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NOTABLE CHANGES IN M&A TRANSACTIONS FROM 2021

I. BACKGROUND

Recently, certain important regulations have been issued that will affect M&A transactions in Vietnam going forward. These regulations include:

- Law No. 61/2020/QH14 on Investment ("**Investment Law 2020**") passed by the National Assembly on 17 June 2020, entering into force from 1 January 2021 and replacing Law No. 67/2014/QH13 on Investment ("**Investment Law 2014**");
- Law No. 59/2020/QH14 on Enterprise (the "**Enterprise Law 2020**") passed by the National Assembly on 17 June 2020, entering into force on 01 January 2021 and replacing Law No. 68/2014/QH13 on Enterprise (the "**Enterprise Law 2014**");
- Decree No. 35/2020/ND-CP implementing the Competition Law ("**Decree 35**") issued by the Government on 24 March 2020, entering into force on 15 May 2020;
- Law No. 54/2019/QH14 on Securities (the "**Securities Law 2019**") passed by the National Assembly on 26 November 2019, entering into force on 01 January 2021 and replacing Law No. 70/2006/QH11 (as amended) on securities ("**Securities Law 2006**"); and
- Decree No. 155/2020/ND-CP implementing the Securities Law ("**Decree 155**") issued by the Government on 31 December 2020, entering into force on 1 January 2021.

We summarize below the key impacts of these regulations that relevant parties should take into account when conducting M&A transaction in Vietnam from 2021.

II. NOTABLE CHANGES

NO.	NEW REGULATION	IMPACT ON M&A TRANSACTIONS
I	**Investment Law 2020**	
1.	**Market Access Conditions and List of Restricted Sectors** The Investment Law 2020 introduces a list of business lines subject to market access restrictions (the "List of Restricted Sectors") and the market access conditions applicable to foreign investors (the "Market Access	With this List of Restricted Sectors, the Investment Law 2020 provides a notable change by introducing a new approach for Market Access Conditions called the "negative-list" approach. Thanks to this new approach, investors will be able to more explicitly foresee the investment opportunities

	Conditions") but leave them for the guiding decree to provide the details. ● List of Restricted Sectors includes: (i) The sectors where market access is not yet allowed; and (ii) The sectors where market access is conditional. ● Market Access Conditions include: (i) Foreign ownership limitations; (ii) Restrictions on statutory investment form; (iii) Restrictions on the scope of business and investment activities; (iv) Capacity of the investors and business partners; and (v) Other regulatory requirements (under international treaties and Vietnamese law).	in Vietnam. In particular, by checking the List of Restricted Sectors, investors can determine which sector is allowed to be invested in, as well as the attached conditions that need to be complied with. The M&A approval[1] application process will, therefore, be more certain. However, all of these positive impacts will be realized only if the Government issues a guiding decree with clear instructions and no ambiguity. For now, M&A approval application process for M&A transactions in various provinces have, unfortunately, been delayed due to the Government not yet issuing such a guiding decree.
2.	**New conditions governing investment activities by the foreign-invested enterprise incorporated in Vietnam** (the "**FIE**") Under the Investment Law 2020, when setting up or acquiring equity interest in an entity, an FIE will be subject to the same conditions and investment procedures applicable to foreign investors if **more than 50%** of such FIE's charter capital is held by: (i) a foreign investor; (ii) an FIE in item (i); or	Compared to the Investment Law 2014, the Investment Law 2020 reduces the foreign ownership ratio from "51% or more" to "more than 50%". Other than expanding the scope of application due to the reduction of the aforementioned threshold, this change will have an implication on tiered corporate structures in M&A transactions. In the past,

[1] M&A approval is the process in which the foreign investor will register with the local Department of Planning and Investment its capital contribution to or shares acquisition at an enterprise as contemplated under Article 26.2 of the Investment Law 2020 (in Vietnamese, '*thủ tục đăng ký góp vốn, mua cổ phần, mua phần vốn góp của tổ chức kinh tế*'). The transaction may only be completed after the local Department of Planning and Investment issues its written confirmation.

	(iii) a foreign investor and an FIE in item (i) jointly. This means that if such an FIE participates in an M&A transaction as the acquirer, it must obtain an M&A approval as if it was a foreign investor.	where the acquiring entity is an FIE with more than 50% but less than 51% foreign ownership, it was treated as a Vietnamese investor and hence, it might avoid the M&A approval requirement as well as relevant market access restrictions accompanied with it. Under the Investment Law 2020, to continue with this structure, the parties will need to reduce the threshold of "more than 50%" to "50% or less". From a commercial perspective, the change in the 50% mark can be significant as it will change the balance of power in the decision-making process in a company.
3.	**New conditions leading to M&A approval requirement** The Investment Law 2020 requires a foreign investor to apply for the M&A approval in the following cases: (i) an increase in the ownership of the foreign investor in the target company engaging in business lines with market entry restrictions for foreign investors. (ii) an increase in foreign ownership in the target company from less than 50% to more than 50% of the charter capital; or (iii) an increase of foreign ownership in the target company where foreign ownership is already exceeding 50% of the charter capital. In addition, a foreign investor will have to apply for the M&A approval in case the target company has a land use right certificate to utilize land located on an island or in a border or coastal	Compared with previous regulations, the Investment Law 2020 has reduced the M&A approval threshold relating to the foreign ownership in the target company from 51% (stipulated in the Investment Law 2014) to more than 50%. This means that any acquisition of equity interest from above 50% will require the obtainment of the M&A approval. Having said that, the Investment Law 2020 removes the requirement for obtaining M&A approvals in case the capital contribution or acquisition of equity does not result in an increase of foreign ownership ratio in the target economic organization (such as issuance of new shares to existing shareholders on pro-rata basis). Regarding the new pre-approval requirement applied for M&A transactions involving local entities with the right to use land plots located on islands, border or coastal areas, it appears to be an expansion of a policy already reflected in the land regulations. This

