

# Updated guide on Vietnam merger control

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Vietnam's merger control regime captures a wide range of onshore and offshore transactions due to the extensive notification thresholds. This has led to a significant increase in the number of merger filings to the Vietnamese competition authority in recent times, including transactions with minimal impact on the Vietnam market. In practice, the merger filing process can be lengthy and complicated and may affect the overall transaction timing.

In this updated Guide on Vietnam Merger Control, we discuss the merger filing requirements, process, recent practice and issues. We also touch on some of the upcoming key changes, including the establishment of the National Competition Commission (**NCC**) and the proposal for a fast-track review process.

# 1. What transactions are captured?

## FOREIGN-TO-FOREIGN TRANSACTIONS CAUGHT

- Vietnam's merger control regime generally captures 'economic concentrations' (including foreign-to-foreign transactions conducted outside Vietnam). 'Economic concentrations' include: (1) mergers; (2) consolidations; (3) acquisitions and (4) joint ventures<sup>1</sup>, each as defined in detail in the law. The regime also captures 'other types of economic concentration provided by law', which have not been specifically identified so far. An economic concentration is generally notifiable if it satisfies any merger filing threshold discussed below.

## INTRA-GROUP RESTRUCTURINGS

- There is no specific exception for intra-group 'economic concentrations' for internal restructuring purposes like other jurisdictions. In fact, there are public records of intra-group restructurings being filed and cleared. Merger control filing in respect of the internal restructurings should be considered on a case-by-case basis.

## JOINT FILING OBLIGATION

- Merger control filing in Vietnam is a joint obligation of all parties to the relevant notifiable economic concentration. A merger control clearance generally must be obtained before the parties carry out an economic concentration.

<sup>1</sup> 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. Concept of 'control'

- Acquisitions of shares or assets by investors (including foreign strategic or financial/private equity investors) is the most common form of economic concentration in practice. In 2021, 109 out of 130 merger filings submitted were for acquisition transactions, accounting for approximately 84%.
- The Vietnam merger control regime only captures acquisitions that confer 'control' in the target company to the acquirer.

## CONCEPT OF 'CONTROL'

- '**Control**' is considered to be conferred and present where any of the followings applies:
  - (i) ownership of more than 50% of the charter capital or voting shares, or assets during all or one business line/sector of the target; or
  - (ii) having the right to:
    - (A) 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;
    - (B) amend the charter of the target; or
    - (C) decide important matters during the business operations 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

- '**Negative control**' (such as veto rights in respect of important corporate decisions) is not expressly captured by the above 'control' test and this has been informally confirmed by the Vietnam competition authority.

# 3. Merger filing thresholds and calculation

Vietnamese competition law generally captures economic concentrations 'causing, or capable of causing, a competition-restraining impact in the Vietnamese market'. This local impact should be assessed on a case-by-case basis for the relevant economic concentration based on, amongst others, the parties' local presence in Vietnam.

Technically an economic concentration is notifiable if any of the following thresholds are met by any party to the transaction,<sup>2</sup> irrespective of whether there is any overlap between the parties to the transaction.

<b>Total assets or total turnover</b>	Total assets or total sales turnover/input purchase turnover in the Vietnamese market of any party or group of affiliated enterprises of such party in the previous financial year	<b>VND3 trillion (c. US\$120.8 million) or more</b>
<b>Transaction value</b>	Transaction value (for onshore transactions conducted in Vietnam only)	<b>VND1 trillion (c. US\$40.3 million) or more</b>
<b>Combined market share</b>	Combined market share of all parties to the economic concentration in the relevant market in the previous financial year	<b>20% or more</b>

## ‘TOTAL ASSETS’ AND ‘TOTAL TURNOVER’ THRESHOLDS

- In practice, 'total assets' and 'total turnover' are the most common thresholds to trigger the merger filing requirement in Vietnam given they are relatively low compared to other jurisdictions.
- Any party satisfying the above 'total assets' or 'total turnover' thresholds in Vietnam should be cautious as its transactions (in Vietnam or offshore) may trigger the merger filing requirement in Vietnam on the basis that such party alone satisfies the relevant filing threshold.
- Some key rules on the calculation of the 'total assets' and 'total turnover' thresholds are as follows:
  - These thresholds apply on an individual basis to any party to the transaction (eg the seller, the target company or the acquirer in an acquisition transaction), and not the combined 'total assets' or 'total turnover' of all parties.
  - These thresholds must be calculated on a consolidated basis of the 'group of affiliated enterprises' of the relevant party. 'Group of affiliated enterprises' includes entities that the relevant party controls, is controlled by and is under common control, with the 'control' test described in Section 2 above.
  - These thresholds cover assets/turnover across all business sectors/markets where the relevant party is active in Vietnam (and not only the market relevant to the proposed transaction).
  - In addition to local entities, these thresholds also cover assets/turnover in Vietnam of offshore entities within the relevant group even if they do not have a local presence. For example, cross-border sales into Vietnam via local distributors of an offshore entity is also captured.

