International
Comparative
Legal Guides

Practical cross-border insights into merger control issues

Merger Control 2022

18th Edition

Contributing Editors:
Nigel Parr & Steven Vaz
Ashurst LLP

ICLG.com

Expert Analysis Chapters

Q&A Chapters

Q&A Chapters Continued

Vietnam


Dr. Nguyen Anh Tuan


Tran Hai Thinh


Tran Hoang My

LNT & Partners

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, among others, 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 below).

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, among others, specific thresholds for merger filings and appraisal criteria. The Guiding Decree took effect from 15 May 2020.

Notably, a degree detailing the NCC's powers, duties and organisational structure is slated to effectuate next year.

1.3 Is there any other relevant legislation for foreign mergers?

Yes. The Law on Investment 2020 (effective from 1 January 2021) is the primary 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 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), the Telecommunications Law 2009 and the 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 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), written approval of the State Bank of Vietnam is required when a credit institution (**CI**) 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 30–50% 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 stipulated that an application for merger clearance exemption must be approved in writing by the Ministry of Information and Communications, was 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, or Chairman of the Members' Council [*and*] executive-level officer;
- 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. However, the authors understand that after the NCC is established, there would be a "fast-track" review process or an auto-clearance mechanism (see question 3.6) for internal restructuring and pure conglomerate mergers.

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

"Control" is broadly defined to also include *de facto* control. Recently, the competition regulator has clarified that the control concept does not encompass negative control or veto rights. In other words, a minority shareholder can only be deemed to acquire control if it can unilaterally decide on any crucial business matter of the target (see also question 2.1).

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 law, 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, all parties to the transaction (e.g., the purchaser, seller and target if the concentration is an acquisition) are subject to the 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 CIs, insurers and/or securities companies.

General thresholds
A contemplated concentration, except for one in the insurance, banking or securities sectors (further discussed below), must be notified to the competition authority if any of the following thresholds are met.

Criteria	Value
Total assets on the Vietnamese market of any undertaking in the transaction or group of affiliated undertakings to which it belongs	VND 3 trillion (approximately USD 129 million or EUR 112 million)
Total sales or **purchase revenue** on the Vietnamese market of any undertaking in the transaction or group of affiliated undertakings to which it belongs	
Transaction value	VND 1 trillion (approximately 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 any 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 (approximately USD 647 million or EUR 563 million)	
Total sales or purchase turnover of any 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 (approximately USD 431 million or EUR 375 million)	VND 3 trillion (approximately USD 129 million or EUR 112 million)
Transaction value	20% of total charter capital of all CIs on Vietnamese market	VND 3 trillion (approximately 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%		

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". The regulator would accept asset value based on the relevant financial statements.
- *Turnover test*
  Similar 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, especially where there is no price interchangeability, 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. In our experience, the regulator only accepts the national market as the widest possible relevant geographical market and accordingly applies the combined market share test on the basis of the parties' national shares. Filing parties are therefore advised to provide national share data for review even if they position the relevant geographical market as regional or global in scope.
  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.
  The VCCA has recently clarified that the combined market share test only applies to horizontal mergers but does not require a market share increment from below to above 20%. In other words, a Vietnam filing will be triggered if the market share of one undertaking to the horizontal merger is already above 20% prior to the transaction.
- *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. As there is no exemption under the current regime, merger filing is required, provided any of the applicable notifying thresholds are met, irrespective of whether there is any overlap between the transaction undertakings (see also question 2.1).

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?

Any foreign-to-foreign transaction that (i) qualifies as a concentration for Vietnamese filing purposes, and (ii) crosses any applicable threshold, will be caught by the Vietnam merger control regime. Although it may be argued that the Competition Law 2018 only applies to foreign-to-foreign transactions which have an actual or potential restrictive impact on the domestic market (Article 1), in practice the regulator does not consider this factor and only looks at the aforementioned conjunctive test when assessing whether a foreign-to-foreign transaction is notifiable.

As a rule of thumb, if any party to the contemplated transaction has revenues and/or assets in Vietnam, they will be required to file if any of the jurisdictional thresholds is 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.

In our experience, the regulator tends to be flexible where a merger takes place in stages. 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. In addition, the regulator has also accepted submission of a single filing where the buyer must conduct several transactions to acquire the target's business.

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 reportable transaction. As for the deadline for notification, the Competition Law 2018 only states generally that reportable transactions must be filed before implementation without providing further guidance on when a transaction would be deemed implemented. A conservative construction of the law arguably suggests that the parties must notify prior to signing. In practice, however, it is generally understood that an anticipated merger must be notified prior to its completion. Presently, the regulator has not released any official guidance in this regard; however, in the authors' experience, they have raised no objection to filings submitted after signing.

