# International Comparative Legal Guides

# Merger Control 2021

A practical cross-border insight into merger control issues

**17th Edition**

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# Vietnam



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## 1 Relevant Authorities and Legislation

### 1.1 Who is/are the relevant merger authority(ies)?

The National Competition Commission (**NCC**) is Vietnam's principal merger authority. Under the purview of the Ministry of Industry and Trade (**MOIT**), the NCC assumes the functions of overseeing the merger control regime and imposing fines and remedies formerly discharged by the Vietnam Competition and Consumer Authority (**VCCA**) and the Vietnam Competition Council (**VCC**), respectively.

To date, the NCC has not been formally established. As such, the MOIT has directed the VCCA to remain in charge of administering the merger control regime until the new competition watchdog is instituted.

### 1.2 What is the merger legislation?

The primary merger control legislation is the Competition Law 2018 (Chapter V), which came into force on 1 July 2019. The Competition Law 2018 provides for, *inter alia*, a definition of concentration, notification thresholds, dossier requirements, the appraisal process and violations of the merger control regime.

The current regime adopts the new effects-based approach whereby the NCC uses the "substantial lessening of competition" test to decide whether to greenlight a merger. Other notable reforms include the appraisal process, jurisdictional thresholds and substantive assessment (please see question 3.6 and section 4).

A number of provisions of the Competition Law 2018 are guided by Decree No. 35/2020/ND-CP dated 24 March 2020 (**Guiding Decree**), which sets out, *inter alia*, specific thresholds for merger filings and appraisal criteria. The Guiding Decree took effect from 15 May 2020.

### 1.3 Is there any other relevant legislation for foreign mergers?

Yes. The Law on Investment 2020 (effective from 1 January 2021) is the main, most recent foreign investment legislation. A clearance, commonly known as an "M&A Approval", is required in certain cases where a foreign investor contributes capital to or purchases a stake (in the form of shares or capital contribution) in a Vietnamese target. Such clearance and its procedure are separate from and must precede a merger filing.

Furthermore, a 49% cap on foreign ownership applies to public companies operating in business lines which are subject to foreign investment conditions but where a foreign investment ratio has not been specified.

### 1.4 Is there any other relevant legislation for mergers in particular sectors?

Yes. The Law on Insurance Business 2000 (as amended), Telecommunications Law 2009 and Law on Credit Institutions 2010 contain specific provisions on M&A transactions in the insurance, telecommunications, and financial sectors, respectively. These provisions do not override merger control regulations under the Competition Law 2018, but rather exist in tandem with the latter. Mergers in the insurance and finance and banking sectors are also subject to a separate set of filing thresholds under the Competition Law 2018 as further discussed below (please see question 2.4).

**Insurance services**

Articles 69.1(e) and 69.1(h) of the Law on Insurance Business 2000 (as amended) provide that a written approval of the Ministry of Finance is required when an insurer:

- transfers shares or contributed capital amounting to at least 10% of its charter capital;
- restructures by way of division, merger, consolidation, dissolution or conversion of legal form; or
- makes an offshore investment.

**Financial services**

Under Article 153.1 of the Law on Credit Institutions 2010 (as amended), a written approval of the State Bank of Vietnam (**SBV**) is required when a credit institution is restructured by way of division, demerger, consolidation, merger, acquisition or conversion of legal form.

**Telecommunications**

A proposed concentration resulting in a telecommunications business having a post-merger market share of 30% to 50% must be notified in advance to the Vietnam Telecommunications Authority

under the Ministry of Information and Communications pursuant to Article 19.5 of the Telecommunications Law 2009 (as amended).

It is also noteworthy that Article 19.6, which stipulates that an application for merger clearance exemption must be approved in writing by the Ministry of Information and Communications, has been abolished by the Competition Law 2018. Coupled with the fact that clearance exemptions are no longer available, any merger in the telecommunications sector must consequently conduct filing under the Competition Law 2018.

### 1.5 Is there any other relevant legislation for mergers which might not be in the national interest?

No. There is only one merger control regime provided by the Competition Law 2018 and its Guiding Decree which applies across the board.

## 2 Transactions Caught by Merger Control Legislation

### 2.1 Which types of transaction are caught – in particular, what constitutes a "merger" and how is the concept of "control" defined?