## ‘COMBINED MARKET SHARE’ THRESHOLD

- The 'combined market share' threshold of 20% or more is 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).
- 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 affiliated enterprises, its market share will be determined on a consolidated group basis based on the total turnover or volume of the group companies in the relevant market, less the intra-group generated turnover or volume.

<sup>2</sup> Different thresholds apply in case of economic concentrations involving a credit institution, an insurance company or a securities company.

# 4. Merger filing and review process

## RESPONSIBLE AUTHORITY

The NCC is tasked with merger filing review. However, pending its establishment, the Ministry of Industry and Trade and the existing Vietnam Competition and Consumer Authority (VCCA) are handling this process in the interim period.

## FILING DOCUMENTATION

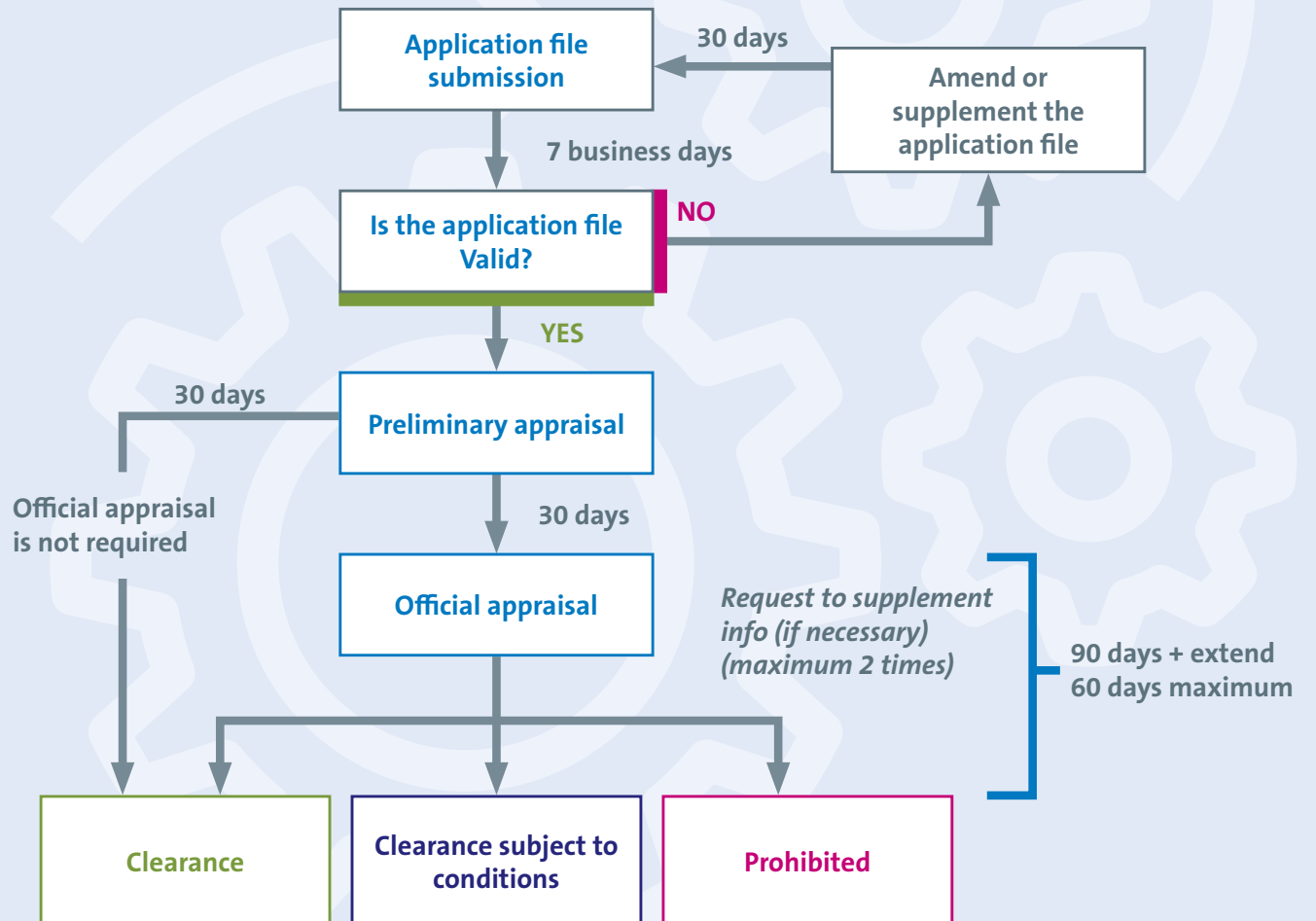
- The merger filing submission consists of numerous documents which can take a long time to prepare. These include notification forms; draft agreement or memorandum and understanding of the transaction, corporate documents of the parties; lists of subsidiaries/affiliates and products traded by the parties; market share report and competition impact assessment report; etc. These documents must be legalised overseas and translated into Vietnamese for submission. Therefore, Vietnam merger filing should be assessed and started as early as possible to avoid delay to the overall transaction timeline.
- A market share report and competition impact assessment report are required in all submissions even in the absence of overlap between the parties. Key content of these reports includes determination of the relevant market(s), parties' market share in the relevant market(s) and the potential competitive impact that the relevant transaction may have in the Vietnamese market.
- Parties can request that their merger filing submission be kept confidential by including such request in the filing to the authority.
- A transaction with multiple steps/phases can be filed in one consolidated merger filing submission provided that they involve the same parties and these steps/phases are linked together and will be completed in a short period of time.

