Public M&A

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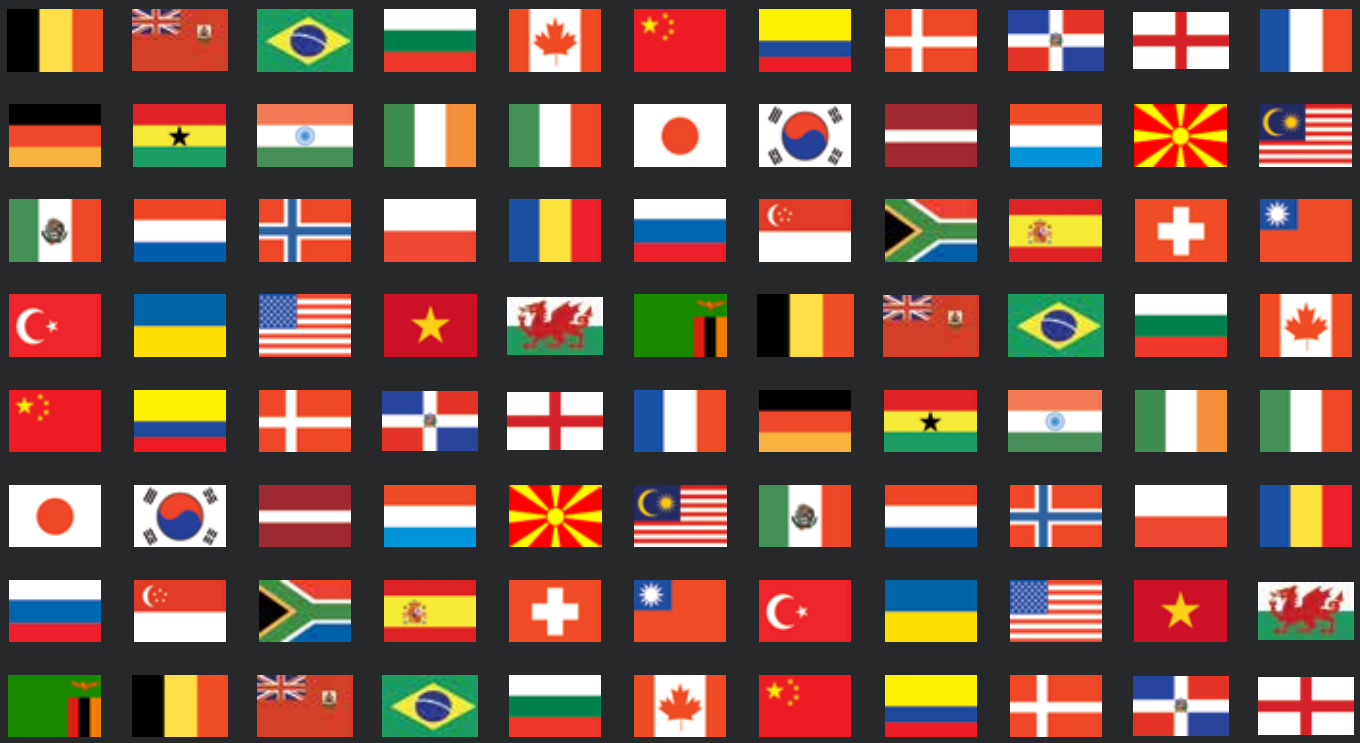

2018

GETTING THE DEAL THROUGH

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Public M&A 2018

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Preface

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First edition

Getting the Deal Through is delighted to publish the first edition of *Public M&A,* which is available in print, as an e-book and online at www.gettingthedealthrough.com.

Getting the Deal Through provides international expert analysis in key areas of law, practice and regulation for corporate counsel, cross-border legal practitioners, and company directors and officers.

Throughout this edition, and following the unique **Getting the Deal Through** format, the same key questions are answered by leading practitioners in each of the jurisdictions featured.

Getting the Deal Through titles are published annually in print. Please ensure you are referring to the latest edition or to the online version at www.gettingthedealthrough.com.

Every effort has been made to cover all matters of concern to readers. However, specific legal advice should always be sought from experienced local advisers.

Getting the Deal Through gratefully acknowledges the efforts of all the contributors to this volume, who were chosen for their recognised expertise. We also extend special thanks to the contributing editor, Alan M Klein of Simpson Thacher & Bartlett LLP, for his assistance in devising and editing this volume.

GETTING THE DEAL THROUGH

London
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Vietnam

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1 Types of transaction

How may publicly listed businesses combine?

Publicly listed business is typically combined via acquisitions and mergers, in which share purchases or subscriptions are the most common. Where several business are targeted by an investor, the deal would be structured in two stages, including spin-off and then share transfers, whereby those interested shall be carved out and separated into a special-purpose vehicle of which shares are then acquired by an investor. A merger is a situation where one or more companies (merging companies) may be merged into another company (merged company) by way of transfer of all lawful assets, rights, obligations and interests to the merged company and, at the same time, termination of the existence of the merging companies. The merged company shall issue new shares to swap the share of merging companies at an agreed rate.