	commune, or in another area having an effect on national security.	will require investors to put more attention to this issue when they conduct due diligence on projects using land. The lack of criteria on the national security and defense might delay the investment application process for an M&A approval in case the licensing authority needs to consult other specialized authorities including the Ministry of Foreign Affairs and/or Ministry of National Defense on relevant issues. This may affect the timeline for the relevant transactions.
4.	**Termination of an investment project due to forged civil transactions** The Investment Law 2020 allows the licensing authority to terminate part or all of a project if an investment is made through a forged transaction as defined by the Civil Code.	This new instance for termination of the investment project is aiming to address nominee arrangements which sometimes have been adopted by foreign investors to invest in restricted sectors using Vietnamese nominees and companies or to avoid investment licensing procedures for foreign investors. However, the relevant provision of Vietnamese law for addressing the Government's concern about forged transaction is vague. *Firstly*, it is unclear whether the definition of "forged civil transaction" actually captures the nominee arrangements. *Secondly*, while the Investment Law 2020 states the investment licensing authority is competent to terminate of project involving the forged transaction, under the Civil Code, the court is the authority to declare if the forged transaction invalid. In addition, determining if the transaction is forged seems very difficult in terms of both theory and practice, which requires a certain capability of the authority. *Thirdly*, criteria to determine instances that

		the project will be fully or partially terminated are not specified in the Investment Law 2020. As such, the Government would need to provide more detailed guidance on this issue in order to facilitate its enforcement.
II	**Enterprise Law 2020**	
1.	**Stricter conditions for private placement in a privately held joint stock company** Pursuant to the Enterprise Law 2020, if a privately held joint stock company conducts a private placement, the shareholders of the company will have the pre-emptive right to acquire the shares (similar to the case where the company issues new shares to existing shareholders). Only if the shareholders do not purchase all the issued shares, then the remaining shares can be sold to third parties according to the private placement plan (unless the General Meeting of Shareholders approve otherwise).	The new requirement makes the private placement process more cumbersome and uncertain as the company and the potential investor may need to seek shareholders' consent to waive their pre-emptive rights in order for the potential investor to acquire the new shares. It is unclear whether the exemption "*unless the General Meeting of Shareholders approve otherwise*" can be used as a ground to bypass this requirement. Otherwise, a proposed private placement transaction of a company may fail if its shareholders do not agree to waive their pre-emptive rights.
2.	**Amended definition of state-owned companies** Previously, state-owned companies refer to those having 100% charter capital held by the State. Under the Enterprise Law 2020, a state-owned company means a company having more than 50% charter capital or voting shares held by the State.	This amendment will subject the companies having more than 50% charter capital or voting shares held by the State to the regulations previously applicable only to companies having 100% charter capital contributed by the State, for example the requirement under the bidding law for procurement of goods and services or the requirement under the construction law for construction contracts of State-owned companies. Investors intending to invest in these companies will need to take into account these requirements so that they can

		have any necessary plans for participating in the management of these companies post closing.
3.	**Removal of the requirement to notify the change regarding the company's managers** Under the Enterprise Law 2020, it is no longer required to notify the licensing authority of the change in the information of the company's managers (e.g., chairperson or member of the Board of Members, President, chairperson or member of the Board of Directors, Director/General Director, or other managerial positions prescribed in the company's charter).	The removal of this requirement would simplify the procedure of a company's manager appointment, especially after an M&A deal when the change in management positions is likely inevitable.
4.	**Recognition of non-voting depository certificates** The Enterprise Law 2020, for the first time, recognizes non-voting depository certificates, the holders of which will have interests and obligations proportional to the underlying ordinary shares, except for voting rights.	The recognition of non-voting depository certificates is important for any investors looking for economic benefits instead of the rights of the company's management. It will also allow Vietnamese companies a flexible method to mobilize capital. Having said that, this arrangement will need to be further guided before it can be implemented, and it is expected that this process will take time.
5.	**More rights given to minor shareholders in a joint-stock company** Under the Enterprise Law 2020, a shareholder or a group of shareholders in a joint-stock company holding at least 5% of the total ordinary shares (or a smaller percentage otherwise stipulated in the company's charter) has the right to request a general shareholders'	This change gives more rights to minority shareholders in a target company. Investors should take this into account when considering corporate governance matters of the target company post closing.

