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NOTABLE CHANGES IN THE DRAFT DECREE REPLACING DECREE NO. 35/2020/ND-CP DETAILING A NUMBER OF ARTICLES OF THE LAW ON COMPETITION

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INTRODUCTION:

The Ministry of Industry and Trade is currently developing a Draft Decree replacing Decree No. 35/2020/ND-CP detailing a number of articles of the Law on Competition ("**Draft**") and is seeking comments from affected entities. Set out below are some notable changes introduced by the Draft in relation to economic concentration ("**EC**") that may have an impact on the M&A market in Vietnam.

1. SUPPLEMENTING THE DEFINITION OF "MANAGEMENT BODY"

Article 2.3 of the Draft introduces the definition of "management body", which includes: *(1) a person who owns more than 50% of the charter capital or more than 50% of the voting shares of an enterprise; (2) a person who has ownership or usage rights over more than 50% of the assets of an enterprise, whether in respect of the enterprise as a whole or a particular business line of the enterprise; (3) an enterprise manager as prescribed by the law on enterprises; and (4) a person or group of persons having the right to decide on any of the following matters of an enterprise: organizing the implementation of resolutions, decisions* *of the Members' council, Board of management; deciding on matters relating to the company's day-to-day business activities; and organizing the implementation of the company's business plan and investment plan.* The supplementation of this definition provides a basis for determining a "group of affiliated enterprises" on the ground that the enterprises have a common management unit. However, in the absence of more specific provisions or guidance, the definition may give rise to a number of ambiguities or differing interpretations in practice, for example, how should "*a person having usage rights over more than 50% of the assets of an enterprise in a particular business line of the enterprise*" be determined so as to exclude cases that are not genuinely related to the management of the enterprise? What criteria should be used to determine a "*group of persons*", family relationships, a commercial agreement, or no specific criteria at all? Given that the concept of a "group of persons" is expressly mentioned only in case (4) and not in the other cases, does this imply that "person" in the other cases refers to a single individual? If two legal entities have only one common manager among their respective enterprise managers (as defined under the Law on enterprises), would this in itself constitute a "common management" and consequently place the two entities within the same "group of affiliated enterprises"? etc.

2. SUPPLEMENTING THE BASIS FOR DETERMINING THE RELEVANT PRODUCT MARKET IN SPECIAL CASES AND THE RELEVANT GEOGRAPHIC MARKET

When determining the relevant product market in special cases, in addition to the factors for determining substitutability under Decree No. 35/2020/ND-CP, Article 6.1 of the Draft also takes into account "*substitutability in terms of other relevant factors of competition, including the quality of products, goods and services*".

For the relevant geographic market, in addition to a "*specific geographical area*", Article 7 of the Draft expands the relevant geographic market to include a "*specific spatial scope*" and introduces an additional factor for determining the boundaries of the geographical area/spatial scope based on "*the ability of customers and users within an adjacent geographical area or another spatial scope to access, purchase and use the relevant products, goods and services*" to cover cases involving business models and methods of operation in cyberspace within the digital economy. However, the concept of a "*specific spatial scope*" is relatively new and remains ambiguous. For example, can the Internet be regarded as a spatial scope, or can a specific e-commerce platform, such as Grab or Amazon, be considered a specific spatial scope?

3. SUPPLEMENTING OTHER FORMS OF EC

In addition to the 04 forms of EC inherited from the current regulations, namely merger of enterprises, consolidation of enterprises, acquisition of enterprises, and joint venture between enterprises, Article 19 of the Draft introduces additional forms of EC, including: (1) joint control of an enterprise, (2) establishment of a common management unit, (3) obtaining control, dominance through an agreement or other means, other than the acquisition of equity interests or assets.

This is a notable new feature for the M&A market, as the Draft tends to expand the scope of EC control to cover transactions that establish control in practice, in addition to transactions involving changes in the ownership of equity interests and assets.

Joint control: The introduction of the concept of "joint control" alongside the concept of "control or dominance" under the current regulations would significantly expand the types of transactions falling within the scope of EC control. Accordingly, not only control acquisitions but also a ***minority acquision where the acquirer has veto rights*** over any of the key matters listed in the Decree would now fall within the forms of EC.

Establishment of a common management unit: The addition of "establishment of a common management unit" may result in certain business cooperation arrangements that were previously not regarded as EC now falling within the scope of EC control. For example, arrangements under which two enterprises share any key management personnel or jointly establish a management mechanism for the business activities of the relevant enterprises may need to be further assessed to determine whether they constitute the "establishment of a common management unit" under the Draft.