The Law on Enterprises (effective from 1 July 2015) allows companies of different types to be merged or consolidated without a change of company type before the merger or consolidation.

2 Statutes and regulations

What are the main laws and regulations governing business combinations and acquisitions of publicly listed companies?

In addition to any sector-specific legislation, business combinations and acquisition of publicly listed company are mainly governed by:

- the Law on Enterprises and its guiding regulations (Decree No. 78/2015/ND-CP and Decree No. 96/2015/ND-CP);
- the Law on Investment and its guiding regulation (Decree No. 118/2015/ND-CP);
- the Law on Securities and its guiding regulations (Decree No. 58/2012/ND-CP as amended by Decree No. 60/2015/ND-CP and Circular No. 123/2015/TT-BTC); and
- the Law on Competition and its guiding regulations (Decree 116/2005/ND-CP as amended by Decree No. 119/2011/ND-CP).

The Law on Enterprise, Law on Investment and Decree No. 118/2015/ND-CP regulate general conditions and formality in business combination and acquisition for all companies incorporated in Vietnam, while the Law on Securities, Decree No. 58/2012/ND-CP (as amended by Decree No. 60/2015/ND-CP) and Circular No. 123/2015/TT-BTC deal with several specific issues with respect to publicly listed companies. If the deal involves credit institutions, Circular No. 04/2010/TT-NHNN (as amended by Circular No. 36/2015/TT-NHNN) shall apply. In the case of acquisition of an insurance business company, the Law on Insurance Business should govern. Cross-border transactions will be subject to the Law on Investment, the Ordinance on Foreign Exchange (and its guiding Circulars 05/2014/TT-NHNN and No. 19/2014/TT-NHNN), Vietnam's World Trade Organization (WTO) commitments, ASEAN Comprehensive Investment Agreement, ASEAN Framework Agreement on Services and other international conventions to which Vietnam is a signatory that, among others, set out the market entry conditions for foreign investors. Where an M&A transaction triggers a competition concern, the Law on Competition must be observed.

3 Transaction agreements

Are transaction agreements typically concluded when publicly listed companies are acquired? What law typically governs the agreements?

Typical documents for business combinations include merger agreement, share purchase or subscription agreement or asset transfer agreement. Ancillary agreements such as shareholders or voting agreement, transition agreement, escrow agreements, executive employment agreements are also common depending on underlying facts and circumstances of the transaction.

Typically, merger agreements, share subscription agreements and shareholders or voting agreements involving a Vietnamese company are governed by Vietnamese law. The governing law for other transaction documents, on the other hand, depends on the negotiation and agreement among the parties themselves. The choice of foreign law rather than Vietnamese law is accepted provided it is not contrary to the basic principles of Vietnamese law. There are increasing cross-border M&A transactions selecting foreign law as the governing law of the transaction agreements when publicly listed companies are acquired.

4 Filings and fees

Which government or stock exchange filings are necessary in connection with a business combination or acquisition of a public company? Are there stamp taxes or other government fees in connection with completing these transactions?

M&A transactions involving companies that are active in certain industries such as banking and finance, aviation or insurance may require the approval of their industry regulator. When state-owned assets or equity are sold, the approval of the relevant state bodies is required. In addition, the transaction may have to be conducted through a competitive method such as tender or bidding if the transaction assets are funded by 30 per cent or more or 500 billion Vietnam dong or more state capital.

Further, if the business combination involves offering of securities of a listed company by way of private placement of shares, the offering application must be filed with and approved by the securities authorities (ie, the State Securities Commission (SSC)), and additional listing application or filing with the relevant stock exchange may be required prior to the transaction.

A tender offer or proxy solicitation is also subject to a filing requirement with the SSC. Specifically, except for the exceptional cases listed in question 9, the Law on Securities requires:

- an acquirer who wishes to acquire 25 per cent of the shares of the target company;
- a shareholder and related parties holding 25 per cent or more of the voting shares continuing a purchase of 10 per cent or more of the voting shares; or
- a shareholder and related parties holding 25 per cent or more of voting shares continuing the purchase of 5 per cent to less than 10 per cent of the voting shares in less than one year after the completion of a previous general tender offer

to file a tender offer application with the SSC. The process for conducting a tender offer includes three major steps as follows: (i) registering

the tender offer application to the SSC; (ii) making a public announcement regarding the tender offer and conducting the tender offer; and (iii) reporting to the SSC. The application comprises the registration application, the shareholders' or board's resolutions of the purchaser regarding the tender offer and the shareholders' resolutions of the target in the event it redeems its shares to reduce its charter capital (if any). Upon completion of the tender, the offeror must report the tender results to the SSC within five days. For the listing of companies after merger and consolidation, there are several conditions with regards to operation duration, number of profitable fiscal years, number of fiscal years of accrued loss, overdue debts and so on.

SSC approval is also required if a public target company is operating businesses that are subject to foreign ownership limit (FOL) and the potential transaction requires SSC FOL lift-up prior to closing. The publicly listed target may have to spin off or remove certain WTO unbound activities to obtain SSC approval for FOL lift-up, and this process usually involves foreign investment review approval. On the other hand, in some transactions, SSC approval for lock-up is necessary to ensure the foreign participation.

