

Vietnam: Compulsory merger filing obligations kick in on 15 May 2020

1 April 2020

On 24 March 2020 the Vietnamese government signed off the second decree to implement the new Law on Competition: Decree No. 35/2020/ND-CP (Decree 35). Decree 35 will take effect from 15 May 2020.

Decree 35 is not much different from previous drafts circulated by the Vietnamese government for public comments. In particular, this decree has 30 provisions, covering both substantive and procedural aspects. On the substantive side, Decree 35 deals with issues on anti-competitive agreements, abuse of dominance, and merger control (but not unfair competition practices).

The most important points in Decree 35 are about clarifying key concepts of the merger control regime under the new Law on Competition, including "control" and the filing thresholds.

Control

Aside from mergers, the new Law on Competition stipulated that the acquisition of the whole or part of property, or shares sufficient to "control" the target, is one of the situations amounting to a potentially reportable "concentration." Decree 35 now provides guidance on what "control" means:

- Ownership of more than 50 percent of charter capital or voting shares, or assets during all or one business line of the target.
- The right to directly or indirectly appoint or dismiss a majority or all members of the board of management, chairman of the members' council, director, or general director of the target.
- The right to amend the target's charter.
- The right to decide important matters during the business activities of the target such as the target's business scope (in terms of products or services and geographies, or selection of the form of organization of the business).

In short, Decree 35 follows a similar path as European Union (EU) competition law and other antitrust laws in focusing on "control" as one of the factors delineating what kind of transactions are "concentrations." In contrast, unlike EU competition law, Decree 35 does not put forward a concept of "negative control" where the acquirer is able to veto the key decisions of the target.

By excluding veto rights from the concept of "control," Decree 35 creates some doubts as to whether –and which – joint ventures would be subject to Vietnamese merger control. This issue may be covered in future implementing rules or guidelines.

Filing thresholds

The new Law on Competition brought about an important change to Vietnamese merger control in that it replaced the prior single filing benchmark (based exclusively on market share) with a multi-threshold approach. As such, the Law on Competition puts forward four alternative benchmarks based on the value of assets, transaction value, revenue, and market share.

However, the Law on Competition left open the numeric amounts for these benchmarks. Decree 35 now fills this gap but with certain differences between four groups of industries: (A) credit institutions, (B) insurance companies, (C) securities companies, and (D) companies in other industries; save for the combined market share of the parties to the transaction, which is the same for all sectors.

Benchmark	Value			
	Group A (Banking)	Group B (Insurance)	Group C (Securities)	Group D (Others)
Value of assets in Vietnam in the last financial year*	≥ 20 percent of the total assets of the system of credit institutions in the Vietnam market	≥ VND 15 trillion (roughly USD 650 million)		≥ VND 3 trillion (roughly USD 130 million)
Revenues in Vietnam in the last financial year*	≥ 20 percent of the total revenues of the system of credit institutions in the Vietnam market	≥ VND 10 trillion (roughly USD 430 million)	≥ VND 3 trillion (roughly USD 130 million)	
Transaction value**	≥ 20 percent of the total charter capital of the system of credit institutions in the Vietnam market	≥ VND 3 trillion (roughly USD 130 million)		≥ VND 1 trillion (roughly USD 43 million)
Combined market share	≥ 20 percent			

*Assets or revenues of either company as party to the transaction or group of affiliated companies.

** Transaction value benchmark does not apply to transactions outside Vietnam.

Decree 35 does not explicitly require that two or more parties to the transaction (for example, the acquirer and the target) have assets or revenues in Vietnam. This means that the filing thresholds may be triggered by only one of the parties to the transaction, and a merger filing to the Vietnam National Competition Commission (NCC) may be required even where the transaction is offshore and all other parties to the transaction are not present in Vietnam at all – i.e., lack of proper "local nexus."

Merger filing assessment

Decree 35 provides some insights into how the NCC will conduct the substantive merger control assessment.

The "preliminary assessment" phase (30 days) essentially appears to revolve around an analysis of the parties' market shares and increases in market concentration levels (Herfindahl-Hirschman Index, HHI). The following mergers (both horizontal and vertical) will be waved through in the preliminary assessment phase.