Obtaining control or dominance through an agreement or other means: The addition of this provision may bring within the scope of EC control transactions that do not result in a change in the ownership structure but nevertheless confer on one party a certain ability to determine or exercise influence over the activities of another enterprise. Accordingly, shareholders' agreements, management agreements, operating agreements or similar arrangements may need to be assessed not only from the perspective of civil or commercial relationship but also from the perspective of competition law. For example, a ***Hotel Management Agreement*** may be considered a transaction giving rise to control or joint control under the Draft where the operator, in certain circumstances, has extensive powers, such as preparing and implementing the business plan, determining and using the budget within a certain scope, and appointing and dismissing the General Manager (GM), etc.

4. NEW PROVISIONS ON CASES EXEMPT FROM THE ECONOMIC CONCENTRATION NOTIFICATION PROCEDURE

Decree No. 35/2020/ND-CP does not exclude any EC transactions from the economic concentration notification obligation if the applicable thresholds are met. For the first time, Article 20 of the Draft provides for cases exempt from the economic concentration notification procedure, including **intra-group transactions** and other transactions that have been approved or decided by the Prime Minister in accordance with the law. However, the scope of intra-group transactions exempt from the economic concentration notification procedure is limited to transactions in the forms of consolidation, merger, acquisition and joint venture, and the entities eligible for the exemption are primarily enterprises that directly or indirectly hold more than 50% of each other's voting equity interests, or are directly or indirectly more than 50% owned by the same other enterprise. Accordingly, the criteria for determining the "intra-group" nature for purposes of the exemption appear to focus solely on ownership of more than 50% of the equity interests, without taking into account other factors such as *"having a common management unit"* or *"control or dominance"*.

5. CLARIFYING THE PRINCIPLES FOR DETERMINING MARKET SHARES IN THE RELEVANT MARKET

Article 9 of the Draft introduces definitions of purchase value, sales revenue and transaction value for the purpose of determining market shares. It also introduces methods for determining market shares based on the number of transactions and transaction value, in addition to the existing methods.

6. CLARIFYING THE CASES IN WHICH AN ECONOMIC CONCENTRATION MAY BE IMPLEMENTED

Article 24.2 of the Draft introduces a case in which an EC may be implemented without assessing the combined market share or HHI criteria, where the enterprises participating in the EC do not operate in the same relevant market and **have no horizontal overlap or vertical relationship**.

For cases where the enterprises have both horizontal overlap and a vertical relationship, Article 24.3 of the Draft provides that the EC may be implemented if both of the following conditions are satisfied: (1) the market share is below 20% in each relevant market; and (2) the transaction falls within one of the cases in which a horizontal EC may be implemented based on the combined market share, HHI, or change in HHI criteria as prescribed.

7. NEW PROVISIONS ON CASES WHERE ENTERPRISES MAY BE REQUIRED TO MODIFY OR TERMINATE PART OR ALL OF THE CONDITIONS OF AN EC

Article 25.5 of the Draft, for the first time, allows an enterprise to request the National Competition Commission to modify or terminate part or all of the conditions of an EC where: (1) a change in the law renders the conditions impossible to implement or no longer appropriate; (2) the enterprise's market share is below 20% in the relevant market for two consecutive years following the year in which the EC was implemented; or (3) the HHI in the relevant market is below 1,800 for two consecutive years following the year in which the EC was implemented. The National Competition Commission is required to respond to such request within 60 days.

8. FURTHER IMPROVEMENTS NEEDED TO THE DRAFT

Overall, the Draft supplements and clarifies many issues that have arisen while implementing Decree No. 35/2020/ND-CP. However, the Draft also introduces a number of amendments and additions that expand its regulatory scope and strengthen the level of control, such as the addition of new forms of EC, which may increase the administrative burden on enterprises when carrying out transactions. Accordingly, it is expected that the Draft will continue to be reviewed and revised before its official issuance to ensure clarity, practicability, and a proper balance between the need for EC control and the creation of a favorable environment for investment and business activities.

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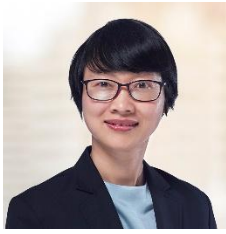

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