When publicly listed companies are acquired, if the transaction price is beyond the trading band at the time of the transaction, the off-band transaction shall be performed outside the stock exchange (off-market transaction) and be required to obtain prior approval from the SSC on a case-by-case basis. Upon approval from the SSC, an off-market transaction must be registered with and confirmed by the Vietnam Securities Depository before closing (ie, wiring of purchase price to selling shareholders' bank account and the depositing of selling shares into the investor's securities deposit account).

For cross-border business combinations, an application needs to be filed by the foreign investor or acquirer to the local foreign investment authority and subject to foreign investment review approvals. Upon the completion of a business combination or acquisition of a public company transaction, an application for registration needs to be filed with a local enterprise registration authority.

In certain circumstances, a business combination involving a Vietnamese company may be subject to the reporting requirements of the Vietnam Competition Authority (VCA). Under the Law on Competition and Law on Enterprises, if the parties to a business combination have a combined market share of between 30 per cent and 50 per cent in the relevant market they must notify the VCA before the proposed combination. The proposed combination can only be carried out after written confirmation has been received from the VCA that the combination is not prohibited. This will be issued within 45 days from the registration or sometimes up to 105 days for complicated cases of economic concentration. The combination shall be prohibited if the combined market share is above 50 per cent in the relevant market, subject to two following exemptions:

- where one or more of the parties participating in the economic concentration is or are at risk of being dissolved or of becoming bankrupt; or
- where the concentration has the effect of extension of export or contribution to socio-economic development or to technical and technological progress. These exemptions, however, are not automatically granted. The relevant parties must file with the VCA a request for an exemption for economic concentration.

In the case of a merger or consolidation, the investor must comply with the procedures under the Law on Enterprises regarding the liquidation of a company and the formation of a new company. Such events must be registered with the business registration authority and the relevant authorities.

If the acquisition results in a shareholder directly or indirectly owning upwards of 5 per cent of a public company, then information about such shareholder shall be reported to the SSC, the stock exchange where the shares are listed within seven days.

A business combination may require a change to be made to the investment certificate or investment registration certificate or business registration certificate or enterprise registration certificate of the target company, or both. A government fee of about US$20 may be paid to register and compulsorily publicise such change with the National Business Registration Portal. In addition, the transaction will be subject to various Vietnamese taxes depending on the structure of the transaction, as further specified in question 18.

In addition, the fee for registering newly issued stock is about 5 million Vietnam dong, and in case the listed stock, which is required by law to exchange via the central stock exchange, is occasionally allowed to be transferred via an off-exchange transaction between parties, a fee of 0.1 per cent of the transaction value shall be charged when the buyer returns to the Vietnam Securities Deposit to register its ownership.

5 Information to be disclosed

What information needs to be made public in a business combination or an acquisition of a public company? Does this depend on what type of structure is used?

The information that needs to be made public in a business combination will depend on the type of structure used. For those required for public offer, the offeror must file a registration application with the SSC that contains various information such as the name, address and historical business performance of the offeror and its market share in the relevant business; the name and address of the target; the relationship between the offeror and the target; the current shareholdings of the offeror in the target; the number of shares to be acquired; the intention of the acquirer post-acquisition with respect to the target's operation and employees; the sources of capital to fund the acquisition, etc. Upon receiving the approval of the SSC, the offeror must make public disclosure of the offer in three consecutive issues of an electronic newspaper or printed newspaper.

Furthermore, an acquisition of listed shares related to internal shareholders requires the disclosure of the plan of acquisition three days in advance and the outcome thereof within three days upon consummation. A deal involving a 5 per cent shareholder of a public company must be reported to the SSC if there is any change of 1 per cent or more in the shareholding or if he or she is no longer regarded as a major shareholder of the public company within seven days from the date of deal closing. Generally, it is not compulsory to disclose all transaction documents, but some identity information of shareholders and basic terms of the deal like volume, timeline and form of transaction.

Besides, a listed company and a large-scale public company must publicise information relating to capital contribution valued at 10 per cent or more of total assets of the company into other organisation; capital contribution valued at 50 per cent or more of charter capital of receiving companies receiving capital contribution; as well as purchasing, selling assets valued at more than 15 per cent of the company's total assets according to the latest audited financial statement or the latest reviewed semi-annual financial statement.

In case there is a merger of companies, the companies must notify their creditors and employees of the merger or consolidation within 15 days from of the merger or consolidation resolution.

Furthermore, if the merger or consolidation triggers competition concerns then the companies must notify the VCA or the Competition Council thereof. Information to be disclosed includes financial statements of the past two years; a report on the market share in the relevant market of the parties in the past two years, list of subsidiaries, list of goods and services supplied, etc.

6 Disclosure of substantial shareholdings

What are the disclosure requirements for owners of large shareholdings in a public company? Are the requirements affected if the company is a party to a business combination?

A shareholder owning 5 per cent or more of a public company must report to the public company, the SSC, the stock exchange where the shares are listed within seven days from the date of acquiring such large shareholdings. Where there is any material change with respect to the previously reported information or a change in the shareholdings that exceeds 1 per cent of the outstanding shares, such shareholder must also submit the amended report to the public company, SSC and the stock exchange where the shares are listed within seven days of the changes being made.

