a type of economic concentration. However, the NCC may take into account the anti-competitive impact of the agreed ancillary restriction when reviewing the merger notification and may require such ancillary restriction to be removed as a condition for approval.

Can a decision on merger clearance be appealed?

Can a decision on merger clearance be appealed?

Yes. The Competition Law 2018 does not provide any specific mechanism for the parties to appeal for NCC's decision concerning a merger filing. However, since the NCC is a ministerial agency, in general, the parties can appeal the NCC's decision on a merger filing in accordance with either complaint procedure at NCC and MOIT under the Law on Complaints 2011 or administrative proceedings at court under the Law on Administrative Proceedings 2015.

What is the time limit for any appeal?

The time limit for an appeal of NCC's decision is:

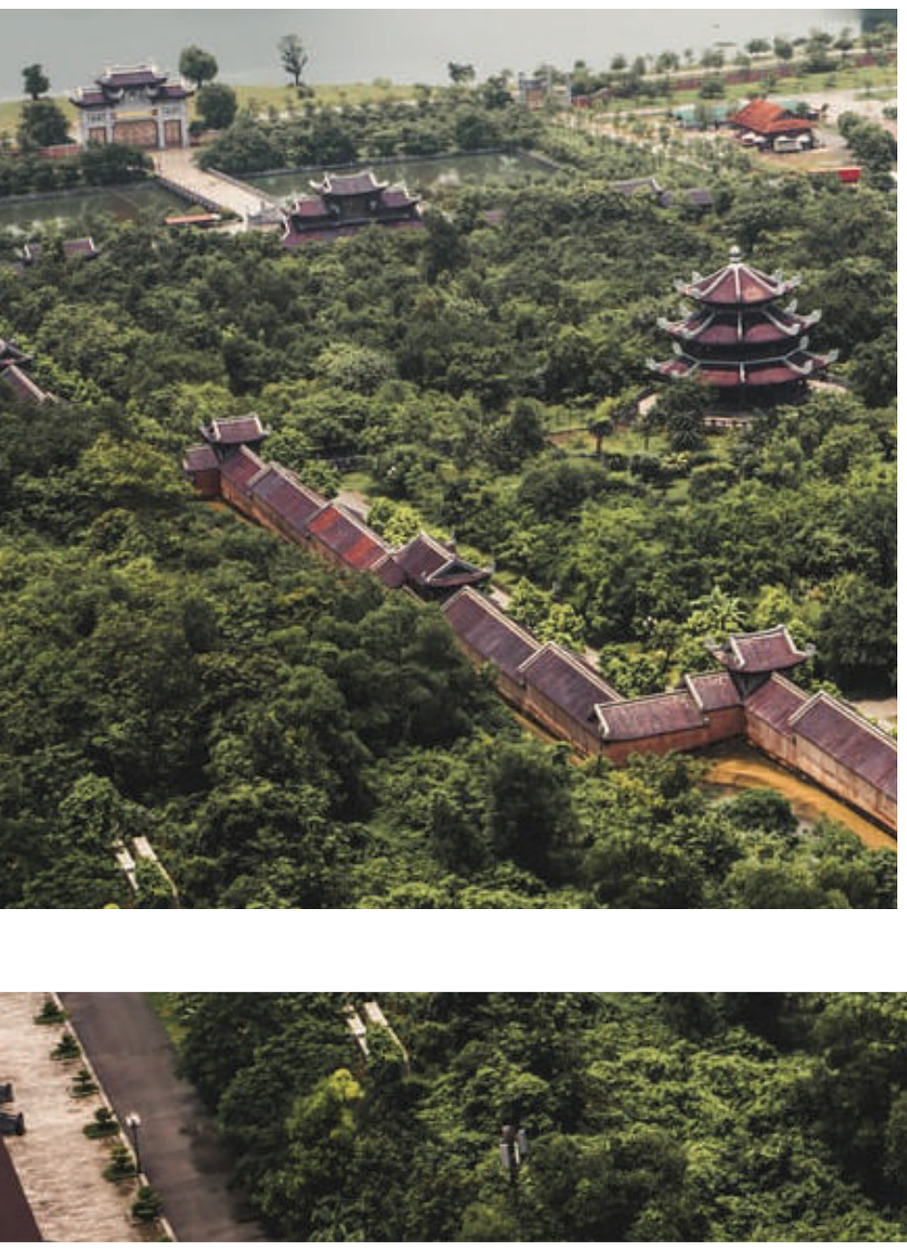
- if parties submit a complaint to NCC under Law on Complaints 2011, 90 days from the date of parties' receipt of the NCC's decision; and

- if parties initiate a lawsuit at the court against the NCC's decision, one year from (i) the date of parties' receipt of or acknowledgment about the NCC's decision on economic concentration, (ii) the date of parties' receipt of or acknowledgment about the complaint settlement decision of NCC or MOIT, or (ii) the expiration of time limit for complaint settlement without any response from the NCC or MOIT.

Is there a time limit for enforcement of merger control legislation?

The NCC may initiate an investigation into a breach of merger control regulations within three years from the date of the violation. However, since a violation of the merger control regulations seems to be considered as an administrative violation, the general time limit for handling administrative violation will also apply to the enforcement of merger control regulations. Under the Law on Handling Administrative Violation 2012, in general, the time limit to apply an administrative penalty including the penalties provided in the Competition Law 2018 is one year from the time of completion of the violating transaction or, if the violation is considered as an ongoing violation, from the time when the authorities is aware of the violation. It is not clear how the time limit to apply the penalties under the Law on Handling Administrative Violation 2012 will reconcile with the time limit to initiate an investigation under the Competition Law 2018.

MISCELLANEOUS



To what extent does the merger authority in your jurisdiction liaise with those in other jurisdictions?

The NCC will cooperate with foreign competition authorities during the competition legal proceedings. The scope of cooperation includes consultation, exchange of information and materials, or other international cooperation activities in accordance with the laws of Vietnam and international treaties to which Vietnam is a party.

Are there any proposals for reform of the merger control regime in your jurisdiction?

Currently, no proposal for reforming the merger control is available and being considered. The Government and the MOIT are still in the process to establish the remaining regulatory framework to implement the merger control regime established by the Competition Law 2018. In particular, the NCC will need to be set up and take over the temporary functions performed by the Competition and Consumers Protection Department.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