Chapter 58

VIETNAM

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I OVERVIEW OF M&A ACTIVITY

According to the Institute of Mergers, Acquisitions and Alliances (IMAA), an institution that monitors M&A deals globally, the number of reported M&A deals in 2016 was 15 per cent higher than in 2015, with a total value of US$5.3 billion. If such total value of M&A deals in 2016 is accurate, it surpassed the figure in 2012 (which is reported to have been between approximately US$4.2 billion to US$5 billion: then depicted as 'an unchallengeable peak' for M&A in Vietnam) and the figure for 2015 (US$5.2 billion). These reported figures have delivered encouraging news to investors and the authorities. Foreign investors may see an opportunity to acquire attractive projects at good prices given the recent developments in investment regulations and conditions.

According to IMAA, in 2016, the real estate sector led in terms of value, while the industries, materials and consumer goods sectors had the highest number of M&A transactions. See Section IV, *infra*, for further discussion on specific deals.

II GENERAL INTRODUCTION TO THE LEGAL FRAMEWORK FOR M&A

M&A activity has developed in Vietnam during the past 10 years following the government's issuance of a large number of new legal regimes, which was considered the government's preparation for Vietnam's official accession to the World Trade Organization on 11 January 2007. However, there is no united legal platform for M&A activities, and investors need to consider requirements, guidance and other information as to the interpretation or practice of investment in different pieces of legislation. The principal regulations for M&A activities may be sorted into the following main categories:

a international treaties and agreements to which Vietnam is a contracting party include Vietnam's commitments to the World Trade Organization applicable to foreign investment into Vietnam from other state parties' investors;

b general regulations include the Civil Code 2015, which is the key general law regulating the 'legal status and standards for conduct of individuals and legal entities, the right and obligations of individuals and legal entities in property and personal relations arising from relations established on the basis of equality, freedom of will, independence of property and self-responsibility' (Article 1 of the Civil Code 2015) (this Civil Code 2015 has replaced the Civil Code 2005 since 1 January 2017);

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c the primary sources for regulating M&A activities in Vietnam are the Law on Enterprises 2014 and the Law on Investment 2014, which have replaced the Law on Enterprises 2005 and the Law on Investment 2005 respectively since 1 July 2015. The Law on Enterprises 2014 governs the establishment, management, organisation and operation of enterprises, and the Law on Investment 2014 mainly focuses on investment activities within Vietnam;

d regulations on land include the Law on Land 2013. In Vietnam, ownership of all land lies with the entire population, with the state acting as the representative owner. Therefore, no enterprise, including domestic private enterprises, state-owned enterprises and foreign private enterprises, is the actual owner of land. Investors may use land through a land use right;

e regulations on specialised business areas, which specifically govern the relevant investment businesses of investors: for instance, the areas of finance, education, distribution or restaurant services;

f regulations applicable to public companies, including the Law on Securities 2006 (as amended in 2010) and its implementation decrees and circulars. In 2015, total foreign investment in a public company was relaxed by the government (see Section III.iii, *infra*). According to Article 25 of the Law on Securities 2006, a public company is a joint-stock company that has already conducted the public offering of its shares; has its shares listed at the Stock Exchange or the Securities Trading Center; or has its shares owned by at least 100 investors, excluding professional securities investors, and has a contributed charter capital of 10 billion dong or more;

g regulations on competition, including the Law on Competition 2004 and its implementation decrees and circulars. See Section IX, *infra*, on the Law on Competition; and

h regulations on other relevant matters, including foreign exchange management and labour.

Some parts of the above regulations are not well enough developed, such as the overlapping and inconsistent regulations between the Law on Enterprises and the Law on Investment, as well as securities regulations and regulations on competition. In addition, similar to other new economic countries, foreign restrictions still play an important role, and foreign investors should look at both domestic laws and international treaties, including bilateral and multilateral, to understand the differences and decide the most appropriate M&A arrangement. In addition, if state-owned enterprises (SOEs) are involved in contemplated transactions, investors should also pay attention to the regulations applying to such SOEs, which sometimes prolong the closing of an M&A deal.