A shareholder owning from 5 per cent of the voting shares of a public company must also report to the public company, the SSC, the stock exchange where the shares are listed within seven days from the date of his or her no longer being a major shareholder of the public company.

7 Duties of directors and controlling shareholders

What duties do the directors or managers of a publicly traded company owe to the company's shareholders, creditors and other stakeholders in connection with a business combination or sale? Do controlling shareholders have similar duties?

Under Vietnamese law, directors (or general director) who manage the day-to-day business operations of the company shall be supervised by the management board and shall be answerable to it and before the law for the exercise of their delegated powers and the performance of their delegated duties.

Besides the fiduciary duties that the directors of a company will assume under the Law on Enterprises, they also have the following duties.

Directors, senior management and major shareholders with knowledge of a takeover situation shall not abuse such information to trade shares for their personal benefit or supply such information, encourage or solicit others to trade shares before the official public disclosure of the tender offer. In addition, the board of the target must notify the SSC and its shareholders of its opinion about the offer to acquire.

Depending on the type of structure applied and the value of transaction, a business combination of a shareholding company may fall within the authority of the shareholders or the board of management. Normally, a business combination or sale with value of less than 35 per cent of total asset value of such company (or a smaller percentage stipulated in the company charter) is under the authority of the board of management. The management board is required to exercise its powers and duties honestly and diligently to the best of its abilities in furtherance of the best lawful interests of the company. A merger or consolidation or business combination or sale with substantial value is a matter under the shareholders' authority, thus a decision to make such business combination or sale must be passed by the shareholders in a convened meeting. The chairman of the board is responsible for convening such meeting pursuant to the procedures stipulated by law in order to obtain the shareholders' approval. Specifically, the chairman shall send notice of the meeting, the agenda and documents to the shareholders at least 10 working days in advance of the scheduled meeting.

The law provides that the contract for a business combination in the form of merger and consolidation must be sent to creditors within 15 days of its being approved. It does not specify the responsible persons but usually it is the legal representatives of the companies. In addition, the business combination shall be announced to the employees within the above-specified time limit.

Directors and managers must also declare the details of companies in which they own shares and companies in which their related parties own more than 35 per cent equity interest. Such declaration must be conducted within seven working days from the date of the relevant interest arising. A business combination involving either of the companies must be approved by the shareholders or the board, as the case may be. A party who has an interest in such transactions cannot vote.

A director (general director) of a credit institution may not concurrently hold the position of director (general director), deputy directors, chairman or member of the board of other companies. A director of a public company cannot simultaneously hold the position of chairman of the management board of the same public company.

With respect to controlling shareholders, except for the reporting obligation mentioned in question 6, basically, they do not have any duty to the company or the minority shareholders in the context of a business combination.

Generally, the Law on Securities prohibits the following conduct:

- directly or indirectly acting fraudulently or cheating, creating false information or omitting essential information that causes a serious misunderstanding and adversely affects a public offering, listing and trading securities, conducting business and investing in securities, securities services and the securities market;
- disclosing false information with the aim of persuading or provoking the purchase and sale of securities, or disclosing incomplete or out-of-date information about events that have a major effect on the price of securities on the market;
- using inside information to purchase or sell securities for oneself or for a third party; disclosing or supplying inside information or advising another person to purchase or sell securities on the basis of inside information;
- colluding in the purchase and sale of securities aimed at creating a false supply and demand; trading securities by colluding with or persuading others to continuously purchase and sell securities in order to manipulate their price;
- combining the aforementioned methods or using other trading methods to manipulate the price of securities; and
- implementing securities trading activities without the SSC's approval.

8 Approval and appraisal rights

What approval rights do shareholders have over business combinations or sales of a public company? Do shareholders have appraisal or similar rights in these transactions?

Under the Law on Enterprises, any proposals for the issuance of new shares or disposing of assets of material amounts of the company, or a merger or consolidation shall require the approval of shareholders present and voting in person or by proxy representing at least 65 per cent of the voting rights of the attending shareholders.

In addition, a shareholder is entitled to demand the cancellation of shareholders' resolutions in the following cases:

- the order and procedures for convening the shareholders meeting did not comply with the Law on Enterprise and the charter of the company; or
- the order and procedures for issuing a resolution and the content of the resolution breach the law or the charter of the company.

Within 90 days from the date of receipt of the minutes of the shareholders meetings, a shareholder or a group of shareholders holding 10 per cent or more of the total ordinary shares for six consecutive months or more shall have the right to request a court or an arbitrator to consider and cancel such resolution of the shareholders.

If a public tender is required, the public tender may be waived if 51 per cent of the voting rights of the attending shareholders has been obtained. The selling or buying shareholders having a related or conflict of interest are not permitted to vote.

There is no regulatory appraisal right of shareholders towards a business combination or sales of a public company.

9 Hostile transactions

What are the special considerations for unsolicited transactions for public companies?