Article 30 of the Competition Law 2018 prohibits *any* economic concentration that has an actual or potential restrictive impact on the domestic market.

An economic concentration occurs when there is a merger, consolidation, acquisition, or joint venture.

- *Merger:* one or more undertakings transfer all of their lawful assets, rights, obligations and interests to another business and, concurrently, terminate their business activities or cease to exist.
- *Consolidation:* two or more undertakings transfer all of their lawful assets, rights, obligations and interests to establish a new entity and, concurrently, terminate their business activities or cease to exist altogether.
- *Acquisition:* an undertaking directly or indirectly acquires all or part of the capital contribution or assets of another undertaking sufficient to *control* the acquiree or any of its business lines.
- *Joint venture:* two or more undertakings jointly establish a new entity by contributing a portion of their lawful assets, rights, obligations and interests.

An undertaking (A) is deemed to control or govern another undertaking (B) if A: (i) owns more than 50% of B's charter capital or voting rights; (ii) owns or has the right to use more than 50% of B's assets; or (iii) has *any* of the following rights:

- directly or indirectly appoint or dismiss all or the majority of B's executive management, Chairman of the Members' Council, Director or CEO;
- alter B's constitutional documents; or
- make crucial decisions with regard to B's business.

Furthermore, it should be highlighted that there is no exception to merger review under the current regime. Consequently, notifiable transactions which inherently raise no competition concerns such as intra-group mergers will still be caught.

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

"Control" is broadly defined to also include *de facto* control. Notably, the competition authority adopts the view that negative control or a veto right is *not* excluded from the "control" concept. As such, a minority shareholder is still deemed to have a controlling power over the target business if, for example, decisions that are critical to the latter's commercial policy, such as operating capital, markets, and/or business lines, require unanimity or a supermajority.

### 2.3 Are joint ventures subject to merger control?

Merger control also applies to joint ventures (please see question 2.1). It is noteworthy that under Vietnamese laws, a joint venture requires the establishment of a new legal entity by the joint venture parties. As such, other forms of joint venture shall *not* be subject to merger control. For example:

- A joint venture which will supply goods and/or provide services only to its parent businesses would constitute a concentration within the meaning of the merger control regime because it is a legal entity jointly formed by the contribution of, among other things, assets of its parents. Whether the joint venture serves only its parents or has a presence on the wider market or dealings with other parties is irrelevant.
- Likewise, a joint venture which is a newly established start-up not having previously traded and not acquiring an existing business from its parents (or an independent vendor) would also constitute a concentration for the same reason. This is the case irrespective of whether the joint venture in question has commenced business.
- A joint venture which is purely contractual with no creation of a new legal entity as the vehicle for the joint venture activities shall not be regarded as a concentration provided that it only exists contractually and does not assume legal personality.

### 2.4 What are the jurisdictional thresholds for application of merger control?

Notification is required if *any* of the filing thresholds are met *regardless* of the types of concentration and the parties in the transaction. In other words, both the purchaser and seller are subject to filing requirement.

**Jurisdictional thresholds**

The Guiding Decree provides for two sets of jurisdictional thresholds, one applicable to transactions in virtually all sectors, the other reserved for transactions involving credit institutions (**CIs**), insurers and/or securities companies.

*General thresholds*

A contemplated concentration, except for one in the insurance, banking or securities sectors, must be notified to the competition authority if any of the following thresholds are met:

| Criteria | Value* |
|---|---|
| **Total assets** on the Vietnamese market of either undertaking in the transaction or group of affiliated undertakings to which it belongs | VND 3 trillion (approx. USD 129 million or EUR 112 million) |
| **Total sales** or **purchase revenue** on the Vietnamese market of either undertaking in the transaction or group of affiliated undertakings to which it belongs | |

| Criteria | Value* |
|---|---|
| **Transaction value** of the merger | VND 1 trillion (approx. USD 43 million or EUR 37 million) |
| **Combined market share** on the relevant market of the parties to the transaction in the fiscal year prior to the year of merger filing | 20% |

