

M&A IN VIETNAM: A BRIEF ON ECONOMIC CONCENTRATION'S REGULATIONS

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In May 2020, Decree 35/2020/ND-CP on detailed regulations for implementation of the 2018 Law on Competition issued by the Vietnamese Government on 24 March 2020 (the **Decree 35**) has come into effect. As Decree 35 introduced a wider outreach on the transactions subject to merger filing requirement to be conducted with the National Competition Authority¹ (the **NCC**), mergers & acquisitions (M&A) transactions in or partly related to Vietnam are forecasted to be significantly affected. By this article, the author aims to present a brief on economic concentration's regulations applicable to those intending to participate in an M&A transaction wholly or partly related to Vietnam. For avoidance of doubt, the selected subjects of this article shall be exclusive of credit institutions, insurance companies and securities companies.

Economic concentration and notification threshold

Under the 2018 Law on Competition², the merger control regime refers to the control of *economic concentration* which can take any of the following forms:

- ✓ Mergers;
- ✓ Consolidations;
- ✓ Acquisitions;
- ✓ Joint ventures; *or*
- ✓ Other kinds of economic concentration provided by law.

A transaction in any form above may be subject to the merger filing requirement if the relevant statutory thresholds are met by such transaction. Compared with the former legislations on competition, the prevailing ones have supplemented two novel thresholds triggering the statutory obligation for merger notification, in addition to the *combined market share*, namely *assets/turnover* threshold and *value of transaction* threshold.

Under Article 13.1 of Decree 35, the threshold of a compulsory economic concentration filing would basically consist of the followings:

Total assets and total sales/input purchase turnover: VND3trillion or more (approx. USD131million or more)

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¹ A regulatory body under purview of the Ministry of Industry and Trade. The NCC has yet to be established and for the period pending its establishment, the Vietnam Competition and Consumer Authority (VCCA) shall be temporarily in charge with respect to the merger filings.

² Law No. 23/2018/QH14 on Competition issued by the National Assembly of Vietnam on 12 June 2018.

Total assets in the market of Vietnam of the enterprise or group of affiliated enterprises of which such enterprise is a member is three (3) trillion Vietnamese Dong or more in the fiscal year immediately preceding the year of proposed implementation of economic concentration.

Total sales turnover or input purchase turnover in the market of Vietnam of the enterprise or group of affiliated enterprises of which the enterprise is a member is three (3) trillion Vietnamese Dong or more in the fiscal year immediately preceding the year of proposed implementation of economic concentration.

Of significance is that Decree 35 is silent on what assets should constitute “assets in the market of Vietnam”. Such broad concept leads to an interpretation that even offshore transactions must be subject to notifications to the NCC in case the related corporations have assets located in Vietnam. Commonly, an offshore M&A transaction can also be made a subject of merger filing control if the parties to such transaction own shares in Vietnam-based company of which value reaches the notification threshold.

Value of transaction: VND1trillion or more (approx. USD43.7million or more)

The transaction value of the economic concentration is one (1) trillion Vietnamese Dong or more and only applicable to the onshore transactions.

Combined market share: from 20% upward

The combined market share of the enterprises proposing to participate in the economic concentration is 20% or more in the relevant market in the fiscal year immediately preceding the year of proposed implementation of economic concentration.

For clarity, *relevant market* is defined on the basis of *relevant product market* and *relevant geographic market*³. This hypothetically requires the parties to conduct a complicated technical analysis based on the specific criteria set out in Chapter II of Decree 35. Moreover, compared to the 2004 Law on Competition, the prevailing regulations set out a lower proportion of combined market share, at 20%, to be subject to an economic concentration notification and remove the merger filing exception for those remaining as small and medium sized enterprise (**SME**) subsequent to the merger⁴.