III DEVELOPMENTS IN CORPORATE AND TAKEOVER LAW AND THEIR IMPACT

i The Law on Enterprises 2014 and the Law on Investment 2014

According to the old regime (before 1 July 2015), upon establishment, all companies, including domestic companies, had to be issued with a business registration certificate (or enterprise registration certificate after 1 June 2010), except in cases where foreign investors invested in Vietnam for the first time and were issued with investment certificates that concurrently act as their business registration certificates.

For instance, foreign investors (i.e., foreign individuals or foreign organisations incorporated under foreign laws) that want to set up a new entity in Vietnam will first need to apply for investment approval from the investment licensing authorities (under the form of an investment registration certificate) for their investment projects in Vietnam. Upon issuance of the investment approval, the foreign investors will carry out the establishment procedure to set up the new entity in Vietnam. These steps are also applicable where a company of which foreign shareholders (directly and indirectly) together hold 51 per cent or more of total shares or equity wants to set up its subsidiary in Vietnam.

In the case of a shares acquisition or subscription of an existing Vietnamese company, foreign investors must register such proposed acquisition or subscription with the investment licensing authority if the target company engages in conditional business sectors, or the proposed transaction would result in 51 per cent or more of the total shares being (directly or indirectly) held by foreign investors. This registration step is not required for other acquisition or subscription cases. Upon completion of the registration, the target company shall amend its enterprise registration certificate in accordance with the Law on Enterprises 2014. This procedure is also applicable where the acquirer or subscriber is a foreign-invested company based in Vietnam of which 51 per cent or more of the total shares are (directly and indirectly) held by foreign shareholders.

ii The Law on Land 2013

In general, domestic economic organisations, households and individuals may obtain land-use rights by:

a being allocated land from the state;
b leasing land from the state;
c receiving transfer, donation or inheritance of land-use rights;
d receiving land-use rights as in-kind capital contribution from a lawful land user (applicable to economic organisations);
e recognition by the state of land-use rights;
f leasing and subleasing land from a developer of an industrial zone, high-technology zone or economic zone;
g receiving the transfer of an ongoing project using land; or
h receiving land-use rights in accordance with the result of a land dispute settlement.

On the other hand, foreign-invested companies are only allowed to obtain land-use rights by one of the following methods:

a directly leasing the land from the state or from a developer of an industrial zone, high-technology zone or economic zone;
b being allocated land from the state;
c receiving land-use rights as in-kind capital contribution from a lawful land user;
d receiving the transfer of investment capital being land-use rights;
e receiving the transfer of an ongoing project using land; or
f receiving land-use rights in accordance with the result of land dispute settlement.

M&A transactions may change the status of the target company from a domestic private company into a foreign-invested one. In such a case, the target company shall have rights of a land user as those of a foreign-invested company if foreign investors together hold 100 per cent or controlling shares. Otherwise, the rights of the target company will remain unchanged (Article 183.4 of the Law on Land 2013).

Another key point under the Law on Land 2013 relates to the definition of 'offshore entity'. According to the language of the Law on Land 2003, the definition of 'offshore entity' is unclear, and it is uncertain whether an offshore entity itself may obtain a land-use right. However, under the Law on Land 2013, it is clear that an offshore entity itself may not obtain a land-use right.

iii The Law on Securities

On 1 September 2015, Decree 60/2015/ND-CP guiding the Law on Securities took effect, relaxing the restrictions imposed on foreign investment in public companies. Foreign ownership in a public company is regulated as follows:

a if an international treaty to which Vietnam is a party has provisions on the foreign ownership ratio, then such provisions apply;

b if a public company operates in a business investment line for which the law on investment and other relevant laws have provisions on foreign ownership ratio, then such provisions apply. If a public company operates in a business investment line with conditions applicable to foreign investors, but there is not yet any specific provision on the foreign ownership ratio, then the maximum foreign ownership ratio is 49 per cent;

c if a public company operates in several business lines with different provisions on the foreign ownership ratio, then the foreign ownership ratio shall not exceed the lowest ratio of the business lines (in which such company operates) wherein there are provisions on foreign ownership, unless otherwise provided in international treaties; and

d for public companies not falling into any of the above scenarios, foreign ownership is unrestricted, unless otherwise provided in the company charter.