*Sector-specific thresholds*

A contemplated transaction involving CIs, insurers and/or securities companies must be notified if it crosses any of the following thresholds:

| Criteria | Value* | | |
|---|---|---|---|
| | CIs | Insurers | Securities companies |
| **Total assets** of either undertaking in the transaction or group of affiliated undertakings to which it belongs | 20% of total assets of all CIs on the Vietnamese market | VND 15 trillion (approx. USD 647 million or EUR 563 million) | |
| **Total sales or purchase turnover** of either undertaking in the transaction or group of affiliated undertakings to which it belongs | 20% of total revenue of all CIs on the Vietnamese market | VND 10 trillion (approx. USD 431 million or EUR 375 million) | VND 3 trillion (approx. USD 129 million or EUR 112 million) |
| **Transaction value** of the merger | 20% of total charter capital of all CIs on Vietnamese market | VND 3 trillion (approx. USD 129 million or EUR 112 million) | |
| **Combined market share** on the relevant market of the parties to the transaction in the fiscal year prior to the year of merger filing | 20% | | |

* Monetary value was based on the reference exchange rate provided by the SBV as of 31 August 2020, available at: Reference Exchange Rate at SBV Operations Centre (https://www.sbv.gov.vn/TyGia/faces/ExchangeRate.jspx?_afrWindowMode=0&_afrLoop=4527208917963297&_adf.ctrl-state=qq22itejk_4).

A "group of affiliated undertakings" refers to a group of undertakings which are under the common control or governance of one or more undertakings within said group, or which share the same management. For the definition of "control", please see question 2.1.

**Calculation of jurisdictional thresholds**

- Asset test
  The threshold value applies to the assets in the domestic market of each relevant party or, where such party belongs to a group of affiliated undertakings, the total assets of the whole group.
  The Competition Law 2018 and the Guiding Decree do not define "assets".
- Turnover test
  Similarly to assets, the relevant turnover is that on the Vietnamese market (i.e. sales in and/or into Vietnam) of each party in the transaction or the group of affiliated undertakings.
- Market share test
  In this regard, "market" corresponds to the "relevant market", which is determined based on relevant product market and relevant geographical market.
  *Relevant product market* refers to the market of goods and services that are interchangeable in terms of characteristics, use purpose, and price. All of these factors are relevant in assessing the interchangeability of the goods and/or services in question. Where necessary, the NCC may also consider additional factors, such as switching costs, consumption habits, and the differentiation between selling and purchasing prices for different customer groups.
  *Relevant geographical market* refers to a particular geographical area where interchangeable goods and services are supplied on similar competitive conditions and such territory is significantly different from neighbouring areas. The boundary of the geographical area is identified on the basis of, *inter alia*, costs and time of transporting goods or providing services, market barriers, and consumption habits.
  Under Article 10.1 of the Guiding Decree, the relevant turnover of the group of affiliated undertakings for market share calculation purposes refers to the group's turnover of the goods or services in question, less intra-group turnover generated from the same. Under Article 10.2, the market share of a member undertaking in a group of affiliated undertakings is that of the whole group.
- Transaction value test
  This test is not applicable to offshore transactions.

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

Yes. Merger filing is required as long as any of the applicable notifying thresholds are met, irrespective of whether there is any overlap between the transaction undertakings.

### 2.6 In what circumstances is it likely that transactions between parties outside your jurisdiction ("foreign-to-foreign" transactions) would be caught by your merger control legislation?

The Competition Law 2018 adopts the effects-based approach when it comes to merger control (please see questions 1.2 and 2.1). As such, a foreign-to-foreign transaction will be caught if it has an actual or potential restrictive impact on the domestic market. As a rule of thumb, if any party to the contemplated transaction has subsidiaries in or generates sales in and/or into Vietnam, they will be required to file if any of the jurisdictional thresholds are met.

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

Merger filings must generally adhere to the regime stipulated in the Competition Law 2018. Exceptions may apply where sector-specific legislations provide different provisions which are not invalidated by the Competition Law 2018. For instance, merger parties in the telecommunications sector must also notify the anticipated transaction to the Vietnam Telecommunications

Authority if the threshold provided by the Telecommunications Law 2009 (as amended) is met (please see question 1.4).

**2.8 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?**

The Competition Law 2018 and the Guiding Decree do not specify any principles in this regard. It follows that whether a multi-stage merger will be identified as a single transaction or a series of transactions will be decided on a case-by-case basis, taking into account factors such as the structure of the merger and the identities of the parties.

