

## Vietnam's New Merger Control Decree

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On 24 March 2020, the Government of Vietnam released Decree No. 35/2020/NĐ-CP providing detailed guidance on several articles of the 2018 Competition Law (“Decree 35”). This article provides an overview of the new decree’s impact on “economic concentration” activity, which includes mergers, acquisitions, consolidations, and joint ventures (collectively “Merger”). Decree 35 will take effect on 15 May 2020.

### Clear Definition of Control for Acquisitions

Decree 35 clearly defines the term “control” for acquisitions under the Merger rules. The purchasing entity shall be considered in control of the targeted company if post-acquisition, it:

- (a) Holds more than 50% of charter capital or voting share of the targeted company;
- (b) Owns or has the right to use 50% assets of the entire or one line of business of the target company; or
- (c) Has one or more of the following rights:
  - the right to directly or indirectly decide on the appointment, dismissal or removal of a majority of the board of directors, chairman of the board, director or general director of the target company;
  - the right to decide on the amendment or supplements to the charter of the target company; and,
  - the right to decide on essential business activities of the target company, including the selection of business models, business lines, business location; adjustment to the scope and business lines; choice of the method to mobilize, distribute, and utilize capital of the targeted company.

Accordingly, acquisition transactions where the purchasing company “controls” the targeted company in a manner described above, along with mergers, consolidations, and joint ventures, are subject to Merger notification requirements if any one of the following merger notification thresholds is triggered.<sup>1</sup>

### Merger Notification

Under Decree 35, the numerical thresholds of a Merger which triggers compulsory notification are:

Sectors	Total asset value	Sale or Purchase Turnover	Transaction Value	Combined Market Share

<sup>1</sup> See Article 33 of the 2018 Competition Law.

<b>Insurance</b>	VND15,000 billion (about USD637 million)	VND10,000 billion (about USD425 million)	VND3,000 billion (about USD127 million)	20% or more
<b>Securities</b>	VND15,000 billion (about USD637 million)	VND3,000 billion (about USD127 million)	VND3,000 billion (about USD127 million)	20% or more
<b>Credit Institution</b>	20% of the total asset value of the credit institutions in Vietnam	20% of the total turnover of the credit institutions in Vietnam	20% of the total charter capital of the credit institutions in Vietnam	20% or more
<b>Other sectors</b>	VND3,000 billion (about USD127 million)	VND3,000 billion (about USD127 million)	VND1,000 billion (about USD42 million)	20% or more

Note that the “Transaction Value” criteria above do not apply for Mergers conducted outside of Vietnam.<sup>2</sup>

## **Safe Harbors**

The 2018 Competition Law replaces a single-phase review process for Mergers with a two-phase review process, which includes a “preliminary review” of 30 days followed by an “official review” of 90 days if required. The official review can be extended for up to 60 days in complex cases<sup>3</sup>.

Under Decree 35, the Merger will be given clearance if:

- (a) the combined market share is less than 20%;
- (b) the combined market share is from 20% or above, and the total square of the market share of companies in the relevant market after the Merger is less than 1,800 on the Herfindahl-Hirschman Index (“HHI”);
- (c) the combined market share is from 20% or above, and the total square of the market share of companies in the relevant market after Merger exceeds 1,800 on the HHI and amplitude increases of the total square of the market share of companies in the relevant market before and after Merger is less than a delta of 100; or
- (d) for vertical Mergers, the market share of each undertaking is less than 20% in each relevant market.

An official review is required for all Mergers not granted clearance.<sup>4</sup> The National Competition Commission (“NCC”) must issue a decision on conducting an official review within 30 days from “the receipt of the complete merger filing dossier.” Otherwise, the relevant transaction will be deemed cleared, and the parties may proceed with the Merger.<sup>5</sup>

## **Official Review**

The NCC shall conduct an assessment on (i) substantial anticompetitive effects (“**Substantive Test**”) and (ii) positive effects of economic concentration (“**Positive Effect Test**”) to decide on Merger

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<sup>2</sup> See Article 13.3 of Decree 35.

<sup>3</sup> See Article 36 and Article 37 of the 2018 Competition Law.

<sup>4</sup> See Article 14.4 of Decree 35.

<sup>5</sup> See Article 36.3 and Article 36.2 of the 2018 Competition Law.

clearance.

Concerning the Substantive Test, the NCC will assess economic concentrations based on one or a combination of the following factors<sup>6</sup>:

- (a) the combined market share of parties participating in the Merger in the relevant market before and after the Merger;
- (b) the degree of concentration in the relevant market before and after the Merger;
- (c) the relationship of the parties participating in the Merger in the chain of production, distribution, and supply of a specific type of goods or services or whose business lines are mutual inputs or complementary to assist each other;
- (d) the competitive advantages brought by the Merger in the relevant market;
- (e) the ability of one party after the Merger to significantly increase prices or the rate of return on sales;
- (f) the ability of an enterprise after the Merger to exclude or hinder other enterprises from entering or expanding the market; and/or
- (g) any other unique factors in the industry or sector in which the enterprises participating in the Merger operates.

Concerning the Positive Effect Test, the NCC will assess the Merger based on one or a combination of (i) the positive impacts on the development of industries, domains and sciences, and technologies according to the State's strategies; (ii) positive effects on the development of small and medium-sized businesses; and (iii) enhancing the competitiveness of Vietnamese enterprises in the international market.<sup>7</sup>

## **Conditional Clearance**

Under the 2018 Competition Law, instead of outright rejection, a Merger can be given conditional clearance, including division or sale of a part of capital or assets of companies participating in Merger<sup>8</sup>.

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<sup>6</sup> See Article 15 of Decree 35.

<sup>7</sup> See Article 16 of Decree 35.

<sup>8</sup> See Article 42 of the 2018 Competition Law.