The Securities Law establishes three situations where the investor acquiring voting shares of a public company must tender a general offer to acquire:

- if the proposed acquisition results in the investor owning 25 per cent or more of voting shares that are issued and outstanding;
- organisations or individuals and related persons holding 25 per cent or more of voting shares to purchase 10 per cent or more of voting shares, which are issued and outstanding; and
- organisations or individuals and related persons holding 25 per cent or more of voting shares to continue the purchase of 5 per cent to less than 10 per cent of the voting shares less than one year after the completion of a previous general tender offer.

In addition, the law provides for seven exempted situations that are not subject to public offering:

- if the proposed acquisition results in the investor owning more than 25 per cent or more of the newly issued voting shares according to the issuance plan already passed by the shareholders of the public company;
- if the proposed acquisition results in the investor owning 25 per cent or more of the voting shares that are already approved by the shareholders of the public company;
- internal transfer of shares between the holding company and the subsidiaries;
- gift, inheritance or share certificates;
- when participating in a public auction of securities for sale is not required to implement the provisions on public offers to acquire if

such entity intends to purchase shares with share ownership ratios at or exceeding the threshold subject to a tender offer;
- transfer under the court's decision; and
- other transactions as provided by the Ministry of Finance.

Generally, the investor must follow the following process in a takeover:
- submit a tender offer to the SSC and send a copy to the target;
- the target makes an announcement of the offer within three days;
- the SSC gives its opinions within 15 days;
- the board must send its opinions regarding the offer to the SSC and shareholders of the target within 10 days. The board's opinions must be in writing and signed by majority of the board members;
- the investor must make an announcement in three consecutive issues of a printed or online newspaper and the website of the stock exchange where the shares are listed, within seven days from its receipt of the SSC's opinion;
- the investor must report the results of the offer to the SSC within five days from completion of the offer and at the same time make a public announcement on the result of the offer;
- the investor must appoint a securities company as an agent conducting the offer; and
- the offer period must be no shorter than 30 days and no longer than 60 days. It is noted foreign ownership of shares of a public company is now removed from the overall 49 per cent cap. Particularly, on 26 June 2015, the government issued Decree No. 60/2015/ND-CP and among the changes, the most welcomed point is the relaxation of the overall 49 per cent cap on foreign ownership in Vietnamese public companies. From 1 September 2016, in general, foreign ownership of public companies will not be limited. Decree 60, however, lists certain cases where foreign ownership will still be restricted, such as certain sectors under Vietnam's international treaties (eg, Vietnam's WTO commitments); and sectors restricted to foreign investors under the Law on Investment. If specific foreign ownership limitations for such conditional sectors have not yet been set, the foreign ownership in such cases will be capped at 49 per cent. In addition, where an investor acquires newly issued shares of a company in a private share placement the investor is restricted from selling the shares within one year.

10 Break-up fees – frustration of additional bidders

Which types of break-up and reverse break-up fees are allowed? What are the limitations on a public company's ability to protect deals from third-party bidders?

Vietnamese law does not prohibit or otherwise regulate break-up fees and reverse break-up fees. Generally, breaches to the break-up fee agreements may lead to contractual penalties whereby the breaching party has to pay a pre-determined amount to the other parties. It is critical to note that a liquidated damages clause is not specifically provided under Vietnamese law. As a general understanding, the amount of the liquidated damages is determined by reference to an estimate of the likely loss suffered by the non-defaulting party as a result of the breach. In other words, the amount of damages is pre-agreed and does not depend on the non-defaulting party demonstrating the amount of loss actually suffered. On the other hand, Vietnamese law provides for two types of monetary remedies for breach of contract, namely penalty for breach and compensation for damages. In term of penalty for breach, the parties may agree on the penalty amount, but the amounts may not be more than 8 per cent of the value of the contractual obligation which is the subject of the breach if they are considered as a penalty. Furthermore, the aggrieved party can request for damages for loss. The value of damages for loss shall comprise the value of the actual and direct loss that the aggrieved party has suffered owing to the breach, as well as the direct profits the aggrieved party would have earned had such breach not been committed. Additionally, although not specifically regulated, the fees should be fully disclosed in the offer document that is registered with the SSC and in the offer announcement. The break-up fees would also be approved by the shareholders of the target. Where the transaction is between affiliated companies, issues such as transfer pricing and related-party transactions should be considered. If the fees are to be paid to a foreign party it will also raise a foreign exchange issue.

We are not aware of any provisions that prohibit or restrict financial assistance in business combinations.

Vietnamese law does not place limitations on a company's ability to protect deals from third-party bidders. As mentioned above, the board of the target must send its opinions regarding a takeover offer to the SSC and shareholders within 10 days. The board's opinions must be in writing and signed by majority of the members of the board. If the board objects to the offer, it is unclear whether the deal can proceed or be aborted. Except for some special circumstances, shareholders are not restricted from selling their shares.

11 Government influence

Other than through relevant competition (antitrust) regulations, or in specific industries in which business combinations or acquisitions are regulated, may government agencies influence or restrict the completion of such transactions, including for reasons of national security?

As mentioned in the foregoing questions, a foreign investment approval from the local foreign investment authority is required prior to the completion of a business combination involving foreign investors.