Based on verbal consultation with the authority, however, it is the authors' understanding that the merger watchdog tends to consider a multi-stage merger as a series of transactions instead of a single transaction. For example, if a buyer contemplates a two-phased acquisition in which it would acquire the seller's 20% and 80% shares in Phase I and II, respectively, the parties will only be required to notify the anticipated merger before commencing Phase II.

## 3 Notification and its Impact on the Transaction Timetable

**3.1 Where the jurisdictional thresholds are met, is notification compulsory and is there a deadline for notification?**

Notification is mandatory for any contemplated transaction that reaches the filing threshold. Although the Competition Law 2018 does not provide for a specific filing deadline, an anticipated merger must be notified prior to its completion. As a practical matter, the parties are advised to file as soon as a draft memorandum of understanding (**MOU**) or term sheet is prepared, in order to avoid any delay in the transaction timetable (please see also question 3.5).

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

There are no exceptions to merger filing under the current regime; all reportable transactions must be notified to the competition authority for review.

The Competition Law 2018 does, however, provide for an auto-clearance mechanism (please see question 3.6).

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

A fine of up to 5% of the violator's total turnover in the relevant market may be imposed for failure to notify. How the NCC imposes sanctions on offshore undertakings which generate sales in and/or into Vietnam but have no presence in the domestic market remains an open question. For sanctions in respect of closing a transaction after filing without obtaining a clearance, please see question 3.7.

To the authors' knowledge, no formal sanction has been imposed since the Competition Law 2018 came into effect.

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

The law is unclear on this issue. In our experience, the competition authority's current approach suggests that carve-out would be possible provided that global completion does not cause any changes to the physical structure of the domestic market (i.e. the number of incumbents). For instance, in a horizontal merger, carve-out would be permitted if after global completion the local subsidiaries of the acquiring party and the target remain separate and independent entities until local clearance is granted. However, parties should be cautious as the authority's view is subject to change.

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

The Competition Law 2018 is silent regarding at what stage in the transaction timetable the parties should formally notify the transaction. Given that in the preliminary appraisal phase the NCC will focus solely on the parties' combined market share and Herfindahl–Hirschman Index (**HHI**)/concentration ratio (**CR**), notification should be filed once the transaction structure and principle terms are sufficiently clear to identify the relevant parties and market. A draft Shareholders' Agreement (**SHA**) or Share Subscription Agreement (**SSA**), or even an MOU or term sheet, may also be submitted.

Given the lack of a clear statutory filing deadline, many have raised concern as to whether signing a Share Purchase Agreement (**SPA**) before a clearance is granted or even before the transaction is notified would constitute "gun jumping". Per the authors' experience with the VCCA, the competition regulator tends not to find this practice problematic as long as closing is subject to the obtainment of the necessary regulatory approvals.

**3.6 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?**

The appraisal process comprises two phases. After receiving the notification file, the NCC has seven working days to inform the filing parties as to whether such file is valid and complete. If the file is not and the NCC issues a request for further documents and/or information, the parties will have 30 calendar days to complete the notification file.

**Phase I:** The preliminary appraisal phase commences once the NCC receives a valid and complete file. Within 30 calendar days of the receipt thereof, the NCC shall (i) issue a decision either greenlighting the transaction or stating that the next phase is required, or (ii) not issue any decision at all. In the latter case, the transaction is automatically greenlit, effectively ending the appraisal process.

In practice, to increase the chance of obtaining clearance in Phase I, the filing should comprehensively define the relevant market(s) and demonstrate that the anticipated transaction falls within one of the safe harbours (please see question 4.1).

**Phase II:** If the review moves to the official appraisal phase, the NCC shall, within 90 calendar days (typical mergers) or 150 calendar days (complex cases) of the announcement date of the Phase I result, decide whether the transaction should be unconditionally cleared, conditionally greenlit, or entirely blocked. During Phase II, the NCC may request the parties to supplement information at most on two occasions. In such

case, the timeframe is suspended unless or until the parties have adequately furnished the NCC with all requested information.

In practice, however, the appraisal process may be prolonged as the authority often issues requests for information which would in effect reset the timeframe for scrutiny. To avoid unnecessary delay, it is advisable that the parties engage in an additional informal stage, i.e. pre-notification or exploration phase. In this period, the parties may seek consultation on whether the transaction is notifiable and, if so, which information is relevant and of interest to the NCC. Such practice, unofficial as it may be, had proven beneficial to both sides in an anticipated merger and the VCCA under the former merger regime. As far as the authors are aware, the NCC welcomes any consultation requests in respect of merger filing.

