



# Special Alert

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## New merger control regulations in Vietnam

On 24 March 2020, the Government issued Decree No. 35/2020/ND-CP (“**Decree 35**”) providing detailed regulations for implementation of the new 2018 Law on Competition (the “**2018 Competition Law**”), which took effect on 1 July 2019. This decree will come into force from 15 May 2020. The 2018 Competition Law and its guiding rules under Decree 35 would significantly impact the M&A sector in Vietnam, as they expand the scope of transactions which are subject to economic concentration review. Following are the key regulations of Decree 35:

### Acquisition of an enterprise and the detailed concept of “control and govern”

The acquisition of an enterprise is one of the forms of economic concentration as prescribed by both the 2018 Competition Law and the old 2004 Law on Competition (the “**2004 Competition Law**”). Such acquisition is defined as the direct or indirect purchase 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 business lines.

In the 2004 Competition Law, “control” is based on whether a party has ownership in sufficient quantity to be able to determine (i) voting rights or (ii) financial policy or operations of the acquired enterprise. The 2018 Competition Law and Decree 35 enumerate specific criteria to determine control. In particular, under Decree 35, control is considered present in one of the following cases:

- (a) the ownership of more than 50% of the charter capital or voting shares, or assets of all or any business line of the acquired enterprise; or
- (b) the acquiring enterprise has the right to:
  - (i) 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

- acquired enterprise;
- (ii) amend the charter of the acquired enterprise; or
- (iii) decide important matters during the business operation of the acquired enterprise, such as selecting the form of business organization; selecting the business lines, the geographical area and forms of business; adjustment of the business scale and the business lines; and selecting the form and method of raising, allocating and utilizing business capital of the acquired enterprise.

## Prohibited economic concentrations

Under the 2004 Competition Law, market share is the only criteria used to determine whether an economic concentration is prohibited. The 2018 Competition Law introduces various factors to evaluate significant impact or the ability to cause such impact on the Vietnam market (the “**Market Impact**”).

Under the 2018 Competition Law and detailed rules of Decree 35, the Market Impact shall be considered based on the following factors:

- (a) the combined market share of enterprises participating in the economic concentration in the relevant market;
- (b) the degree of concentration in the relevant market before and after the economic concentration;
- (c) the relationship of the enterprises participating in the economic concentration in the chain of production, distribution and supply of a certain 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 economic concentration in the relevant market;
- (e) the ability of an enterprise after economic concentration to significantly increase prices or the rate of return on sales;
- (f) the ability of an enterprise after the economic concentration to exclude or hinder other enterprises from entering or expanding the market; and/or
- (g) any other special factors in the industry or sector in which the enterprises participating in the economic concentration operate.

This approach will provide the regulator with more flexibility to review and determine the prohibited economic concentrations in Vietnam.

## Threshold for notification of economic concentration

Under the old law a percentage of market share was the only threshold legislated for notification to the regulator of an economic concentration. Decree 35 requires that enterprises proposing to participate in an economic concentration must notify the National Competition Committee (the “NCC”) prior to consummating the economic concentration in any of the following cases:

- (a) the total assets in the Vietnam market of the enterprise or group of affiliated enterprises of which such enterprise is a member was VND3 trillion or more in the financial year immediately preceding the year of proposed implementation of economic concentration;
- (b) the total sales turnover or input purchase turnover in the Vietnam market of the enterprise or group of affiliated enterprises of which the enterprise is a member was VND3 trillion or more in the financial year immediately preceding the year of proposed implementation of economic concentration;
- (c) the transaction value of the economic concentration is VND1 trillion or more; or
- (d) the combined market share of the enterprises participating in the economic concentration was 20% or more in the relevant market in the financial year immediately preceding the year of proposed implementation of economic concentration.

Special industries such as credit institutions, insurance enterprises and securities companies have an even stricter threshold.

Decree 35 also captures offshore transactions. Parties conducting an economic concentration outside the territory of Vietnam must notify the NCC if elements of such concentration fall within the territory of Vietnam and meet the threshold requirements listed above. Such offshore transaction may be prohibited in Vietnam if it is considered to cause Market Impact.

## Two-round appraisal process

Enterprises required to notify the NCC prior to conducting an economic concentration must submit an application dossier to the NCC. As required by the 2018 Competition Law and Decree 35 there will be two rounds of appraisal.

The preliminary appraisal reviews (i) the market share; (ii) concentration level before and after the economic concentration; and (iii) the relationship of enterprises in the chain of production, distribution and supply. The preliminary appraisal will be conducted within 30 days after receipt of a complete and valid application dossier. Upon completion of this appraisal, the NCC will either approve the concentration without further review, or subject the concentration to a second appraisal. If the NCC doesn't notify the enterprises after 30 days, the economic concentration is deemed permitted.

The necessity for a secondary appraisal is determined by the preliminary appraisal. If the economic concentration is subject to an official appraisal, it will be conducted by the NCC and review the Market

Impact of the proposed concentration. The NCC shall also review the positive impacts of the economic concentration based on factors provided in Decree 35. The time-limit for this appraisal is 90 days from the issuance of the results of the preliminary appraisal. For the complex cases, the NCC may extend the time-limit. Upon completion of the official appraisal, the NCC will either approve the concentration unconditionally, with conditions, or deny approval. If the NCC does not issue a decision within 90 days, thereby causing loss and damage to the enterprise, it must pay compensation.

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