

The Impact of Vietnam's New Competition Law on Mergers

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On 12 June 2018, the National Assembly of Vietnam updated its primary competition legislation through the passage of Law No. 23/2018/QH14 ("**2018 Competition Law**"), replacing an earlier version of the law which had been active since 2004. The 2018 Competition Law took effect on **01 July 2019**. A draft decree is expected to be released within this year to provide further guidance. This article gives an overview of the new law's impact on "economic concentration" activity which includes mergers, acquisitions, consolidations, and joint ventures.

Express Applicability to Offshore Entities

The 2018 Competition Law applies to anti-competitive practices occurring outside of Vietnam which has the effect of retraining competition within Vietnam, and the law has extended its governing scope to "[F]oreign agencies, organizations, and individuals."¹ Consequently, foreign companies involved in offshore economic concentrations impacting Vietnam will be subject to the 2018 Competition Law. This extra-territorial reach is not entirely new because it has been applied by the Vietnam Competition Authority ("**VCA**") in practice for many years based on their interpretation of the old competition law. With any ambiguity on this issue removed, VCA is expected to be more active in asserting jurisdiction over offshore economic concentrations having an impact on the domestic market.

Merger Notification

The 2018 Competition Law has added three new types of economic concentrations that would trigger merger notification – based on turnover, assets, and transaction value. Under previous law, only economic concentrations resulting in equal or greater than 30% market share in the "relevant market" triggered merger notification, and economic concentrations of equal to or greater than 50% were prohibited.

The 2018 Competition Law states that it will legislate value thresholds for the new types of economic concentrations that trigger merger notification. Under the draft decree of the Government detailing and guiding implementation of the 2018 Competition Law ("**Draft Decree**"), the following types of concentrations require notification:

- (a) either party's total turnover in Vietnam exceeds VND1,000 billion (about USD44 million);
- (b) either party's total asset value in Vietnam exceeds VND500 billion (about USD22 million);
- (c) the transaction value of the economic concentration exceeds VND500 billion (about USD22 million); or

¹ See Article 2.3 of the 2018 Competition Law.

- (iii) the combined market share of the parties in the relevant market is 30% or more.²

As of date, the Draft Decree has yet to become law; hence, the thresholds mentioned above might be subject to amendment before its passage into law.

Safe Harbors and Conditional Clearance

The 2018 Competition Law replaces a single-phase review process for economic concentration with two-phase review process which includes a preliminary review of 30 days followed by an official investigation of 90 days if required. The official investigation can be extended by 60 days in complex cases³. Under the Draft Decree, an economic concentration will be given clearance if: (a) the combined market share of the parties is less than 20% or (b) if the post-merger entity does not fall into a group of 5 entities accounting for 85% or more of the relevant market.

Also, under the 2018 Competition Law, instead of outright rejection, economic concentrations can be given conditional clearance, such as requiring division or sale of a part of capital or assets of companies participating in economic concentration.⁴

Prohibited Economic Concentration

Under 2018 Competition Law, the assessment of prohibited economic concentrations is no longer based solely on the “combined market share” in the “relevant market.” Instead, “*economic concentration shall be prohibited if it causes or is likely to cause substantial anti-competitive effects on the Vietnamese market.*”⁵ The combined market share is now only one factor among other factors to consider when assessing the economic concentration’s impact on competition, including:

- (a) the extent of the concentration in the relevant market before and after economic concentration;
- (b) relationships between the companies engaged in economic concentration in the chain of production, supply and distribution of a certain type of product or service;
- (c) competitive advantages in the relevant market caused by the economic concentration;
- (d) the ability of companies after the economic concentration to increase their prices or profit on sales significantly;
- (e) the ability of companies after the economic concentration to remove or prevent other companies from market entry or expansion; and
- (f) other particular factors of the relevant market.⁶

² See Article 33.2 of the 2018 Competition Law.

³ See Article 36 and Article 37 of the 2018 Competition Law.

⁴ See Article 42 of the 2018 Competition Law.

⁵ See Article 30 of the 2018 Competition Law.

⁶ See Article 31.1 of the 2018 Competition Law.

5% Cap on Fines

The 2018 Competition Law limits the amount of fines for violations of its merger rules to 5% of the total turnover of the companies engaged in the concentration. For individuals, the maximum penalty is 2.5%.

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With its extra-territorial reach, expanded grounds for mandatory notification, and a multi-pronged subjective test for what constitutes a prohibited economic concentration, the 2018 Competition Law will result in increased voluntary merger notifications and requests for informal opinions from the VCA. In 2017 and 2018, VCA received a combined total of 8 merger notifications. Given the size of the Vietnamese economy, VCA should have invariably received much more merger notifications than it did. One of the primary reasons for low compliance with Vietnam's merger rules is the ambiguous concepts of "market share" and "relevant market" under the old competition law. Another reason is the perceived lack of enforcement of the merger rules by VCA. It appears to us the situation has changed, and merger counsel should take note.

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