### 3.7 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. A fine of up to 1% of the total turnover of the respective violator may be imposed for completing a transaction before clearance is granted.

### 3.8 Where notification is required, is there a prescribed format?

The Competition Law 2018 requires that notification must follow a prescribed format. The regulator has published a notification template on its website (http://vcca.gov.vn/data/ec84ff2e-887c-4a2f-8c60-c919696e3f1d/userfiles/files/2_%20M%E1%BA%AAU%20TB-TKT.docx). The form requires the parties to provide their basic corporate information, the transaction structure, the value and the anticipated timetable, and to indicate which notification threshold(s) is(are) applicable.

A notification file comprises:

- a notification form following the prescribed template;
- a draft merger agreement (an SPA/SSA/SHA), MOU or term sheet is acceptable);
- each merger party's certificate of incorporation (e.g. Enterprise Registration Certificate, Certificate of Incorporation);
- each merger party's audited financial statements for the two years preceding the notification;
- a list of parent companies, subsidiaries, member companies, branches, representative offices and other dependent entities (if any) of each merger party;
- a list of all goods and services currently provided by each merger party;
- information about each merger party's market share on the relevant market for the two years preceding the notification;
- remedial plans for potential restrictive impact caused by the merger (if any); and
- an assessment report on the positive effect brought about by the merger and measures for enhancing such effect.

The notification file must be submitted in Vietnamese. Where the document is issued abroad, it must be (i) legalised by the relevant Vietnamese embassy or consular office, and (ii) translated into Vietnamese; the translation must then be notarised by a licensed notary in Vietnam. It is also noteworthy that certain commercial documents issued by the competent authority in certain jurisdictions are exempted from the legalisation requirement. The full list of exempted documents can be found on the Ministry of Foreign Affairs' online portal (https://lanhsuvietnam.gov.vn/Lists/BaiViet/B%C3%A0i%20vi%E1%BA%BFt/DispForm.aspx?List=dc7c7d75%2D6a32%2D4215%2Dafeb%2D47d4bee70eee&ID=755).

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

There is no short form or accelerated procedure for any type of mergers. Fundamentally, Phase I can be regarded as a simplified procedure due to the relatively short waiting period and auto clearance mechanism (please see question 3.6). The 30-calendar-day waiting period may potentially be shortened if the parties have sought consultation in the exploration phase and prepared the notification file accordingly.

### 3.10 Who is responsible for making the notification?

Please see question 2.4.

In a transaction where multiple parties are subject to the filing requirement, only one notification file will be accepted. In such case, either party may also authorise the other to submit a notification on their behalf.

### 3.11 Are there any fees in relation to merger control?

No fees are charged for merger filing and appraisal.

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

A public offer for a listed business is governed by the Law on Securities 2019 (effective from 1 January 2020) and related guiding instruments. These regulations have no impact whatsoever on the merger control clearance process.

As long as any of the jurisdictional thresholds is satisfied, the parties are required to submit a filing before any subscription of shares is made.

### 3.13 Will the notification be published?

The notification itself will not be published when submitted to the competition regulator. There is no mechanism for public comment on an anticipated merger under the current regime either. On the other hand, all clearance decisions, save for such parts concerning State or business secrets, must be published.

In practice, the VCCA does not publish the entire clearance decision and its full reasoning for granting clearance, but only publishes a press release announcing the clearance. The press releases, which are publicly available on VCCA's website (http://vcca.gov.vn/?page=news&do=browse&category_id=e0904ba0-4694-4595-9f66-dc2df621842a&current_id=48caff09-211e-4400-b9b8-ab2de0dfe989), are often light on details, providing only the dates of filing submission and clearance, the names of the transaction parties, a brief description of the transaction, and a general statement that the transaction was greenlit because it is not a prohibited concentration within the meaning of Article 30 of the Competition Law 2018. Clearance conditions and remedies (if any) are only mentioned in passing without elaboration.

## 4 Substantive Assessment of the Merger and Outcome of the Process

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

The NCC employs the "substantial lessening of competition" test to determine whether to block a merger.

