



Vietnam merger control guide

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Vietnam's new merger control regime took effect from 15 May 2020. The new regime substantially expands the scope of transactions subject to the merger filing requirement and thereby captures more M&A transactions in Vietnam and offshore.

In this guide, we set out a high-level summary of the new regime and discuss some frequently asked questions in relation to its implementation.

Transactions caught by the Vietnam merger control regime

TYPES OF ECONOMIC CONCENTRATIONS

Vietnam's merger control regime captures 'economic concentrations', which include:

- mergers;
- consolidations;
- acquisitions;
- joint ventures;¹ and
- other kind of economic concentration provided by law.²

Each of the types of economic concentration has a detailed definition in the law.

ACQUISITIONS AND THE CONCEPT OF 'CONTROL'

In practice, acquisitions of shares or assets are the most common form of economic concentrations conducted by foreign investors in Vietnam. By definition, 'acquisition' is the 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. Accordingly, only acquisitions conferring

'control' are caught under the Vietnam merger control regime. These include acquisitions (by way of shares or assets) of a business from a Vietnamese counterpart, or investments into a Vietnamese business by strategic or financial/private equity investors.

■ Concept of 'control'

'Control' is considered to be conferred and present in one of the following cases:

- ownership of more than 50% of the charter capital or voting shares, or assets during all or one business line of the target; or
- having the right to:
 - directly or indirectly appoint or dismiss a majority or all members of the board of management, chairman of the members' council, director or general director of the target;
 - amend the charter of the target; or
 - decide important matters during the business operation of the target, such as business lines, geographical areas and forms of business, adjustment to the scale of business; and the form and method of raising, allocating and utilising business capital.

■ Negative control

- Based on the above definition, 'control' test does not appear to capture 'negative control' that investors often obtain as a part of their acquisition of a minority stake in the targets (such as veto rights in respect of important corporate decisions). However, in practice, the Vietnamese competition authority has unofficially indicated that 'negative control' should be one of the factors to be considered, together with other rights the investors would have in the target post-acquisition, to determine if the 'control' test is satisfied. Therefore, a case-by-case analysis should be conducted based on the specific set of rights conferred to the investors to consider whether a filing is required in respect of the proposed transaction on the basis of 'negative control'.

¹ Based on the definition under Vietnamese law, a 'joint venture' requires the joint venture parties to contribute a portion of their lawful assets, rights, obligations and interests in order to form a new joint venture enterprise. Therefore, it seems that unincorporated joint ventures would not be captured by the Vietnam merger control regime.

² So far, we are not aware of any type of transaction being classified as 'other kind of economic concentration provided by law'.

FOREIGN-TO-FOREIGN TRANSACTIONS CAUGHT

Vietnam's merger control regime captures foreign-to-foreign transactions conducted outside Vietnam if they cause, or are capable of causing, a competition-restraining impact in the Vietnamese market. This may capture transactions that involve an entity incorporated in Vietnam or carrying out business within or having sales to Vietnam. Therefore, a case-by-case analysis of whether an offshore transaction needs to be notified in Vietnam will be required.

For example, assuming the filing thresholds are satisfied, a merger filing in Vietnam may be required in cases where a foreign acquirer acquires an interest in a foreign target company which (directly or indirectly) has a controlling interest in a Vietnamese company, derives income/turnover in Vietnam or has assets in Vietnam.

INTRA-GROUP RESTRUCTURINGS

The merger control regime does not have any specific exception for intra-group 'economic concentrations' (ie transactions conducted within the same group for internal restructuring purposes). Technically, therefore, these transactions may still be caught and a specific analysis would be required. In practice, we are aware of precedents of intra-group restructurings being filed to, and cleared by, the Vietnamese competition authority.

TRANSACTIONS WITH MULTIPLE STEPS/PHASES

In practice, a transaction with multiple steps/phases can be filed in one consolidated merger filing provided that the parties in these steps/phases are the same and these steps/phases are linked together.