IV FOREIGN INVOLVEMENT IN M&A TRANSACTIONS

According to the Ministry of Planning and Investment, Japan ranked second on the list of countries investing in Vietnam in 2016 in terms of capital (US$2.58 billion: 10.62 per cent of the total), after the Republic of Korea (US$7 billion: 28.8 per cent of the total). Japan was among the most active in M&A in the real estate and retail sectors in Vietnam in 2016. The wave of Japanese investment into Vietnam is expected to continue due to the fact that the economic growth of companies in Japan has slowed down, and investment into South-East Asian countries may improve this; the relocation of Japanese investment out of China; and the similarity between Japanese and Vietnamese culture.

With a population of more than 94 million and an expanding middle class, Vietnam remains an attractive destination for investors in the retail industry and consumer goods manufacturing.

Outbound M&A investment from Vietnam to other countries is strictly managed by the licensing authorities, especially in the banking and financial sector. Accordingly, to conduct an outbound M&A project, a Vietnam-based company shall need to seek approval by the centre-level licensing authority, the Ministry of Planning of Investment, which considers applications on a case-by-case basis. Therefore the number of licensed offshore investment projects to date has been limited compared with the number of licensed onshore investment projects, and mostly focused on South-East Asian countries such as Laos, Cambodia and Myanmar. In mid-2016, the Bank for Investment and Development of Vietnam was granted a licence to open a branch in Myanmar, which makes it the first ASEAN-based bank to be granted such licence. Elsewhere, the military-run telecommunications firm Viettel has established subsidiaries in Mozambique, Cameroon, Burundi and Tanzania.

V SIGNIFICANT TRANSACTIONS, KEY TRENDS AND HOT INDUSTRIES

Highlighted M&A deals during 2016 focused on real estate and the retailing industry, as these were the most active sectors.

The real estate sector continues to remain attractive to offshore investors, and in 2016 it was one of the most active in M&A. The physical transfer of land, buildings and other types of real estate property, however, is a problematic issue and may take a long time, especially if it is a transfer to a foreign investor. In particular, an offshore investor may need to set up its subsidiary in Vietnam; apply to the licensing authorities to implement projects in connection with the use of the real estate properties to be transferred; and register the physical transfer of the real estate properties with the relevant authorities. Therefore, in practice, foreign acquirers often consider acquiring vendors' shares in the project company that owns such real estate properties. The procedure for shares acquisition is much simpler, and the offshore investors still own the real estate properties through the project company.

Highlight transactions in 2016 included the following:

a the acquisition of Keangnam Hanoi Landmark Tower, the tallest building in the country, by Mirae Asset Securities Co of South Korea, in cooperation with the global investment company AON BGN, for US$350 million;

b Mapletree Investments Pte Ltd from Singapore acquired Kumho Asiana Plaza in District 1, Ho Chi Minh City, from Kumho Industrial Company Limited and Asiana Airlines Inc for US$215 million;

c Low Keng Huat (Singapore) Ltd transferred Duxton Hotel Saigon, also in District 1, Ho Chi Minh, to New Life Real Estate for US$49.4 million. Duxton Hotel is a four-star, 198-room hotel located in one of the prime sites in District 1;

d Saigon Greenview Investment bought Novotel Saigon Centre, a four-star hotel, from Que Hong Liberty Corporation for US$46.7 million;

e BRG Group Joint Stock Company, a Vietnamese conglomerate, acquired Sedona Suites Hanoi, comprising 175 serviced apartments and villas, from Keppel Land Vietnam for US$31.5 million; and

f Japanese companies Hankyu Realty and Nishi-Nippon Railroad continued to invest in 2016 in the real estate sector, acquiring 50 per cent of the shares in APSL-PLB-Nam Long Co, Ltd in order to invest in Fuji Residence, a real estate project in Ho Chi Minh City comprising villas and apartments.