In Phase I, the NCC primarily relies on the combined market share, post-merger HHI and Delta. Accordingly, a concentration will be greenlit if:

- the combined market share is less than 20%;
- the combined market share is equal to or over 20% and either (i) the post-merger HHI is less than 1,800, or (ii) the post-merger HHI is larger than 1,800 and Delta is lower than 100; or
- for vertical mergers, the market share of each participant in the transaction on the relevant market is less than 20%.

In Phase II, the NCC will thoroughly assess the restrictive and positive factors (which are further discussed in question 4.2), and their correlation. Assessment of the negative impact on competition will consider:

- the combined market share and pre- and post-merger extent of concentration on the relevant market (not applicable to assessment of non-horizontal mergers);
- the relationship in the supply chain of the parties to the anticipated merger;
- the competitive advantages of the post-merger undertaking;
- the ability to considerably increase the price or return on sales (**ROS**) ratio after the merger;
- the ability to exclude or impede other undertakings from penetrating or expanding the market; and/or
- other relevant special factors in the sector or industry in question.

When assessing the abovementioned factors, the regulator will rely on information and data furnished by not only the filing parties but also relevant industry regulators, other undertakings, experts, etc. through consultation.

### 4.2 To what extent are efficiency considerations taken into account?

Efficiencies are also taken into consideration as mentioned above. In particular, the NCC will assess the positive impacts brought about by the merger on:

- the development of industry, science and technology in line with the State's master plans (by assessing, *inter alia*, economies of scale and the application of technological advancements and innovation);
- the development of small and medium-sized businesses; and/or
- the competitiveness of domestic businesses (i.e. advancing national champions).

In general, mergers which have a net positive impact will more likely be greenlit than not.

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

Generally, non-competition issues are relevant when it comes to assessing the positive effect, such as promoting national champions. Assessment of the restrictive impact only involves competition issues (please see questions 4.1 and 4.2).

### 4.4 What is the scope for the involvement of third parties (or complainants) in the regulatory scrutiny process?

The involvement of third parties in the merger appraisal is relatively limited and passive as it is only relevant through consultation which is initiated by and entirely at the discretion of the NCC. In practice, third parties may include relevant industry regulators, undertakings, associations and experts. Notably, the competition regulator is not mandated to follow, consider or even solicit third-party information or recommendations as it is for reference only.

### 4.5 What information gathering powers (and sanctions) does the merger authority enjoy in relation to the scrutiny of a merger?

Typically, the authority is interested in information in connection with the anticipated merger and its restrictive as well as positive effects. Such information includes, for example, data of sales generated in and/or into Vietnam, the holding structure of the merger parties, tax remittance contributed to the State budget, contribution to GDP growth, etc.

During Phase II, the NCC is empowered to consult relevant industry regulators, who are mandated to respond within 15 calendar days of receiving the NCC's consultation request, and other undertakings, experts and/or relevant third parties, who are responsible to duly and timely furnish the NCC with complete and accurate information upon request. However, no sanctions shall be imposed on these third parties for failure to comply with the NCC's information request.

With regard to the filing parties, failure to comply with the NCC's information request can prolong the appraisal process (please see also question 3.6) and negatively impact the final outcome.

As a matter of principle, the filing parties are responsible for the accuracy and truthfulness of information submitted. The NCC renders its decision on the basis of not only the information provided, but also the data which the regulator collects on its own initiative. As such, the notification should be as comprehensive as possible to adequately address all the NCC's concerns, and should use information from verifiable sources to facilitate the NCC's review, thereby potentially expediting the regulator's decision-making process.

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

The NCC is obliged to maintain the confidentiality of all the information provided, including the term sheet and draft SPA/SSA/SHA during the appraisal process. In practice, if there is specific information in the filing which the parties wish to keep confidential throughout the review process, they should attach a Request for Confidential Treatment to the filing, specify therein the information which must be kept confidential, and highlight the same in the filing for the VCCA's attention.

## 5 The End of the Process: Remedies, Appeals and Enforcement

### 5.1 How does the regulatory process end?

Please see question 3.6.

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

Whilst a formal negotiation process does not explicitly exist under the Competition Law 2018, as a practical matter, the NCC would encourage the filing parties to propose remedies in good faith to address any competition concerns arising out of the merger (please see also question 5.4).