The Vietnamese government may restrict or bar certain cross-border transactions for reasons of national security or public policies of Vietnam.

Cross-border M&A transactions shall comply with the commitments of Vietnam upon accession to WTO. Transactions involving a Vietnam-incorporated company active in multiple businesses usually require appraisals of various line ministries and satisfaction of numerous industry specific conditions. Business lines that are not required to be to open to foreign investment under the WTO framework are subject to the sole discretion of the Vietnamese authorities. Owing to the workload in some big cities, a lack of inter-agency coordination and a lack of implementing regulations in several sectors, these reasons may break deals or delay business combinations in some situations.

12 Conditional offers

What conditions to a tender offer, exchange offer, mergers, plans or schemes of arrangements or other form of business combination are allowed? In a cash transaction, may the financing be conditional? Can the commencement of a tender offer or exchange offer for a public company be subject to conditions?

A tender offer may be conditional only upon the minimum number of shares being tendered (ie, 25 per cent); in other words, the offeror will not be obligated to purchase any of the shares tendered if the actual number of shares tendered falls below the minimum number set by the offeror at the outset. During the tender offer process, the offeror may withdraw its offer under certain circumstances such as an increase or decrease of charter capital or disposal of part or whole assets or business of the target company and subject to the approval of the SSC.

As to other forms of business combinations, conditions may be agreed by the parties and typically include shareholder approval, regulatory approvals and third-party consents.

A tender offer must ensure that:
- all conditions specified in a tender offer apply equally to all shareholders in the target company;
- the relevant parties can fully access the tender offer information;
- the self-determination right of the shareholders of the target company is fully respected;
- the law on securities and securities market and other relevant laws are observed; and
- the party making tender offer must appoint a securities company as an offering agent.

A tender offer must be between 30 and 60 days. A tender offer may be supplemented or revised with terms no less favourable than those of the previous offers.

During a tender offer process, the offeror shall not:
- directly or indirectly purchase or undertake to purchase the subject shares of the offer outside the offer tranche;
- sell or undertake to sell the subject shares of the offer;
- treat shareholders holding the subject shares unfairly;

- supply separate information to a sub-group of shareholders or provide a different level of information to different groups of shareholders or at different times;
- refuse to purchase the subject shares of target company or fund certificates of investors from the target investing fund; or
- purchase the target company's shares or fund certificates of the target investing fund, which is contrary to the terms disclosed in the registration of tender offer.

After making a public announcement, the offeror may only withdraw the offer in the following circumstances:

- the total number of shares registered to sell is less than that intended to be purchased by the offeror as announced;
- the target company increases or reduces the number of its voting shares via a share split, share consolidation or conversion of preference shares;
- the target company reduces its shareholding capital;
- the target company issues additional securities to increase charter capital; or
- the target company sells all or a part of its business or assets.

The purchaser must specify in its disclosure report to the SSC the sources of funds it uses for the acquisition. In addition, financing may be conditional upon successful completion of the tender offer, but, typically be escrowed in advance as the proof of payment is sometimes required to be present to the licensing authorities.

13 Financing

If a buyer needs to obtain financing for a transaction involving a public company, how is this dealt with in the transaction documents? What are the typical obligations of the seller to assist in the buyer's financing?

If a buyer needs debt financing to complete a transaction, the seller may require the buyer to provide and attach the relevant financing or commitment documents as an exhibit to the transaction agreement, and require the buyer to take all actions necessary to obtain that financing.

Vietnamese law is silent on the seller's obligations to assist the buyer's financing in an M&A deal. While sellers in Vietnam are inclined to cooperate with the buyer for obtaining financing for the transaction, sellers typically do not have, and would be reluctant to accept, any contractual obligation to support or assist in the buyer's financing. In practice, the seller may, upon mutually agreement by the parties, assist the buyer in its financing by recommending some sound financing entities to the buyer or signing necessary documents relating to the buyer's financing purposes.

14 Minority squeeze-out

May minority stockholders of a public company be squeezed out? If so, what steps must be taken and what is the time frame for the process?

Vietnamese law does not specifically regulate situations where minority shareholders are squeezed out. Since the law does not require the consent of all shareholders, a business combination may still occur against the will of the minority shareholders. In the case of a merger approved by a supermajority representing 65 per cent of the voting rights of the shareholders present or by proxy, the merger plan will be binding on all the shareholders. If the merger plan calls for the transfer of all the company's shares, then the entire share capital of the company will be transferred to the acquirer (including the shares of any dissenting shareholder). There are no regulations specifying the steps to be taken and time frame for the process in this particular minority squeeze-out.

The squeezed-out shareholders are entitled to request that the company buy back their shares at the prevailing fair price if they vote against a merger. The request shall be made to the company in writing within 10 days of the shareholders' meeting approving the merger. After receiving the request, the company shall buy back the shares of the dissenting minority shareholders at fair price within 90 days from receipt of request. In contrast, if there is no mutual agreement reached, the parties may retain a professional price appraiser to determine that fair price.

The minority shareholders of a public company are nevertheless protected in a takeover situation where they can refuse to sell the shares to the offeror or are even entitled to withdraw the subject shares at any time during the offer process. They also have the put option to compel the acquirer to buy their shares at the announced transaction price if, as a result of the acquisition, the acquirer owns more than 80 per cent of the outstanding shares of the target.