Merger filing thresholds and calculation

MERGER FILING THRESHOLDS

An economic concentration is notifiable if any of the following thresholds is met³

Total assets or total turnover	Total assets or total sales turnover/input purchase turnover in the Vietnamese market of the enterprise or group of affiliated enterprises that the enterprise is a member of in the previous financial year.	VND3 trillion or more (c. US\$128.7 million or more)
Transaction value	The transaction value (for onshore transactions conducted in Vietnam only).	VND1 trillion or more (c. US\$42.9 million or more)
Combined market share	Combined market share of the parties to the economic concentration in the relevant market in the previous financial year.	20% or more

Merger filing is triggered if any of the above filing threshold is met, irrespective of whether there is any overlap in the relevant market between the parties to the transaction.

The total assets and total turnover thresholds apply:

- to all parties to the economic concentration (ie including the seller, the purchaser and the target company in an acquisition transaction); and
- on an individual basis (ie based on the total assets/turnover of a single party and not the aggregate of the total assets/turnover of all parties to the transaction).

'TOTAL ASSETS' AND 'TOTAL TURNOVER' THRESHOLDS

In practice, 'total assets' and 'total turnover' are the most common thresholds that trigger a merger filing. In this section we discuss how these thresholds should be calculated.

- Where a party belongs to a group of companies, the total assets/total turnover threshold should be calculated on a consolidated basis of the entire group and not just the party directly participating in the transaction. The group should include entities that the relevant party controls, is controlled by and is under common control, with the 'control' test applied based on the definition described above under *Acquisitions and the concept of 'control'*.
- If a party has assets/turnover across various business sectors/markets in Vietnam, all assets/turnover across all such sectors/markets (and not only for the market relevant to the proposed transaction) will need to be included in the calculation.

- (The law does not define what constitutes assets or turnover 'in the Vietnamese market'. In practice, such assets can be broadly interpreted to include any asset located in Vietnam, whether held by a local or an offshore entity. For example, securities in a Vietnamese company or loan to a Vietnamese company can be considered as assets in the Vietnamese market of an offshore entity even though it does not have any local presence in Vietnam.)

Similarly, sales turnover in the Vietnamese market broadly includes turnover generated from sales in and/or into the Vietnamese market, regardless of local presence. For example, an offshore entity without a local presence can have turnover generated from sales into the Vietnamese market via local distributors.

'COMBINED MARKET SHARE' THRESHOLD

Transactions involving parties which have a combined market share in the relevant market of 20% or more in the previous financial year must also be notified. This 'combined market share' threshold should be calculated only in respect of the market relevant to the proposed transaction (and not across all markets where the parties have a presence in Vietnam, like in the case of total assets or turnover discussed above).

The relevant market is determined based on the relevant product market and the relevant geographical market. Complex technical analysis of the business operations of the parties would be required to determine the relevant market. Often there may be several relevant markets that need to be considered.

If a party is part of a group of companies, its market share will be determined on a consolidated group basis based on the total turnover or sales volume of the group companies in the relevant market, less the intra-group generated turnover or sales volume.

³ Different thresholds apply in case of economic concentrations involving a credit institution, an insurance company or a securities company.

Merger filing formalities

SUSPENSORY PRE-CLOSING REGIME

Vietnam's merger control regime requires parties to notify transactions and obtain a clearance before their closing.

It is not required for the parties to sign definitive agreements for the transaction to commence the merger clearance process in Vietnam. The parties are only required to submit a memorandum of understanding or summary of key terms of the transaction to the Vietnamese competition authority as part of the merger filing application. Therefore, in practice, parties may consider commencing the merger filing process early on to avoid delay to the overall timeline of the transaction. However, there may be confidentiality concerns that the investors should consider, as discussed below under *Confidentiality of filing and filing documentation*.