Both types of remedies, i.e. structural and behavioural, are available in the forms of restructuring, divestment and price control. Article 42 also contains blanket provisions covering any other remedies that lessen the restrictive impacts or enhance the positive effects brought about by the merger.

As to cross-border mergers, given that the current merger control regime is at its early stage, it remains to be seen whether and to what extent the NCC liaises with its overseas counterparts in the appraisal process.

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

Publicly available information suggests that there has only been one foreign-to-foreign transaction – i.e. Elanco's acquisition of Bayer's animal health business – subject to a conditional clearance. Specifically, since the post-merger undertaking will have a dominant position on the market for swine antibiotics in Vietnam, the competition authority has requested the undertaking to implement certain measures in line with the Competition Law 2018. However, it is unclear what these measures are. Other than this, public records suggest that all mergers notified to the VCCA since the Competition Law 2018 came into force have been unconditionally greenlit, in some cases reportedly owing to the fact that the post-merger physical structure of the relevant market (i.e. number of incumbents) would remain unchanged.

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

Theoretically, negotiation can commence as early as the exploration phase if the parties anticipate that the appraisal process will move to Phase II. In the pre-notification stage, the parties may consult the NCC on a range of issues including remedial plans and enhancing measures, which would form part of the notification file (please see question 3.8).

The NCC will, however, only consider the proposed remedies more comprehensively after the start of Phase II, at which point the details surrounding the transaction structure and principle terms will have come into clearer focus. Any meaningful rounds of discussion will likely take place during Phase II, specifically after the NCC has received consultation from third parties. The NCC will then review the remedies and will have considerable leeway to accept them in whole or in part or reject them entirely in the clearance decision.

### 5.5 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 guidance on this remedy is currently available. The establishment of trustees or independent managers is not necessary, although this requirement remains untested.

There are no public records of any transaction subject to the divestment remedy thus far.

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

As a matter of principle, structural remedies must be fulfilled prior to closing, whereas behavioural remedies, e.g. price commitments, can usually be observed thereafter. It is possible, however, that the NCC may allow the parties to implement the restructuring and/or divestment schemes after completing the merger if there are reasonable grounds to believe that prior implementation is not viable. As no guideline on this matter is provided, the final decision is entirely at the NCC's discretion. In any event, if the anticipated transaction is conditionally greenlit, the clearance decision will specify whether the merger parties may complete the transaction before fulfilling all applicable conditions and remedies.

### 5.7 How are any negotiated remedies enforced?

Where any of the remedies is unfulfilled, the NCC is empowered to impose fines of up to 3% of the violator's annual turnover.

### 5.8 Will a clearance decision cover ancillary restrictions?

In principle, ancillary restrictions will not be covered in the clearance decision. Such restrictions may nonetheless be included therein as part of the greenlight conditions. Accordingly, since in Phase II the NCC needs to assess the post-merger undertaking's ability to prevent or hinder another undertaking from entering or expanding the market (please see question 4.1), the NCC may request the parties to remove or revise these unlawful restrictive agreements.

If ancillary restrictions are not notified along with the merger but later become known to the NCC, they may be challenged as a prohibited cartel. As such, the parties may consider informing the NCC of these restrictions during the exploration phase, in the notification file or in the rounds of discussion during the appraisal process for the NCC's consideration, thereby potentially avoiding any concerns raised in the future.

### 5.9 Can a decision on merger clearance be appealed?

Whilst there is no formal process for complaints about, or objections to, the merger under the Competition Law 2018, an appeal can be made on the basis of the regulations and procedure provided by the Law on Complaints 2011 (as amended) and the Law on Administrative Proceedings 2015. *Any* party (including third parties, e.g. consumers or competitors) dissatisfied with the decision on merger clearance may lodge an appeal to the NCC (first-instance complaint) or the Minister of Industry and Trade (second-instance complaint) or initiate administrative proceedings before the courts (administrative litigation).

### 5.10 What is the time limit for any appeal?

- First-instance complaint: 90 days from the NCC's decision on merger clearance.
- Second-instance complaint: 30 days from (i) the expiry date of the first-instance time limit; or (ii) the issuing date of the decision on first-instance resolution.

- Administrative litigation: one year from (i) the issuance date of the NCC's merger clearance decision; or (ii) the decision on complaint resolution (either first or second instance).