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 and subsequently greenlit by the competition authority.

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. Since all transaction parties are responsible for filing regardless of which party crosses the filing threshold (see question 2.4), *all* parties will also be held liable for failure to file. 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 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 arguably 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 on this issue. Given that, in the preliminary appraisal phase, the NCC will focus solely on the parties' combined market share and the Herfindahl-Hirschman Index (**HHI**)/concentration ratio, notification should be filed once the transaction structure and principle terms are sufficiently clear to identify the relevant parties and market.

It is noted that the parties are not obliged to wait until the transactional documents are signed to submit a filing. The authority accepts filings made on the basis of a draft transactional document or even a memorandum of understanding (**MOU**) or term sheet. As a practical matter, the parties are advised to file as soon as the transaction structure is sufficiently clear to avoid any delay in the transaction timetable.

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. In practice, the competition authority usually issues a request for information (**RFI**) a week after the initial submission.

Phase I: The preliminary appraisal phase commences once the NCC receives a valid and complete file in terms of both formalities and substance, that is, once the authority receives all required formality documents and satisfactory responses to their RFI(s). 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.

Phase II: If the review moves to the official appraisal phase, the NCC shall, within 90 calendar days (for typical mergers) or 150 calendar days (for 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 the requested information.

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 local 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 notification form must follow a prescribed template published on the VCCA's 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.

In addition to the notification form, the parties must also submit:

- a draft transactional document (e.g., a Framework Agreement or a Share Purchase (**SPA**)/Subscription Agreement (**SSA**) – an MOU or term sheet is also acceptable);
- each concentration party's certificate of incorporation (e.g., Enterprise Registration Certificate, Articles of Association);
- each concentration party's audited financial statements for the two years preceding the notification;
- a list of each concentration party's parent companies, subsidiaries, member companies, branches, representative offices and other dependent entities (if any) in Vietnam;
- a list of all goods and services currently provided in Vietnam by each concentration party;
- information about each concentration party's market share on the relevant market for the two years preceding the notification;
- remedial plans for potential restrictive impact caused by the concentration (if any); and
- an assessment report on the positive effect brought about by the concentration and measures for enhancing such effect.

The notification file must be submitted in Vietnamese. Certificates of incorporation issued abroad 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. Given the logistical delay caused by COVID-19, parties should commence the legalisation process as soon as practicable to avoid delaying the review process (see also question 3.9).

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).

In our experience, there are a number of measures which the parties may take to expedite the review process:

- engage in pre-notification consultation with the competition regulator to seek guidance on whether the transaction is notifiable and, if so, which specific information is relevant and of interest to the authority;
- prepare a detailed relevant market analysis based on the relevant criteria in the Guiding Decree and relevant Vietnamese regulations and classification systems (if any);
- estimate market shares using verifiable sources (for example, market data from the Vietnam Customs if the products are imported);
- if applicable, highlight that the contemplated transaction falls within the safe harbours (see question 4.1) and has limited or no local nexus;
- in terms of formalities, commence the legalisation process as soon as possible to minimise logistical delays caused by COVID-19; and
- maintain an active communication channel with the authority throughout the review process to promptly address any concerns they may have.

Given the VCCA's constantly evolving practice, it is crucial to keep up with the regulator to ensure accurate assessment of the notifiability issue and, if the transaction is indeed reportable, swift obtainment of clearance. Having experienced local counsel with an established working relationship with the regulator would also help the parties navigate this nascent merger control regime and ensure the global transaction timetable, particularly during these challenging times.

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.

Provided 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 will generally not be published when submitted to the competition regulator, unless the transaction is subject to a Phase II review, in which case the regulator will issue a press release to invite public comments. 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 the 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 either falls within Article 14.2 of the Guiding Decree (i.e., the safe harbour provision) or is not prohibited under 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 (on the Vietnamese market), post-merger HHI and Delta. Accordingly, a concentration will be greenlit if:

- For horizontal mergers, the combined market share is less than 20%, or 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.
- For non-horizontal mergers, the market share of each transaction party on its respective 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 the 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 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 (see question 4.4).

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, among others, 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 (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 competition regulator. In practice, third parties may include relevant industry regulators, undertakings, associations and experts. Notably, the regulator is not mandated to follow, consider or even solicit third-party information or recommendations as it is for reference only. In our experience, as the regulator conducts merger review independently, negative third-party feedback does not automatically imply the transaction will be blocked entirely or conditionally greenlit.

