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1. Old law: The failed Grab/Uber attempt

Vietnam enacted its first-ever Competition Law in 2004 under which the combined market share of the merging firms was the determining factor as to whether a merger required notification to the local antitrust agency or whether it would be blocked.

Grab acquired Uber's hailing platform business in Vietnam as part of a regional package deal in 2018. Following a year-long investigation, the Vietnam Competition and Consumer Authority (VCCA) concluded that the transaction was illegal. As per the then-applicable law, this conclusion rested solely on the fact that the post-deal combined market share exceeded the regulatory threshold of 50%. It was the very first time where VCCA flexed its muscles, seeking to halt an M&A deal. The Competition Council, which was authorized to decide the legality of merger cases, effortlessly foiled such an attempt by ruling that the transaction was not an "acquisition" as defined by the then-current law.

2. New law: Dawn of a new regime

The Competition Council's decision was handed down between the issuing (June 2018) and coming into force (July 2019) of a new Competition Law. With the new law, the merger control regime in the country underwent a number of significant changes. Reporting on M&A transactions is now based on any of total assets, total turnover, combined market share, or transaction value. Moreover, the new law adopts a test called "substantial lessening of competition" (SLC), under which a transaction is prohibited if it "results in, or is likely to result in, a substantial lessening of competition."

Vietnam has not yet blocked any M&A transactions under the new law. The first two years following the new law's effectiveness (from July 2019 to July 2021) saw 125 M&A transactions reported to VCCA. In those reported mergers, horizontal mergers made up 45%, vertical mergers 19%, and conglomerate mergers 36%. Only 10% of them had to undergo a rigorous "second phase" review.¹

There were 130 merger filings to VCCA in 2021 alone. Thirty percent of those reported transactions took place outside Vietnam and three of them were subject to the "second phase" stricter scrutiny.²

¹ VCCA, "Economic Concentration Activities under Competition Law for the Period from July 2019 to July 2021."

² VCCA, 2021 Annual Report.

A great deal of digital ink has been spilled to criticize the existing regulations, including low quantitative thresholds, lack of exemptions, and the separate application of the size of person test and the size of transaction one.

3. Doing deals in the darkness

Under the new law, an M&A transaction, regardless of whether or not it must be reported to the competition authority, would nonetheless be prohibited if it “results in, or is likely to result in, a substantial lessening of competition.”

What matters now is how VCCA would apply this internationally-used but vague and non-quantitative legal test to examine a transaction in practice. The new Competition Law and the governmental regulations elaborating on it simply introduce a list of ambiguous and qualitative factors. Meanwhile, VCCA has not officially and publicly issued any analytical guidance in the form of guidelines that are typically seen in other jurisdictions such as the United States, European Union, and Vietnam's Southeast Asian neighbor, Singapore.

So far, VCCA has revealed very few details about its clearance decisions. All information that the public may learn about the transactions reviewed by this authority takes the form of bite-sized news that VCCA publishes on its own website. It is too cursory, however, to provide dealmakers with any insight into how VCCA would analyze a merger. Here are two examples:

In May 2020, VCCA approved Elanco Animal Health Incorporated's acquisition of Bayer Aktiengesellschaft's animal health business.³ Nevertheless, the authority noted that the merged firm would dominate Vietnam's antimicrobial drug market for pigs. As a result, it “recommended” that the merged firm take appropriate “measures” in line with the new Competition Law so that it could “enhance the supervision of firms with a dominant market position.” The news did not explain why, in the authority's view, the deal did not lessen competition significantly. In addition, nothing clarified why the measures were only recommended but not compulsory requested.

Another clearance was granted in October 2020 to the deal between insurance brokers Marsh Vietnam and Jardine Lloyd Thompson.⁴ While the deal brought about a dominant player in the market, no explanation was provided for why it was cleared.

Since official guidelines and fuller disclosure of well-reasoned decisions from the competition authority are what have been asked for and not yet given, dealmakers would bumble in the darkness if they do not have counsel who know not only local laws and practices, but also international ones.

4. Challenges ahead

A closer look at the current law and regulations suggests that Vietnam's competition authority would follow the footsteps of its counterparts in developed countries in reviewing mergers. That means, a substantive analysis

³ See VCCA's news in Vietnamese on the clearance at http://vcca.gov.vn/default.aspx?page=news&do=detail&category_id=e0904ba0-4694-4595-9f66-dc2df621842a&id=c3372588-77d8-41db-96b6-c61bb53b913b.

⁴ See VCCA's news in Vietnamese on the clearance at <http://vcca.gov.vn/default.aspx?page=news&do=detail&id=6d0a4259-91ff-4389-b48c-c99adf1ea452>.

of a transaction typically begins with the definition of the market, followed by an assessment of any anticompetitive effects the deal may have on competition and any countervailing factors.

Further than that, the Vietnamese competition authority may approve an anticompetitive merger if it produces any “positive impacts” that outweigh any negative effects on the market. Dealmakers are anxiously awaiting specific criteria that the authority will employ to fairly assess such kind of impacts.

VCCA's and other government-backed websites began explaining and introducing concepts found in merger control laws in developed countries, such as unilateral effects, coordinated effects, market entry, buyer power, failing firm defenses, and efficiencies.⁵

What remains to be seen is how effectively and efficiently Vietnam's competition authority could carry out sophisticated merger analyses given their self-admitted lack of resources and experience. Further, Vietnam appears to be struggling to establish an independent court system to check its administrative agencies' decisions.

5. What we have done

Back in 2006, we were invited to work on a project funded by the Japan International Collaboration Agency (JICA) and supported by the Japan Fair Trade Commission (JFTC) to assist the Vietnamese competition authority in implementing the country's first competition law, which came into effect in 2005. Since then, Nishimura & Asahi's lawyers in Vietnam effectively and diligently assisted clients with overcoming local merger control barriers. The team is strongly backed by competition law practice groups in our Tokyo headquarters and regional offices. When the new law was still in its draft form, our Partner Masahiro Heike provided comments on the draft and engaged in dialogue with the local competition authority. Through time, we have developed a genuinely positive relationship with Vietnam's top competition law officials by engaging them in constructive discussions about the interpretation and practical application of the new law.

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⁵ For example, see <http://www.hoidongcanhtranh.gov.vn/default.aspx?page=news&do=detail&id=151> (in Vietnamese).