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

Yes. The NCC must launch an investigation into a possible merger control infringement within three years of the date on which the alleged violation is committed.

## 6 Miscellaneous

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

Interplay with other jurisdictions involves consultation, information exchange and other international cooperation activities as provided by Article 108.2 of the Competition Law 2018.

To date, the VCCA has engaged in various multilateral and bilateral cooperation programmes with international organisations and national competition watchdogs. For the time being, such programmes centre primarily on competition policymaking and enforcement experience sharing. The VCCA has also conducted several informal exchanges with regional competition regulators concerning Grab's acquisition of Uber's Southeast Asia operations. It is expected that the NCC will continue these cooperative relations in the years to come.

Other than the above, the authors are not aware of any actual case where international cooperation has a significant impact on appraisal process.

**6.2 What is the recent enforcement record of the merger control regime in your jurisdiction?**

Based on our experience with the VCCA in recent filings, the authors have observed a surge in activity at the competition regulator since the Competition Law 2018 came into force, partly due to the extended scope of application of the new law and the lower notification thresholds. Between the effective date of the legislation (1 July 2019) and the date of writing, the regulator has announced a total of 20 clearance decisions, eight of which concern foreign-to-foreign transactions where the parties are located offshore but generate revenues in Vietnam. By comparison, under the former regime, the VCCA's annual merger control reports indicate that the regulator received a modest total of 35 filings between 2009–2019 (authors' note: the VCCA's merger control report was first issued in 2009).

The recent enforcement trend also suggests that the VCCA monitors M&A activities in the country, and the VCCA has proactively requested information on a number of transactions. In 2019, the regulator requested relevant parties to provide information on two high-profile transactions, *viz.*, Masan Group's acquisition of VinCommerce and VinEco, and Taisho's acquisition of a controlling stake in DHG Pharma. More recently, in August 2020, the VCCA initiated an inquiry into Indo Trans Logistics Corporation's acquisition of Ho Chi Minh City Stock Exchange (**HoSE**)-listed warehousing and transportation services provider Sotrans.

On the other hand, there are no public records of any sanction imposed on parties for failure to file or for conducting unlawful mergers. The closest attempt came in 2018 when the VCCA found that the Grab-Uber merger was reportable but not notified *and* was also unlawful. As such, the VCCA proposed a maximum fine of 5% of Grab's and Uber's respective total turnover for *each infringement* and requested Grab to:

- maintain the pre-merger pricing algorithm and driver commission rates; and
- notify the competition authority in advance of any increase in fares and driver commission rates.

Such finding and the proposed fines and remedies, however, were rejected by the VCC on the ground that the merger did not constitute a concentration within the meaning of Vietnamese competition laws. The VCCA has appealed the VCC's decision. Further developments are unknown to the authors so far.

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

No further reforms are being considered at the time of writing.

**6.4 Please identify the date as at which your answers are up to date.**

The answers are up to date as of 20 October 2020.

## 7 Is Merger Control Fit for Digital Services and Products?

**7.1 Is there or has there been debate in your jurisdiction on the suitability of current merger control tools to address digital mergers?**

To the authors' knowledge, M&A in the digital/tech sector has not been prominently featured or discussed in the most recent official seminars held by the VCCA and VCC. The VCCA has held a seminar on competition in the e-commerce sector in collaboration with the Japan International Cooperation Agency (**JICA**), although the seminar focused more on cartels and abuse of dominance.

Notably, the VCCA was recently recruiting consultants for a study on the competition landscape of the e-commerce market in Vietnam, which is part of the JICA-sponsored project "Enhancing the Competition Law Enforcement".

**7.2 Have there been any changes to law, process or guidance in relation to digital mergers (or are any such changes being proposed or considered)?**

As far as digital/tech mergers are concerned, there have been no notable reforms specifically addressing this issue, nor are there any proposed changes in the pipeline.

**7.3 Have there been any cases that have highlighted the difficulties of dealing with digital mergers, and how have these been handled?**

The high-profile Grab-Uber merger highlighted a flaw in the former regime, namely, the rigid definition of a concentration. The Competition Law 2018 has largely addressed this concern by abandoning the form-based approach adopted by its predecessor. How such issues are ultimately handled remains to be seen as the final resolution of the case has not been publicly disclosed.

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