15 Cross-border transactions

How are cross-border transactions structured? Do specific laws and regulations apply to cross-border transactions?

Cross-border transactions may be structured as an asset or equity deal.

Asset acquisitions usually involve the establishment of a wholly owned entity specifically for the purpose of acquiring the business and undertaking of the target. Asset deals used to be the preferred choice owing to the complexity and legal loophole of the equity deal.

Cross-border transactions shall be subject to the FOL for public companies regulated by Decree No. 58/2012/ND-CP (as amended by Decree No. 60/2015/ND-CP). In particular, the FOL shall be subject to the Vietnam's WTO Schedule of Specific Commitments in Services, or capped at 49 per cent if the target is involved in conditional business. Conditional businesses are those business lines for which the laws require one or several conditions and a list thereof is set out by the Law on Investment. Under the Law on Investment, an acquisition of 51 per cent shares or more in a local company or acquisition of shares of a local company engaging in conditional business sector shall generally be subject to a foreign investment review approvals. Therefore, in structuring cross-border transactions, attention should be paid to Vietnam's foreign investment regulatory scheme. Under Vietnam's foreign investment regulations, Vietnam's industries are categorised into permissible and prohibited industries that are applicable to both foreign and domestic investors, while foreign investors are subject to several further conditions, such as market entry restriction according to international agreements to which Vietnam is a signatory, such as the WTO Commitment or other conditions specified under relevant laws.

Equity acquisitions may be onshore transactions whereby the equity of a shareholder in a Vietnamese domestic company or FIE is acquired directly. An onshore equity deal is subject to the approval by the relevant Vietnamese authorities and governed by the Law on Investment and Decree 118/2015/ND-CP.

Equity transactions may be conducted offshore at investor level, which would involve the sale of the equity of the foreign shareholder in an offshore company. They will usually need to register the change of investor with the Vietnamese authorities. Where a Vietnamese resident invests in an offshore entity that has been established to make round-trip investments back into Vietnam, the investor needs to conduct the offshore investment procedures with respect to the establishment of such offshore entity and periodically report the offshore investment activities to the competent authorities of Vietnam, including subsequent disposal of any equity in the company.

16 Waiting or notification periods

Other than as set forth in the competition laws, what are the relevant waiting or notification periods for completing business combinations or acquisitions involving public companies?

The public tender shall be subject to notification period as mentioned in question 12. Transactions involving shares of internal shareholders must be notified three days in advance.

For a normal merger, the public company shall:

- notify the shareholders of the scheduled meeting regarding a merger at least 50 days in advance;
- notify creditors of the merger resolution and make a public announcement; and
- the authorities decide on whether to approve a domestic merger within five working days after receipt of all the required documents.

For a merger with a foreign element, the prescribed approval period is between 15 and 45 working days.

For a takeover deal:

Update and trends

The second half of 2017 witnessed some high-profile deals of state divestment with the successful sale of a 53.59 per cent shareholding at Sabeco for about US$5 billion value and the sale of 128 million DIC Corp shares. The balance of state-owned companies and state divestment is expected to keep steady in 2018, especially with the direction under Resolution No. 1232/QĐ-TTg dated 17 August 2017 of the government of Vietnam. Above all, the public is now paying attention to plan of exit of 20 per cent shareholding in Vietnam Airlines and 24.9 per cent shareholding in Petrolimex by Ministry of Industry and Trade in 2018. Moreover, with a plan of state divestment for Vinatex, Viglacera, Lilama or Vinapharm, or the IPO plan of PV Oil or PV Power during, 2018 is expected to be a busy M&A year with respect to state-owned companies. In the private sector, as reported by the Foreign Investment Authority of the Ministry of Industry and Trade, 2017 saw the biggest influx since 2009 of foreign direct investment capital at US$36 billion, primarily from investors from Japan, Korea and Thailand. M&A transactions in 2018 are set to continue apace in the retail, real estate and consumer goods business sectors. Vietnam is still making effort to perfect its regulatory framework in general and M&A in particular. Among other things, 2018 will see the issuance of a new Antitrust Law and proposed amendment to the Law on Securities. Further, simplifying the administrative procedure in business registration and investment will continue in 2018, as enshrined by Resolution No. 136/NQ-CP dated 27 December 2017 of the government of Vietnam. Finally, the Comprehensive Progressive Agreement for the Trans-Pacific Partnership, which was inked on 9 March 2018, is also expected to boost the expansion and success of cross-border M&A transactions in the years ahead.

- the target makes an announcement of the offer within three days from the receipt of the tender documents;
- the SSC reviews the tender documents within 15 days;
- the board must send its opinions regarding the offer to the SSC and the shareholders of the target within 10 days from receipt of the tender documents;
- the acquirer makes an announcement on three consecutive issues of a newspaper and the website of the stock exchange where the shares are listed, within seven days from its receipt of the SSC's opinions;
- the length of the offer period is between 30 and 60 days from the date recorded in the offer registration sent to SSC; and
- the acquirer reports the results of the tender to the SSC within five days of completion.