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 review, 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 stakeholders, who are responsible to duly and timely furnish the NCC with complete and accurate information upon request. In practice, if the filing parties' relevant products are imported into Vietnam, the VCCA would consult the Vietnam Customs to verify the submitted market data.

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, however, 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 makes 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 in order 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/Shareholders' Agreement 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 submit a separate Request for Confidential Treatment, specifying therein the information which must be kept confidential, and highlight the same in the filing for the regulator'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 of the Competition Law 2018 also contains blanket provisions covering any other remedies that reduce the restrictive impacts or enhance the positive effects brought about by the merger.

With regard to cross-border mergers, given that the current merger control regime is in 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. Excluding this, the majority of foreign-to-foreign mergers have been unconditionally greenlit according to public records.

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 to expedite the review process if the parties anticipate that the appraisal process will move to Phase II (see also question 3.9). In this phase, 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 parties' operations in Vietnam 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; however, 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 permit 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 guidelines on this matter are 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?

The NCC may, among other measures, monitor the market to investigate any possible violations, including non-compliance of

remedies. 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 must 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. In principle, the regulator conducts merger review independently and rarely liaises with their overseas counterparts when appraising a notified transaction. To the authors' best knowledge, there has been no case where international cooperation has a significant impact on the appraisal process.

To date, the VCCA has engaged in various multilateral and bilateral cooperation programmes with multiple agencies and organisations, such as the Japan Fair Trade Commission (**JFTC**), German Corporation for International Cooperation GmbH (**GIZ**), the Australian Embassy and the Australian Competition and Consumers Commission. For the time being, such programmes centre primarily on enhancing antitrust enforcement (such as developing guidelines and handbooks and hosting advocacy workshops) and promoting consumer welfare.

Notwithstanding the above, decisional practice of overseas regulators (such as the European Commission, the JFTC, or the Korean Fair Trade Commission) have proven useful to the Vietnamese regulator in their assessment of the relevant product market, as well as in substantiating that the notified transaction does not raise any significant competition concerns globally, much less in Vietnam. It is expected that the NCC will continue and deepen these cooperative relations in the years to come.

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

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. According to a factsheet published by the VCCA in September 2021 (http://vcca.gov.vn/data/ec84ff2e-887c-4a2f-8c60-c919696e3f1d/userfiles/files/Cuc%20QLCT_Fact%20Sheet%20Tap%20Trung%20Kinh%20Te_Version%20E%20(v2).pdf), the authority received a total of 125 notifications between 1 July 2019 and 30 June 2021, 39 (31%) of which concerned foreign-to-foreign transactions. In 2020 alone, the VCCA received 62 notifications, which is approximately five times the annual average between 2005 and 2019. The notifications concern various industries, from real estate (most popular); services; manufacturing and trading in motor vehicles and spare parts; construction materials; food and beverage; and energy. Notable transactions include AMD's acquisition of Xilinx and Siemens Healthineers' acquisition of Varian.

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 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.

Moving forward, it is expected that the competition authority will ramp up their enforcement efforts. According to their 2020 annual report (http://vcca.gov.vn/?page=document&-category_id=154b131f-af6c-4af7-ae32-a71f70b1f298&current_id=7a6db5ba-88dd-4f41-8f46-9ba54b5b05dc), the VCCA has been developing a market database on key sectors such as real estate, logistics and energy, which should expedite the regulator's review process in these sectors in the future. The VCCA is also working on an internal guideline for merger control, reportedly laying grounds for a more streamlined review process for certain mergers (see also question 2.1).

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; however, a decree on the NCC's establishment is on the horizon (see question 1.2).

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

The answers are up to date as at 21 October 2021.

7 Is Merger Control Fit for Digital Services & 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?

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 did hold a seminar on competition in the e-commerce sector in collaboration with the Japan International Cooperation Agency (**JICA**); however, the seminar focused more on cartels and abuse of dominance.

To the authors' knowledge, the VCCA has conducted 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". This development suggests that the NCC will continue keeping a close watch on this sector as part of the authority's enforcement efforts.

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?

There have been no notable digital mergers since the Competition Law 2018 took effect. Most recently, the competition authority has unconditionally greenlit Tiki, one of Vietnam's leading e-commerce platforms, for its sale of a controlling stake to Tiki Global Pte Ltd. The authors understand that the digital sector will be one of the NCC's main focuses in merger control.