RESPONSIBLE PARTIES

Merger filing is a joint obligation of all parties participating in the relevant economic concentration (including the seller, the purchaser and the target company in an acquisition transaction).



REVIEW AUTHORITY

Merger filings should be submitted to, and will be reviewed by, the National Competition Commission (**NCC**), a new competition authority to be established under the Ministry of Industry and Trade (**MOIT**). However, to date, the NCC has not yet been established. For the time being, the existing Vietnam Competition and Consumer Protection Authority is continuing to review the merger filings and submit to the MOIT for approval.

FILING DOCUMENTATION

The filling dossier includes, among others:

- a written notification in the form set out by law;
- corporate documents of the relevant parties;
- a list of products traded by the parties;
- a list of subsidiaries of the parties;
- the draft agreement or memorandum of understanding setting out key terms of the transaction;
- a market share report; and
- a report on the competition impact of the transaction.

The above filing documents may take a substantial time to compile and this should be factored into the overall timeline for the merger filing process.

CONFIDENTIALITY OF FILING AND FILING DOCUMENTATION

Merger filing itself will not be published when submitted to the Vietnamese competition authority. In practice, the authority typically announces the clearance decisions on its website and provides a brief description of the filings made and cleared in the previous year in its annual reports. These announcements only include brief information on the date of submission, transaction parties, description of the transaction and the statement that the transaction has been cleared.