	meeting and to ask the Board of Inspection to investigate issues relating to the management and administration of the joint-stock company, among others. Previously, the threshold of this requirement was 10%.	
III	**Decree No. 35 implementing the Competition Law**	
1.	**Threshold for merger filing requirement** Decree No. 35 provides a detailed guidance for the threshold for merger filing requirements under the Competition Law. In particular, any M&A transactions falling in one of the following cases would be required to conduct merger filings to the National Competition Committee: • Total assets available in the Vietnamese market of a company or a group of affiliated companies of which the company is an affiliate must be VND 3,000 billion or more in the fiscal year preceding the year intended for the economic concentration; • Total sales or purchase volume arising in the Vietnamese market of a company or a group of affiliated companies of which the company is an affiliate must be VND 3,000 billion or more in the fiscal year preceding the year intended for the economic concentration; • Value of the economic concentration transaction is at least VND 1,000 billion; or • The joint market share of companies intending to	Compared with the previous regulations, Decree No. 35 has lowered the threshold for merger filing requirements. This means that more transactions would be captured, especially due to the threshold of economic concentration transactions being VND 1,000 billion or more. Furthermore, while Decree No. 35 has taken effect from 15 May 2020, the National Competition Committee is - so far - not yet established. The applications for merger filings is currently handled by the Ministry of Industry and Trade. Therefore, a bottleneck and delay in the process should be expected. Parties to M&A transactions should take into account this process in the transaction timeline.

	participate in the economic concentration must account for at least 20% of total share of the relevant market in the fiscal year preceding the planned year of economic concentration. Credit institutions, insurance companies or security companies are subject to a difference set of conditions on merger filing.	
IV	**Securities Law 2019 and Decree No. 155**	
1.	**Broader circumstances triggering tender offer** Under the Securities Law 2019, the acquisition of shares at a public company (the "**Target**") must be made in tender offer and be registered with the State Securities Commission of Vietnam if: • An investor and its related persons intend to acquire voting shares to directly or indirectly hold in aggregate 25% or more of the total voting shares of the Target; • An investor and its related persons who hold in aggregate 25% more of the total voting shares of the Target intend to acquire more shares and such shares acquisition will cause their direct or indirect shareholding to reach or exceed each threshold of 35%, 45%, 55%, 65% and 75% of the total voting shares of the Target; or • Except for where the tender offer has been made for all voting shares of the Target, an investor and its related	While Securities Law 2006 only refers to an investor's purchase of voting shares which results in the ownership of 25% or more of the total shares of the Target, Securities Law 2019 now also counts the indirect shareholdings of such investor and the shareholdings of its related persons in order to determine the ownership threshold that would trigger the tender offer. In addition, anytime each threshold of 35%, 45%, 55%, 65% and 75% of the total voting shares of the Target is met, the tender offer requirement will apply. As such, the investor should note these aspects of shareholdings in order to comply with the new tender offer requirement.

	persons who hold in aggregate 80% or more of the total voting shares of the Target must continue to offer to acquire shares from the remaining shareholders for 30 days, with similar conditions on purchase price and payment methods to those of the preceding tender offer.	
2.	**Stricter conditions for private placement in public companies** Under the Securities Law 2019, there are five conditions for private placement of shares by public companies: • Obtaining GMS approval for (i) the plan for private placement, (ii) the use of proceeds from the private placement; and (iii) number and eligibility of participating investors; • Only strategic investors and professional securities investors are allowed to participate in the private placement; • The privately placed shares of strategic investors and professional securities investors will not be transferred for at least 3 years and 1 years, respectively, from the completion of the private placement. However, transfer of shares is still permitted among the professional securities investors or to enforce the court judgement or arbitrary award in accordance with law; • A private placement must end for at least 6 months before another may commence; and	Under Securities Law 2006, private placement is the offer of securities to fewer than 100 investors, excluding professional securities investors and without using mass media or the Internet. However, Securities Law 2019 allows only strategic investors and professional securities investors to participate in the private placement. Another restriction is that strategic investors are now subject to a longer lockup period of shares transfer (i.e. 3 years or more instead of 1 year from the completion of the private placement) compared to Securities Law 2006.

	• The private placement must satisfy the foreign ownership limitations requirement, as discussed below.	
3.	**New foreign ownership limitations in public companies by default** Prior to Decree No. 155, for public companies which are subject to foreign investment conditions, the foreign ownership limitations, if not so provided in such foreign investment conditions, would be capped at 49% by default. Decree No.155 has lifted this cap to 50% of the total charter capital. In addition, Decree No. 155 allows a public company to adopt its foreign ownership limitations of being lower than provided under the laws and international treaties to which Vietnam is a signatory, as long as such lower foreign ownership limitations are approved by the GMS and so recorded in the charter.	The new cap of 50% would allow foreign investors to reach a shareholding threshold where they can have veto right over the decision of the target company's decision. Therefore, this is positive news to foreign investors. Having said that, to be prudent, foreign investors should also check if the target company adopts different foreign ownership limitations in its charter when considering the legal feasibility a transaction.

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Please contact us if you are interested in discussing any impact of the new regulations to the M&A transactions in the coming time or if you need any assistance in M&A area.

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