



Market
Intelligence

MERGER CONTROL 2021

Global interview panel led by White & Case LLP

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Vietnam

Nguyen Anh Tuan is a partner in charge of LNT & Partners' corporate practice group and leads a team specialising in competition law. A co-founder of the Vietnam Competition Network, Tuan has been recognised as one of the few experts in Vietnam with an in-depth understanding of international practices and local insights in this area. He has advised leading multinational corporations (MNC) in the F&B, pharmaceutical, fast moving consumer goods, automotive and consumer electronics sectors on the full suite of competition law matters, from merger filings, cartels and competition law litigation to internal competition compliance audit and training. In the past 12 months, Tuan and his team have secured unconditional Vietnam clearance for multiple mega transactions, such as AMD's US\$35 billion acquisition of Xilinx and Siemens Healthineers' US\$16.4 billion acquisition of Varian Medical Systems.

Tran Hai Thinh is an associate in LNT's competition practice. Thinh has extensive experience assisting clients in obtaining Vietnam clearance for complex cross-border transactions under a strict timeline, as well as advising on other competition law issues, such as cartels, competition compliance audit and training.

Tran Hoang My is an associate in LNT's competition and compliance practice. She has gained significant experience partaking in multi-jurisdictional filing exercises and advising leading MNCs in a variety of sectors on merger filing obligations in Vietnam.

1 | What are the key developments in the past year in merger control in your jurisdiction?

The competition regulator has remained active since the new merger control regime under the Competition Law 2018 took effect in July 2019. According to a factsheet published by the Vietnam Competition and Consumer Authority (VCCA) in September 2021 (VCCA's Factsheet), the authority received a total of 125 notifications between 1 July 2019 and 30 June 2021, 39 (31 percent) 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 a variety of sectors, including real estate (most popular); services; manufacturing and trading in motor vehicles and spare parts; construction materials; food and beverage; and energy. The surge in the number of notifiable transactions is explicable by the extended scope of application of the new law and the lower notification thresholds.

While there have been some logistical difficulties caused by covid-19, we expect the VCCA to keep up the momentum for the rest of 2021 and going into 2022.

The past 12 months have also seen a number of notable developments in the VCCA's interpretation of key merger control concepts, despite the fact that the National Competition Commission (NCC) – the official competition watchdog to replace VCCA under the current merger control regime – has not been established and therefore no official guidelines have been issued. Insofar as the threshold issue is concerned, control for merger filing purposes does not encompass negative control. This means that the acquisition of a minority interest with veto rights or other standard minority shareholders' protection rights would not be deemed a concentration for Vietnamese merger filing purposes and therefore not subject to the notification obligation. This is a welcome development, for there was much uncertainty surrounding the notifiability of, for instance, private equity funds' acquisition of strategic minority interests in portfolio companies.

Another welcome development concerns the application of the combined market share (CMS) threshold to conglomerate mergers. By way of context, the general position under the Competition Law is that any transaction that qualifies as a concentration for Vietnamese merger filing purposes and crosses any applicable filing threshold must be notified to the competition regulator without exception. The legislation only explicitly states that the transaction value threshold does not apply to offshore mergers, which leads to the general consensus that the remaining tests, including the CMS threshold, apply to every transaction regardless of whether the parties have any substantive overlap or local nexus. In other words, an offshore transaction will trigger a Vietnam filing if either party's group-level revenues or



“The authority continues to keep up the momentum going into 2021.”

“As a nascent authority, the VCCA is constantly evolving and streamlining its review process.”

assets in Vietnam exceed 3 trillion dong (unless the transaction involves an insurance company, credit institution or securities company) or the parties' CMS on the relevant market exceeds 20 per cent.

However, in recent cases, the VCCA has only applied the CMS threshold to horizontal mergers. In other words, offshore transactions where the parties do not have any overlaps or vertical relationships would only be notifiable if either party crosses the total local turnover or asset thresholds. This is a very welcome development and is expected to ease the filing test for conglomerate mergers in the future.

To a certain extent, these developments represent a shift in the regulator's approach towards internationally accepted practices and indicate how the NCC will administer and enforce merger control regulation once established.

2 | Have there been any developments that impact how you advise clients about merger clearance?

As a nascent authority, the VCCA is constantly evolving and streamlining its review process. In addition to the changes discussed above, a few other developments in the past 12 months are also worth highlighting.