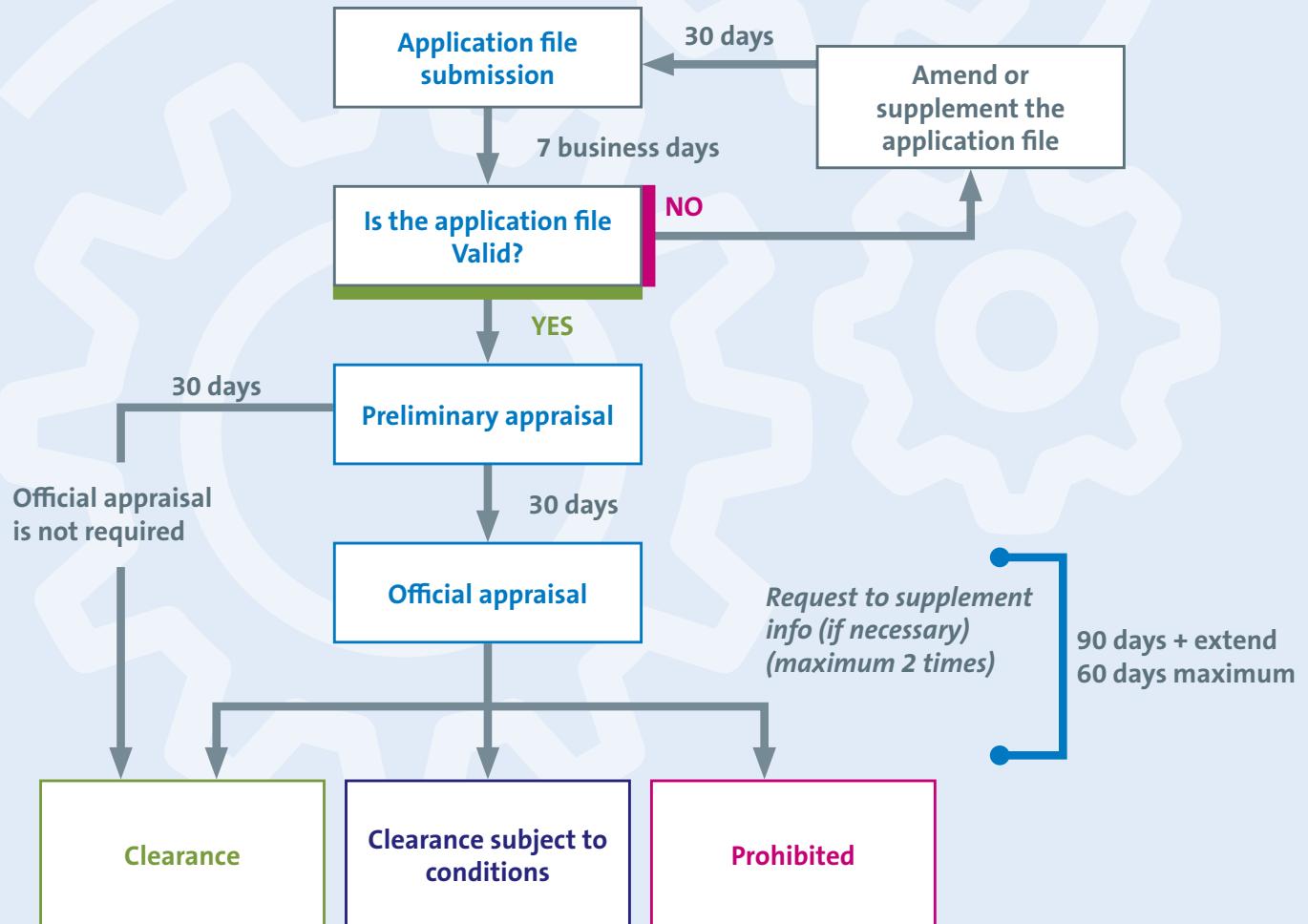
Two-phase review process

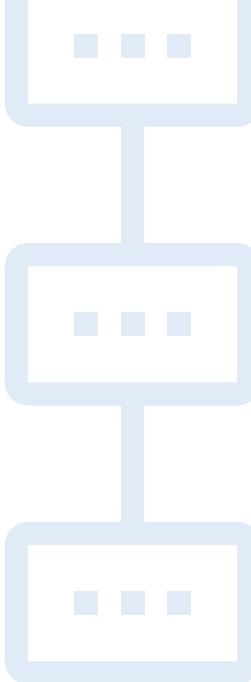
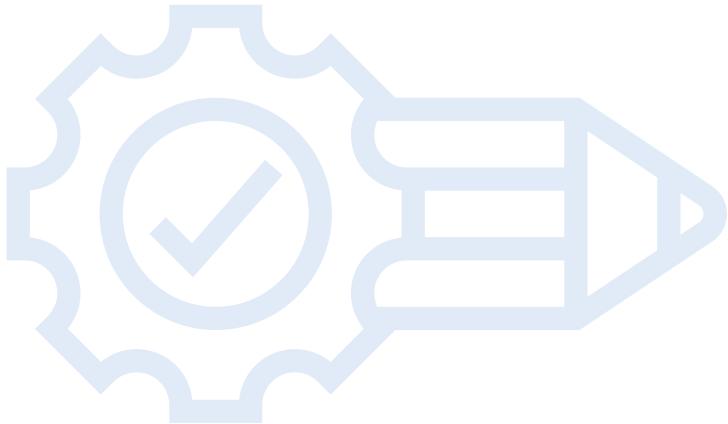
Vietnamese law prescribes a two-phase merger review process comprising:

- the preliminary appraisal; and
- the official appraisal.

Depending on the complexity of the transaction, it can be cleared at the preliminary appraisal phase or reviewed in more detail in the official appraisal phase (in which case the total statutory timing can take up to about six months). In practice, the process can take longer than the statutory timing prescribed by law. For example, currently in our experience the preliminary appraisal phase itself can take around three to four months to complete (with the transaction being cleared after this phase).

The two-phase merger review process is illustrated below:





PRELIMINARY APPRAISAL PHASE

In this first phase, the competition authority will mainly consider the combined market share and/or Herfindahl-Hirschman Index (**HHI**) to measure the competition impact, relationship of parties in the supply chain and level of concentration in the relevant market before and after the transaction.