## MERGER REVIEW PROCESS

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

- the preliminary appraisal; and
- the official appraisal.

Up to June 2021, approximately 90% of the merger filings submitted were cleared at the preliminary appraisal phase, and only about 10% of those filings were brought to the official appraisal phase.



The two-phase merger review process is illustrated below:

## PRELIMINARY APPRAISAL PHASE

- Simple or no-issue filings are likely cleared at the preliminary appraisal phase if they satisfy the 'safe harbours' test. This test is based on the combined market share of the parties and/or Herfindahl-Hirschman Index. For example, a transaction will likely be cleared at the preliminary appraisal phase if the combined market share of the parties in the relevant market is less than 20%.
- A transaction is deemed to be cleared if the competition authority has not issued any written objection after 30 days of receiving a complete and valid merger filing dossier. In practice, so far written official clearances have always been issued by the VCCA.
- The preliminary appraisal phase usually takes three to four months, including preparing the filing documents. The VCCA is considering applying a fast-track review process for no-issue cases to shorten the review timing in those cases but it remains unclear when such fast-track review will be introduced and adopted.

## OFFICIAL APPRAISAL PHASE

More complex transactions will likely proceed to the official appraisal phase (which may take up to approximately six months). 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.

The official appraisal phase may result in one of the three outcomes below:

- Unconditional clearance:** the transaction is cleared and the parties can proceed 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. The competition authority typically adopts remedial conditions/ measures as proposed by the parties.
- 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'. This is determined based on various factors, such as the combined market share of the parties and extent of concentration in the relevant market and the impact of the proposed transaction on the relevant market.

No transaction has been reportedly blocked by the competition authority since the new merger control regime was adopted in May 2020.



## 5. Penalties, remedies and enforcement

Administrative sanctions and other remedies can be imposed in respect of breaches of merger control regulations as below. So far, we are not aware of any precedent of these sanctions being imposed in practice.

Breach	Responsible parties	Administrative fines	Additional remedies
<b>Failure to file</b>	Each party to the transaction	<b>1% to 5%</b> of the total revenue in the relevant market in the previous financial year	N/A
<b>Gun-jumping or pre-clearance closing</b>	Each party to the transaction	<b>0.5% to 1%</b> of the total revenue in the relevant market in the previous financial year	N/A
<b>Prohibited transactions</b>	Depending on the form of the prohibited economic concentration	<b>1% to 5%</b> of the total revenue in the relevant market in the previous financial year	Demerger or split of the merged/ consolidated entity, sale of the acquired interest, withdrawal of enterprise registration certificate of the joint venture (as applicable) or compulsory control by the state over the prices for buying/selling goods/ services, or other conditions

The above 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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