In terms of information required for the review, the regulator is often interested in the filing parties' business models in Vietnam. To facilitate the review process, the parties should focus on information that demonstrates the extent of their nexus to the Vietnamese market.

With respect to the relevant market analysis, the VCCA remains adamant that filing parties provide a detailed analysis covering all relevant statutory criteria even if the parties do not have any horizontal overlap or vertical relationship, even on the narrowest relevant market definition. Filing parties would be expected to clearly delineate the scope of their definition rather than simply advocating that the precise relevant market definition can be left open because the transaction is not capable of raising any anticompetitive concerns regardless of which definition is adopted.

Zooming in on the relevant product market in particular, our experience suggests that the level of required details would depend more on the regulator's familiarity with the markets in question than whether the transaction is capable of lessening competition. In cases where there is no relevant local precedent, the parties should be prepared to provide a detailed and comprehensive relevant product market analysis – often more so than in other jurisdictions – and to answer technical questions from the VCCA about their products. While references to the decisional practice of overseas regulators, such as the European Commission, would be helpful, filing parties would still be expected to discuss the relevant Vietnamese regulations and categorisation systems (if any) in their analysis. On the other hand, in regulated

markets with which the VCCA is more familiar, such as insurance, the authority is willing to take a more relaxed approach and would accept a relatively simple relevant product market analysis solely based on industry-specific legislation.

With respect to the relevant geographic market, although parties may advocate for a regional or global relevant geographic market, the VCCA would still expect to see arguments in favour of a hypothetical nationwide market.

As for the submission process, since early August 2021, when covid-19 related social distancing measures intensified, the VCCA has also been flexible enough to accept email submission in lieu of a formal e-submission portal. This has helped the VCCA to address logistical delays caused by the handling of hard copy submissions. However, in principle, and for the VCCA's internal recordkeeping purposes, the filing parties will still need to make a complete and valid hard copy submission to obtain clearance. Given that the 30-day preliminary review clock only officially starts after the VCCA has received a full and valid dossier, in terms of both formalities and substance, we often advise clients to start preparing the formality documents, such as legalised copies of certificate of incorporation, as soon as possible to minimise delay.

Insofar as the review timeline is concerned, the regulator does generally keep to the statutory deadlines and issue clearance within 30 days of receiving a full and valid filing dossier. There are a few rare instances where clearance is not issued within this statutory timeframe due to a surge in workload or covid-19 related procedural delay at the Ministry of Industry and Trade (MOIT), which is the VCCA's supervisory body, although in these cases concentration parties are safe to understand that their transaction has been automatically cleared.

In light of the VCCA's practice, there are a number of measures we often advise our client to consider if they are under a tight timeline. Among those, it is most important to maintain an active communication channel with the authority throughout, or even prior to, the review process to promptly address any concerns that the regulator may have. This approach not only allows the parties to tailor the filing to address the regulator's requirements, thereby expediting the review process, but also helps the parties to predict the actual review timeline for closing purposes. To this end, having an experienced local counsel with an established working relationship with the regulator would help the parties navigate this constantly evolving merger control regime while ensuring the global transaction timetable.



3 | Do recent cases or settlements suggest any changes in merger enforcement priorities in your jurisdiction?

Recent enforcement trends suggest that the VCCA does monitor M&A activities in the country and has proactively requested information on a number of transactions. For instance, in August 2020, the VCCA initiated an inquiry into Indo Trans Logistics Corporation's acquisition of the Ho Chi Minh City Stock Exchange (HoSE)-listed warehousing and transportation services provider Sotrans.

4 | Are there any trends in merger challenges, settlements or remedies that have emerged over the past year? Any notable deals that have been blocked or cleared subject to conditions?

There are still no public records of any transaction blocked under the Competition Law 2018. According to the VCCA's Factsheet, the MOIT did not block any of the 125 transactions notified between 1 July 2019 and 30 June 2021. Approximately 90 percent of the filings were cleared in the preliminary review phase, while the

remaining 10 percent were cleared after a full review. Publicly available information suggests that the majority of notified transactions are unconditionally cleared and that there has only been one foreign-to-foreign transaction subject to a conditional clearance.

The VCCA may also consult relevant stakeholders during the review process if they deem it necessary. Although the regulator conducts its merger review independently, such that negative third-party feedback does not automatically mean that the transaction will be blocked or cleared subject to conditions, third-party consultation may delay the review process as not every stakeholder is responsive to the VCCA's consultation request. That said, we understand that this situation is only temporary and will eventually improve once the NCC is established.