Highlights in the food and beverages sector included the following: the purchase by Singapore-based Fraser & Neave of 78.38 million shares in Vietnam Dairy Products Joint Stock Company (Vinamilk) worth around US$499.56 million; Thailand's Singha buying 25 per cent of Masan Consumer and 33.3 per cent of Masan Brewery for a total of US$1.1 billion, one the highest-value deals in 2016; and South Korea's Daesang Corporation acquiring a 99.99 per cent stake in Duc Viet Food Joint-Stock Company, a domestic meat processor and distributor, for US$32 million.

Retail continued to be an attractive area for M&A in 2016. Among the best-known deals were the acquisition of Big C Vietnam, a leading food retailer with a network of 43 stores and 30 shopping malls, by Thailand's Central group from France's Casino group for US$1.14 billion, reportedly the highest-value deal in 2016; and the complete operations of Metro Cash & Carry Vietnam, including its 19 centres and real estate, by Thailand's TCC Group from Germany's Metro Group for US$848 million.

As to other sectors, another highlight was the acquisition by JX Nippon Oil & Energy of an 8 per cent stake in Petrolimex, Vietnam's leading petroleum trader, for US$184 million. ANA Holdings, Japan's largest airline group, acquired 8.8 per cent of Vietnam Airlines for US$109 million. Japan's Taisho Pharmaceutical Co, Ltd acquired a 24.5 per cent stake in Duoc Hau Giang Pharmaceutical Joint-Stock Company from several foreign shareholders for US$97.7 million in total, thus, becoming the second-largest shareholder in the company after the State Capital Investment Corporation. In the insurance sector, FWD Group, the insurance business of Pacific Century Group, acquired Great Eastern Life (Vietnam) Co, Ltd from Singapore's Great Eastern Life Assurance for US$35.6 million.

According to the government's Steering Committee for Enterprise Renewal and Development, 52 state-owned enterprises underwent equitisation in the first 11 months of 2016. The equitisation process faced the obstacle of incomplete legal regulations, as several ministries failed to submit regulations related to equitisation to the relevant authorities. By 2020, the goal of the government is to retain only 190 state-owned enterprises, out of 718, in the vital sectors of electricity transmission, cartography related to national security and military, railway infrastructure, air traffic services, post, irrigation management, lending for socioeconomic development, banking safety and lottery.

A new innovation of M&A in Vietnam is the initial public offerings (IPOs) of aviation companies, such as Vietjet Air in February 2017 (the country's largest IPO so far). These should be a turning point in M&A in future years.

VI FINANCING OF M&A: MAIN SOURCES AND DEVELOPMENTS

Even with the stagnant global economic recovery and Vietnam falling short of its 6.7 per cent target gross domestic product for 2016, Vietnam's economic growth is expected to recover in 2017, sustained by foreign investments, resilient domestic demand and strong export growth. However, although lending interest rates have fallen by between 0.3 to 0.5 per cent from 2014 (with an average of 9 to 12 per cent), enterprises still continue to face difficulties in approaching financial sources from domestic banks due to high rates of interest. To support economic growth, in the latter part of 2016, several banks led by state-controlled JSC Bank for Foreign Trade of Vietnam (Vietcombank) reduced interest rates on short-term loans in the following sectors: agriculture, exports, supply-chain industries, small and medium-sized enterprises, hi-tech businesses and start-up companies.

Vietnamese parties are familiar with typical clauses applicable to offshore loan arrangements such as financial covenants and security requirements. However, while an offshore creditor's right to collect payment from debtors in the event of default is protected, enforceability of some terms may in practice be questionable. For instance, offshore creditors may face challenges if they want to exercise the right to acquire secured shares in the event of default if the project company is operating in areas that are conditional or restricted for foreign investment. In addition, offshore creditors are not allowed to have collateral over a land-use right in Vietnam.