Companies in specific industries are subject to industry-specific regulations that stipulate different waiting and notification periods for completing business combinations. Specific legal advice should be sought regarding such mergers.

17 Sector-specific rules

Are companies in specific industries subject to additional regulations and statutes?

M&A transactions involving companies in specific industries are subject to additional and specific regulations and statutes. In principle, approval is usually required before a business combination may proceed. Foreign equity in certain industries is capped (for example, at 30 per cent for banking) or subject to industry-specific approvals (namely, distribution services), or both.

Business combinations involving banks, insurance companies or securities firms are governed by the Law on Credit Institutions, Law on Insurance Business, and the Law on Securities and rules promulgated thereunder. These laws and their enforcing rules prescribe, among others, approval procedures, terms and conditions that are permissible or restricted of the transactions, and qualifications for the acquirer and the target.

Business combination in certain investment sectors require approval of the relevant authorities at ministerial level. Opinions of those central ministries have considerable impact and can determine whether the business combination can be approved.

18 Tax issues

What are the basic tax issues involved in business combinations or acquisitions involving public companies?

The tax treatment will depend on the structure of the transaction and legal status of the seller. If the seller is a legal person, corporate income tax (CIT) at 20 per cent will be levied on the capital gains generated from the transfer of assets. The tax base would be the actual sales price less the cost of acquiring the assets and direct expenses of transferring such assets. In addition, an asset transaction (except for special assets such as land use right, intellectual property, etc) will be subject to VAT ranging from zero per cent up to 10 per cent, while share transfer will not. Transfer of certain property transactions such as real estate will be subject to a property registration fee at 0.5 per cent or those of vehicles will be charged at 2 per cent. The CIT rate of 20 per cent will also apply in the case of a share transfer, saving that newly issued shares subscription shall not be subject to CIT.

Where the seller is a natural person, personal income tax is usually levied on profit derived from the transfer of shares. For the capital contribution of liability limited company, the tax rate is 20 per cent of the income. For the shares of a joint stock company, including a listed or unlisted company, the tax rate of 0.1 per cent of the transaction value shall be applied.

Furthermore, special adjustment rules that govern transfer pricing may apply if the transaction involves affiliated parties. The parties may also take advantage of various double-taxation agreements that Vietnam has entered into with other countries in cross-border transactions involving Vietnam-incorporated companies.

19 Labour and employee benefits

What is the basic regulatory framework governing labour and employee benefits in a business combination or acquisition involving a public company?

Under the Labour Code, in a share deal the acquirer is responsible for taking over the labour contracts of the employees of the target company. Any redundancy as a result of the combination shall be subject to a rigorous procedure including an employment plan to be worked out with the participation of the trade union representatives. Job loss allowances for those employees serving for 12 months or more could be payable to the extent not covered by the unemployment insurance regime in accordance with the Law on Social Insurance, which is equivalent to an aggregate amount of one month's wages for each year of employment, but no less than two months' wages. In an asset deal, the labour contract shall not be automatically novated and the parties involved should arrange a handover of employees, which includes termination of employment contracts with the seller and execution of a new labour contract with the buyer. The early termination of a labour contract may trigger severance allowance to the extent not covered by unemployment insurance, which is half a monthly wage per year of service for those serving 12 months or more.

20 Restructuring, bankruptcy or receivership

What are the special considerations for business combinations or acquisitions involving a target company that is in bankruptcy or receivership or engaged in a similar restructuring?

Bankrupt companies are subject to the Bankruptcy Law, which took effect on 1 January 2015. The Bankruptcy Law applies to all entities in Vietnam that have legal person status.

Where there is a decision to start the bankruptcy procedures, the Bankruptcy Law does not allow a bankrupt company to sell or exchange its shares or transfer its property without the prior written consent of the presiding receivers.

Certain transactions entered into by a bankrupt company within six months or 18 months in case of internal transaction prior to the court accepting a bankruptcy application may be invalid, such as where the bankrupt company has donated its property, paid undue

debts, mortgaged or pledged property for debts or carried out other transactions aiming to disperse its property. In addition, within five days of the court accepting a bankruptcy application, if it is deemed that a suspension of the performance of valid contracts that are being performed or have not yet been performed will be more beneficial for the bankrupt company, the performance of such contracts shall be suspended. Therefore, investors dealing with such entities should take care to ensure that their dealings are conducted in a manner that will not expose them to the risk of a transaction being suspended or terminated.

21 Anti-corruption and sanctions

What are the anti-corruption, anti-bribery and economic sanctions considerations in connection with business combinations with, or acquisitions of, a public company?

The Law on Anti-corruption of Vietnam does not refer to business combinations.

A fine up to 10 per cent of the total revenue in the financial year prior to the year in which a breach of the provisions of business combinations was committed shall be imposed on each enterprises participating in carrying out a prohibited merger, consolidation, acquisition or joint venture, as stipulated in the Law on Competition.

A fine up to 10 per cent of the total revenue in the financial year prior to the year of each enterprise in which the breach was committed shall be imposed on each enterprise participating in given economic concentration that was not notified as required by law.

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