Dr. Nguyen Anh Tuan is a partner in charge of LNT & Partners' (**LNT**) Corporate/M&A practice group and leads a team specialised in competition law. A co-founder of the Vietnam Competition Network, Tuan has been recognised as one of the few experts in Vietnam who have an in-depth understanding of international regulations and practices and local insights in this area. He has advised leading multinational companies in the food and beverage, pharmaceutical, fast-moving consumer goods, automotive, and consumer electronics sectors on the full suite of competition law matters, including merger filings, cartels, competition law litigation, and internal competition law compliance audit and training programmes.

Tuan is a trusted consultant of the World Bank Group, having worked with the organisation's Competition Policy Team on a number of projects. He is also a regular speaker at domestic and international fora and has written for international publications such as *Global Competition Review* and *Getting the Deal Through*. He is also a contributing author of *Cartels in Asia: Law & Practice* (published by Wolters Kluwer) and authored the Vietnam Chapter for the United Nations Conference on Trade and Development's Competitive Neutrality and its application in selected developing countries.

LNT & Partners
Unit 3, Level 21, Bitexco Financial Tower
2 Hai Trieu Street, District 1
Ho Chi Minh City
Vietnam

Tel: +84 28 3821 2357
Email: tuan.nguyen@lntpartners.com
URL: www.lntpartners.com

Tran Hai Thinh is an associate in LNT's competition team. He has advised multinational companies in the fast-moving consumer goods, consumer electronics, and automotive sectors on various competition law-related issues, from merger filings and cartels to competition compliance audit and training.

Thinh holds an LL.B. and BBA from the Ho Chi Minh City University of Law.

LNT & Partners
Unit 3, Level 21, Bitexco Financial Tower
2 Hai Trieu Street, District 1
Ho Chi Minh City
Vietnam

Tel: +84 28 3821 2357
Email: thinh.tran@lntpartners.com
URL: www.lntpartners.com

Tran Hoang My is an associate in LNT's competition and compliance practice. She has been involved in advising multinational companies in a variety of sectors on merger filing and competition law compliance, as well as assisting in internal compliance investigations and competition training programmes.

My holds an LL.M. and LL.B. from the University of Nottingham.

LNT & Partners
Unit 3, Level 21, Bitexco Financial Tower
2 Hai Trieu Street, District 1
Ho Chi Minh City
Vietnam

Tel: +84 28 3821 2357
Email: my.tran@lntpartners.com
URL: www.lntpartners.com

LNT is a leading full-service law firm headquartered in Ho Chi Minh City and one of the few local firms with a dedicated competition law practice. Led by Dr. Nguyen Anh Tuan, the team is known not only for its sound understanding of the laws, but also the ability to deliver practical solutions under time pressures. The team is a trusted local contact of international law firms and has been engaged in numerous multi-jurisdictional filing exercises. Notably, over the past 12 months, the team has secured unconditional Vietnam clearance for a number of high-profile transactions, such as AMD's USD 35 billion acquisition of Xilinx and Siemens Healthineers' USD 16.4 billion acquisition of Varian.

In 2019, 2018 and 2015, LNT was named Vietnam Firm of the Year in Antitrust/Competition by *ASIAN-MENA COUNSEL* magazine of *In-House Community*. The award was based entirely on a survey taken by in-house counsel in the Asia-Pacific.

www.lntpartners.com

ICLG.com

Current titles in the ICLG series

Alternative Investment Funds
Anti-Money Laundering
Aviation Finance & Leasing
Aviation Law
Business Crime
Cartels & Leniency
Class & Group Actions
Competition Litigation
Construction & Engineering Law
Consumer Protection
Copyright
Corporate Governance
Corporate Immigration
Corporate Investigations
Corporate Tax
Cybersecurity
Data Protection
Derivatives
Designs
Digital Business
Digital Health
Drug & Medical Device Litigation
Employment & Labour Law
Enforcement of Foreign Judgments
Environment & Climate Change Law
Environmental, Social & Governance Law
Family Law
Fintech
Foreign Direct Investment Regimes
Franchise
Gambling
Insurance & Reinsurance
International Arbitration
Investor-State Arbitration
Lending & Secured Finance
Litigation & Dispute Resolution
Merger Control
Mergers & Acquisitions
Mining Law
Oil & Gas Regulation
Patents
Pharmaceutical Advertising
Private Client
Private Equity
Product Liability
Project Finance
Public Investment Funds
Public Procurement
Real Estate
Renewable Energy
Restructuring & Insolvency
Sanctions
Securitisation
Shipping Law
Technology Sourcing
Telecoms, Media & Internet
Trade Marks
Vertical Agreements and Dominant Firms

The International Comparative Legal Guides are published by: global legal group