According to foreign exchange management regulations, offshore loans with terms of more than one year are subject to registration with the central bank of Vietnam (the State Bank of Vietnam). However, the loan registration requirement is just an administrative tool for the State Bank of Vietnam to manage and control the flow of foreign exchange currencies in Vietnam from time to time; it is not a confirmation or certification of the state that the agreement is legally recognised.

Vietnam remains an attractive place for investment in the private sector, and even more so now that it has relaxed the restrictions imposed on foreign investment in public companies (see Section III.iii, *supra*).

VII EMPLOYMENT LAW

The current Labour Code 10/2012/QH13 has been effective since 1 May 2013. Key notes under the current Labour Code include the following.

According to Article 106 of the current Labour Code, the number of employees' overtime hours does not exceed 50 per cent of the normal working hours in one day. In the case of working on a weekly basis, the total of normal working hours plus overtime hours must not exceed 12 hours in one day, 30 hours in one month and 200 hours in one year. The previous law simply provided that the number of overtime hours must not exceed four hours per day and 200 hours per year. Other provisions include:

a adding one more day off during the lunar new year period (Article 115);

b extending the maternity leave period for female employees from four to six months in general (Article 157);

c extending the limitation period for dealing with breaches of labour discipline from three to six months, or 12 months in some special cases (Article 124); and

d providing more details regarding cases where foreign workers are exempted from work permits requirements (Article 172). In particular, exemption cases include:
- capital-contributing members or owners of limited liability companies;
- members of the board of directors of joint-stock companies;
- chiefs of representative offices, and directors of projects of international organisations or non-governmental organisations in Vietnam;
- those who stay in Vietnam for under three months to offer services for sale;
- those who stay in Vietnam for under three months to deal with complicated technical or technological problems that adversely affect or are at risk of exerting adverse effects on production and business activities where these problems cannot be handled by Vietnamese and foreign experts who are currently in Vietnam;
- foreign lawyers possessing a professional practice licence in Vietnam in accordance with the Law on Lawyers;
- cases that are in accordance with a treaty to which Vietnam is a contracting party;
- those who are studying and working in Vietnam, provided that their employer shall notify their employment to the provincial level state management agency of labour seven days in advance;

- internal transfer within an enterprise and within the scope of the 11 services on the List of Commitment on Services of Vietnam with the World Trade Organization, namely, business services, information services, construction services, distribution services, education services, environment services, financial services, medical health services, tourism services, culture and entertainment services, and transportation services;
- entering Vietnam to provide expert technical consultancy services or to undertake other tasks servicing the work of research, formulation, evaluation, monitoring and assessment, management and implementation of a programme or project using official development assistance (ODA) in accordance with an international treaty on ODA signed by the competent authorities of both Vietnam and the foreign country; and
- entering Vietnam to work as an expert, manager, executive director or technician for a working period under 30 days and for a total cumulative period not exceeding 90 days in any one year.

VIII TAX LAW

Law No. 71/2014/QH13 on amending a number of articles of tax laws (Law No. 71) became effective from 1 January 2015. Key amendments include the following.

The list of deductible expenses of companies used for the calculation of taxable income is expanded to include expenditures on vocational education (Article 1.3 of Law No. 71). On the other hand, the list of non-deductible expenses shall exclude expenditures on advertising, marketing, promotion, commissions, receptions, conferences, support for marketing and expenses directly related to business that exceed 15 per cent of the deductible expenses (Article 1.4 of Law No. 71).