Similarly, there are no public records of any sanction imposed on parties for failure to file, gun-jumping or for conducting a prohibited concentration. Moving forward, however, it is expected that the regulator will ramp up their enforcement efforts with respect to both merger review and investigation of allegedly unlawful transactions. According to their 2020 annual report, 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 and assist with investigations of suspected failures to file. The VCCA is also working on an internal guideline for merger control, reportedly laying grounds for a more streamlined review process for certain mergers.

5 | Have the authorities released any key studies or guidelines or announced other significant changes that impact merger control in your jurisdiction in the past year?

As mentioned above, the VCCA is still working on a comprehensive merger review guideline, which is expected to facilitate filing preparation and increase legal certainty during the review process. In the meantime, parties are advised to refer to the materials already published in 2020, including the official notification form, a checklist of required documents, an overview of the review process and expected timeline, and a set of practice notes on issues such as relevant market definition, impact assessment and request for confidential treatment. This is a very welcome first step from the VCCA.

In addition, there are indications that the VCCA is also working on various industry reports, covering from the booming e-commerce market to the pharmaceutical distribution sector. Together with the sector-specific database that the VCCA has been developing, these reports should pave the way for the NCC to develop a more simplified review process for key industries 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.”

6 | Do you expect any significant changes to merger control rules? How could that change your client advocacy before the authorities? What changes would you like to see implemented in your jurisdiction?

The most anticipated development at the moment remains the establishment of the NCC, the new competition authority to succeed the VCCA and the Vietnam Competition Council. Once established, the NCC is expected to reinforce cooperation via, inter alia, consultation and information exchange with its overseas counterparts to crack down on any potential cross-border infringements. Two procedural changes are also expected to be rolled out when the NCC is established, namely an official e-submission portal for all filings, and a fast-track review or auto-clearance process for transactions that pose no inherent competition concerns, such as intragroup restructuring or pure conglomerate mergers.

Another much-anticipated change is the promulgation of a full merger control guideline, which, based on informal discussion with the competition watchdog, we understand will be modelled on that of the European Commission and the Competition and Consumer Commission of Singapore. It is unclear which matters the guidance will address, as the authority has not released any draft for public comment. In any event, a full guideline is a welcome development as it would be tremendously helpful to filing parties as well as practitioners.

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The Inside Track

What should a prospective client consider when contemplating a complex, multi-jurisdictional transaction?

A multi-jurisdictional screening should be conducted as soon as possible to identify jurisdictions where the transaction might trigger a filing. It is also useful to obtain an anticipated timeline and a checklist for each 'triggered' jurisdiction to facilitate planning and cross-border coordination. Furthermore, having a master briefing note containing narratives applicable to all jurisdictions would also help ensure consistency and save local counsels' drafting time and the client's reviewing time. The resources thus freed could instead be spent on jurisdiction-specific issues that are not addressed in the briefing and require local expertise.

In your experience, what makes a difference in obtaining clearance quickly?

As a nascent authority, the Vietnamese regulator is constantly evolving its review approach and interpretation over time. As such, maintaining an open communication channel with the regulator has proved instrumental in expediting the review process. Early discussion is useful to anticipate the specific content that would be of interest to the regulator, while keeping the communication channel open throughout the review process is also important so that the parties can promptly address any concerns that the regulator may have. To this end, it would help to engage experienced local counsels with an established working relationship with the authority.

What merger control issues did you observe in the past year that surprised you?

It is quite unusual that the seller is also considered a concentration party under the current merger control regime. This means that the seller's revenues and assets are also relevant to the notifiability assessment and, if the transaction is notifiable, the seller must also be a filing party. This approach not only generates additional time-consuming and costly formalities obligations (as the parties would also have to submit the seller's legalised documents and signatures on the filing form), but could also lead to an anomalous situation where the seller could be held liable for failure to file, even in divestment transactions.

Lexology GTDT Market Intelligence provides a unique perspective on evolving legal and regulatory landscapes.

Led by White & Case LLP, this *Merger Control* volume features discussion and analysis of emerging trends and hot topics within key jurisdictions worldwide.

Market Intelligence offers readers a highly accessible take on the crucial issues of the day and an opportunity to discover more about the people behind the most significant cases and deals.

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