Procedures for conducting the economic concentration notification⁵

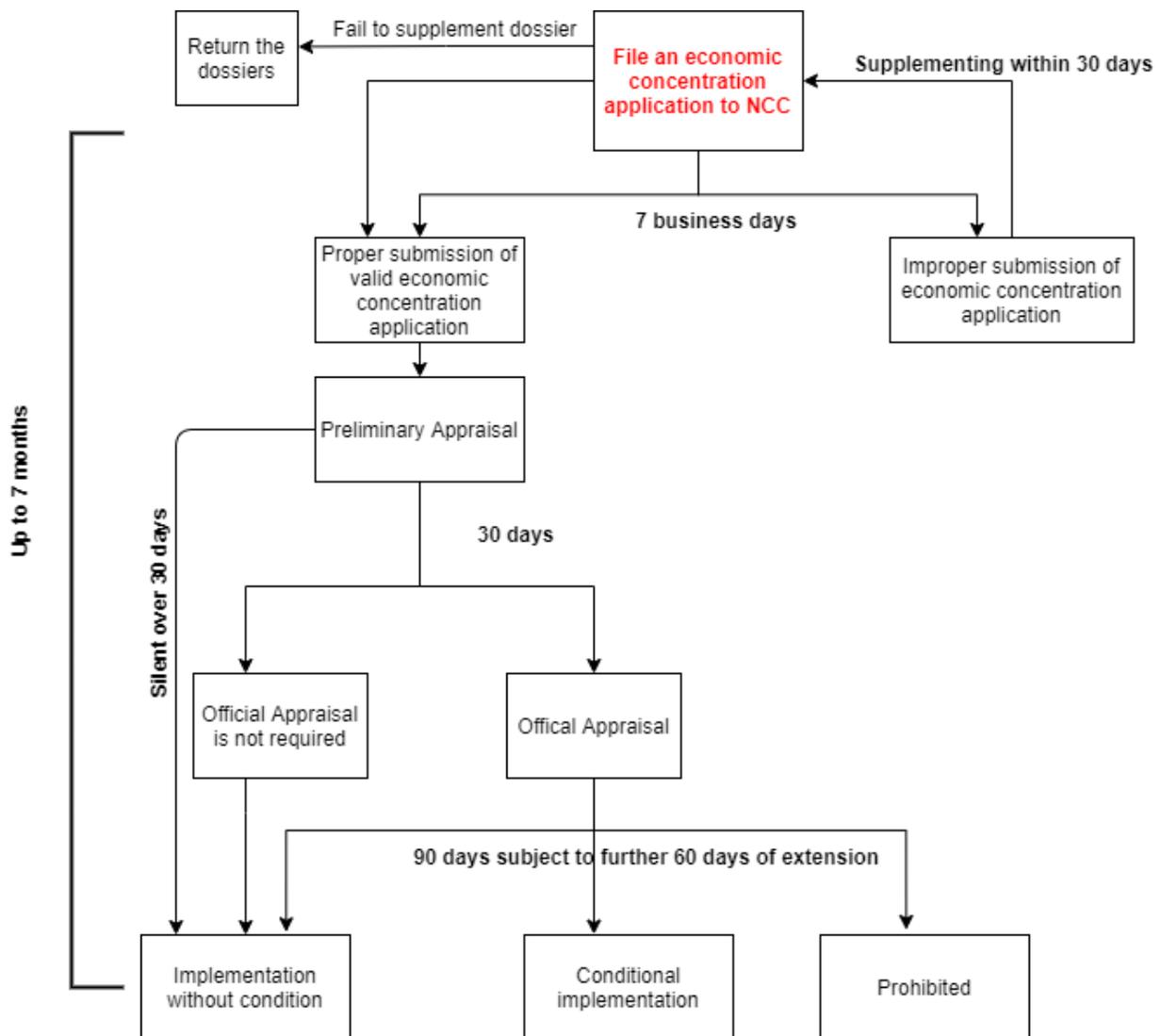
³ Decree 35, Art. 3.1.

⁴ The 2004 Law on Competition only refers to the criterion of *combined market share* at which a merger filing shall trigger. This applies to enterprises participating in an economic concentration having a combined market share in the relevant market of from 30 percent to 50 percent, except for those participating in the economic concentration have a combined share in the relevant market of less than 30 percent or if, after the economic concentration, still fall within the category of SME as stipulated by laws.

⁵ The 2018 Law on Competition and Decree 35.

The Vietnamese laws require any transactions reaching notification thresholds must be granted with approvals prior to completion, and remain silent on the transitional regulations applicable to the deals existing before Decree 35. This means a number of on-going transactions near to their closing date must face with the postponement as the parties need to prepare for the application in compliance with Decree 35. This, in some ways, negatively affects their commercial benefits since such additional licensing procedures have never been easy due to high costs and lengthening timeline. The below is an overview of merger filing process.

An illustration diagram on procedures for notifying the economic concentration



A description on the procedures for notifying the economic concentration

The procedures include two phases: (i) Preliminary appraisal and (ii) Official appraisal. In which:

Phase 1 - Preliminary appraisal

- ✓ The parties intending to participate in an economic concentration transaction shall submit the application for economic concentration to the NCC which comprises of the documents stated in Article 34.1 of the 2018 Law on Competition;
- ✓ Within 7 business days from receipt of an application, the NCC shall notify the applicant in writing that whether the application is proper and valid. If not, the NCC shall notify the applicant in writing and allow them 30 days to make amendments as from the date of notice;
- ✓ Within 30 days from receipt of a proper and valid notification dossier, the NCC shall inform the result of preliminary appraisal which can either be that (i) the intended economic concentration is approved; or (ii) the intended economic concentration must further be subject to the process of official appraisal. If NCC fails to arrive at any of the foregoing conclusions within 30 days, the intended economic concentration shall be deemed approved.

Phase 2 - Official appraisal

- ✓ The NCC shall carry out the official appraisal of economic concentration within 90 days as from the date of a notification of preliminary appraisal result, subject to a further maximum 60 days of extension in complicated cases. During this period, the NCC may require the applicant to supplement other documents maximum 2 times;
- ✓ Upon completion of official appraisal, the NCC may either decide to:
 - (i) approve the economic concentration without conditions; or
 - (ii) approve the economic concentration subject to conditions set out in Article 42 of the 2018 Law on Competition; or
 - (iii) prohibit the economic concentration.

The total timeline for economic concentration procedures may take up to 7 months.

To note that Article 34.1(b) of the 2018 Law on Competition only requires the parties to, among others, submit to the NCC the key summary of the economic concentration's contents or the draft contracts, the memorandum of understanding. Given such, the responsible parties must prepare for notification procedures from the very early stage of their transaction. This also leads to a number of complicated issues that they must handle, including but not limited to (i) the confidentiality of transaction; (ii) the lengthening timeline and cost escalation; and (iii) dealing strategies in case of economic concentration's rejection.

Administrative sanctions

The specific rate of penalty for violating economic concentration regulations shall be determined subject to the severity of violation. Notwithstanding the foregoing, any sanctions must not exceed 5% of the total turnover of violating enterprises in the relevant market in the fiscal year preceding the year of violation.



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