A tax rate of 10 per cent for 15 years is expanded to include income of a company from execution of a new investment project in (Article 1.5 of Law No. 71):

a manufacturing of products on the list of ancillary products given priority and satisfying one of the following conditions:
   - ancillary products supporting high-technology defined in the Law on High-Technology; or
   - ancillary products serving manufacturing in the following industries: textiles, leather, electronic, automobile manufacturing and assembly, and mechanical engineering, provided such products could not be manufactured in Vietnam until 1 January 2015, or can be manufactured in Vietnam and satisfy technical standards established by the European Union or equivalent; and

b manufacturing, except for manufacturing of products subject to a special excise tax and mineral extraction, the capital investment in which is not less than 12,000 billion dong, the technologies applied are assessed in accordance with the Law on High-Technology and the Law on Science and Technology, and the registered capital is disbursed within five years from the day on which the investment is permitted as prescribed by regulations of the Law on Investment.

IX COMPETITION LAW

There was no change to the Law on Competition in 2016. Under the current regulations, the following key points should be noted.

'Economic concentration' is defined in Article 16 of the Law on Competition as any of the following transactions: merger, amalgamation, acquisition, joint venture and other forms as stipulated in law.

An economic concentration is prohibited if the enterprises participating in the economic concentration have a combined market share of more than 50 per cent of the relevant market (the relevant market consists of the relevant product market and the relevant geographical market), except for certain cases under Article 19 of the Law on Competition, which include cases where the enterprise (or enterprises) is at risk of being dissolved or of becoming bankrupt, and the economic concentration has an effect on the extension of exports, or contributions to socioeconomic development or to technical or technological progress.

An economic concentration to be conducted by enterprises with a combined market share in the relevant market of 30 to 50 per cent must be notified to the state authority (i.e., the Vietnam Competition Agency (VCA)) in advance. As set forth in Article 24 of the Law on Competition, enterprises may only carry out the concentration after receiving a written reply from the VCA confirming that such concentration is not within a prohibited category.

A company with a dominant position in the market (i.e., holding a market share of 30 per cent or more) or a company with a monopoly position will also be subject to certain restrictions and prohibitions to prevent the abuse of its dominant or monopoly position, including, *inter alia*, price dumping, price limiting, exclusive dealing and price discrimination in accordance with Articles 13 and 14 of the Law on Competition.

Finally, a normal company is prohibited from entering into anticompetitive agreements for the restriction of the entry of another enterprise into the market, the elimination of an enterprise from the market or bid rigging as set forth in Article 9 of the Law on Competition. A group of companies with a combined market share of 30 per cent or more are prohibited from entering into other anticompetitive agreements such as price fixing, dividing territories and exclusive dealing in accordance with Article 9.

As of April 2017, the government is collecting comments on the draft Law on Competition. A new Law on Competition is expected to take effect in early 2018.

X OUTLOOK

According to the government, the withdrawal of the United States from the Trans-Pacific Partnership is not expected to impact Vietnam's long-term economic goals and integration direction. In May 2017, the leaders of both the United States and Vietnam affirmed the importance of establishing favourable conditions for the businesses of both countries. Vietnam is also expected to increase trade with its ASEAN neighbours and countries where it has trade agreements, such as Japan. As a member of the ASEAN, Vietnam has signed trade agreements with Australia and New Zealand, India, Japan, China, and South Korea. Vietnam also has bilateral trade agreements with the United States, Chile, Japan, South Korea and the Eurasian Economic Union (which took effect on 5 October 2016). Trade negotiations with the European Union were concluded on 2 December 2015, and are expected to take effect in early 2018. Vietnam is also currently negotiating trade agreements with Israel and the European Free Trade Association. Thus, 2017 is expected to be a significant year for M&A

activity. Given the government's development plan for the retail sector, strong interest in this sector is expected to continue. In the next four years, it has been forecast that the number of supermarkets will almost double to 1,300 and shopping malls to 300. The current 25 per cent rate of consumer spending at these venues, including convenience stores, is anticipated to increase to 45 per cent of total consumer spending. In the real estate sector, Jones Lang La Salle foresees a new record number of M&As this year, which has shown a 12 per cent year-on-year increase in investment.

The recent issuance of regulations on casino business, which is permitted to operate only within an integrated entertainment, services and tourism zone, and policies on solar power projects should contribute to strong M&A activities in the hotel and resort tourism segments and in renewable energy sector.

Appendix 1

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