If a transaction falls into the ‘safe harbours’ below, the transaction is likely to be cleared at the preliminary appraisal phase:

Cleared concentration	Market share	Post HHI	Delta (Post HHI – Pre HHI)
Vertical	< 20% in each relevant market	The HHI is not used for vertical concentration	
	Combined ≥ 20%	< 1,800	N/A
Horizontal	Combined ≥ 20%	> 1800	< 100
	Combined < 20%	N/A	N/A

If the competition authority does not respond to the parties within 30 days after it has acknowledged the receipt of a complete and valid merger filing dossier, the transaction will be deemed to have been cleared and the parties can proceed with it.

OFFICIAL APPRAISAL PHASE

More complex transactions are likely to proceed to the official appraisal phase. These could involve transactions where divestures or other remedies may be required.

In this phase, the competition authority will focus on assessing the competition-restraining impact, as well as any positive impacts on the economy that the transaction may have, to decide whether the transaction should be cleared or not.

Following its review, the competition authority will conclude whether the transaction in question is cleared without any condition, cleared but subject to conditions, or prohibited:

- **Unconditional clearance:** the transaction is cleared and the parties can proceed with it without any conditions.
- **Conditional clearance:** the transaction is cleared on the basis of certain conditions/measures being undertaken (such as divestitures) to remedy any anti-competitive effect after the transaction.
- **Prohibited merger:** the transaction is prohibited on the basis that it ‘causes or is capable of causing a significant competition-restraining impact in the Vietnamese market’, which is determined based on various factors, including:
 - combined market share and extent of concentration in the relevant market, both pre- and post-concentration;
 - relationship among parties to the concentration in the supply chain;
 - competitive advantage brought about by the concentration in the relevant market;
 - ability of price raising or increase of return on sales after the concentration;
 - ability of excluding or preventing other players to enter or expand the market; and
 - special factors in relevant industries.

So far, we are not aware of any transaction being blocked by the competition authority under the new merger control regime.

Penalties, remedies and enforcement

Administrative sanctions and other remedies are available for breaches of merger control regulations. In particular:

FAILURE TO FILE

Each party to the transaction may be subject to an administrative fine of 1% to 5% of the total revenue in the relevant market in the previous financial year if they fail to notify a transaction that should have been notified.

GUN-JUMPING OR PRE-CLEARANCE CLOSING

Each party to the transaction may be subject to an administrative fine of 0.5% to 1% of the total revenue in the relevant market in the previous financial year if they carry out the transaction before clearance is obtained from the competition authority. This could include 'gun-jumping', such as taking steps to implement the transaction, transferring customers or coordinating prices before clearance is granted.

In the case of global transactions, Vietnam's merger control regime does not provide for any mechanism to carve out local completion or local business operations in Vietnam whilst allowing the remainder of the global transaction to close. Technically, global completion prior to local clearance may be viewed as a pre-clearance closing breach.

PROHIBITED TRANSACTIONS

An administrative fine of 1% to 5% of the total revenue in the relevant market in the previous financial year can be imposed⁴ if the parties carry out a transaction that is prohibited. In this case, additional measures may be applied, including demerger or split of the merged entity, or compulsory control by the state over the prices for buying/selling goods/services, or other conditions.

The penalties are calculated on 'total revenue in the relevant market'. There is no specific guidance on how this will be applied, but it is likely to be interpreted as the total revenue in the relevant markets in Vietnam which are subject to the proposed transaction (and not across all markets/sectors in Vietnam in which parties to the transaction operate).

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⁴ In the case of prohibited mergers or prohibited consolidations, the sanctioned party would be the surviving enterprise (in case of a merger) or the enterprise formed post-consolidation (in the case of a consolidation), but the penalty will be calculated based on the total revenue of all parties participating in the merger or the consolidation. In the case of prohibited acquisitions, the sanctioned party would be the acquirer, but the penalty will be calculated based on the total revenue of the acquirer and the acquired entity.

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