Permitted mergers	Combined market share	Post-merge HHI	HHI increase (Pre- vs. Post-merger)
Horizontal	< 20 percent	-	-
	≥ 20 percent	< 1,800	-
	≥ 20 percent	> 1,800	<100
Vertical	< 20 percent	-	-

If the transaction does not fall into these "safe harbors," a "formal assessment" phase will be opened. Decree 35 provides some guidance on the substantive analysis in that phase. Generally speaking, Decree 35 (implicitly) refers to internationally used concepts such as unilateral and coordinated effects in horizontal mergers and foreclosure effects in vertical mergers, and lists (relatively abstract and high-level) factors for analyses of these theories of harm. Decree 35 also sets out factors for analyses of a transaction's positive impact on competition – factors widely known in international antitrust law such as efficiencies and technological improvement, but also more local flavors such as the strengthening of the competitiveness of Vietnamese companies in international markets.

Anti-competitive agreements

The Law on Competition identified different categories of agreements: cartel agreements, other horizontal agreements, vertical agreements, and certain additional agreements (such as bidding offenses) prohibited for both horizontal and vertical relationships. Horizontal agreements other than cartels and vertical agreements are subject to a "rule of reason" test, requiring a showing of a significant restriction to competition.

Decree 35 sets out "safe harbors" for horizontal agreements other than cartels and vertical agreements: horizontal agreements where the parties have a combined market share below five percent and vertical agreements where the parties have less than 15 percent market share at each level are deemed not to lead to a significant restriction to competition.

The fact that Decree 35 proposes safe harbors should be commended, but the currently proposed levels seem quite low by international standards.

Abuse of dominance

Decree 35 is quite succinct when it comes to abuse of dominance. It does provide guidance on market definition, which will be important for a finding of dominance. In that respect, Decree 35 largely follows international thinking in terms of demand-side and supply-side substitutability analyses, with some distinct local flavors.

The relevant market is determined based on the product and geographic boundaries. Products or services can be deemed as substitutable for each other if they are interchangeable, in terms of characteristics, use, purpose, and price (with a normal pricing margin being five percent higher or lower in similar trading conditions). The relevant geographical market can be defined as a market in which the interchangeable products or services are supplied on similar competitive conditions and such market is significantly different from neighboring geographical areas. In particular, Decree 35 looks to the following criteria in determining a relevant geographical market:

- The time and costs of transportation cause the price of the products or services to increase by no more than 10 percent.
- One of the barriers to market entry and expansion (i.e., in relation to legal requirements, financial capacity, or performance of intellectual property rights) is present.

While market definition should be largely a matter of fact, in practice it is also likely to be subject to the discretion of the NCC with decisions made on a case by case basis.

Decree 35 also attempts to flesh out in more detail the criteria for finding dominance listed in the Law on Competition. However, the additional guidance remains high-level and generic, hence may be of limited use in practice.

Conclusions

The biggest change brought about by Decree 35 is the quite radical change to Vietnamese merger control as first laid out in the new Law on Competition.

On the upside, Decree 35 clarifies that "control" means sole control by one company (for example, by acquiring more than 50 percent of shares of the target company), excluding veto rights by possibly several companies. This clarification may reduce the types of transactions that need to be filed in Vietnam. In addition, the introduction of clear numeric benchmarks as filing thresholds, especially those based on the value of assets and revenues, may clarify the scope of filing obligations for companies and thereby contribute to legal certainty.

On the downside, to the extent that the asset and revenue thresholds are "combined" and can be met by a single party to the transaction, they lack a proper "local nexus." As a result of such "low" thresholds, a large number of transactions could potentially be caught by the Vietnamese merger control regime. It is unclear whether the NCC will have the necessary human and other resources to handle a large amount of filings. This concern is especially important for the early stages of the new merger control regime, as the new antitrust authority is still in the process of being set up. Time will tell whether the NCC will be fully staffed and up and running when the new merger filing obligations kick in on 15 May 2020.

Please contact [Chui Mei Goh](#) if you would like to obtain a copy of our English translation of Decree 35.

Contacts



Jeff Olson
Office Managing Partner
Ho Chi Minh City, Hanoi
T +84 28 3829 5100
jeff.olson@hoganlovells.com



Adrian Emch
Partner
Beijing
T +86 10 6582 9510
adrian.emch@hoganlovells.com



Ngan Tran
Associate
Ho Chi Minh City
T +84 28 3827 1734
ngan.tran@hoganlovells.com

www.hoganlovells.com

"Hogan Lovells" or the "firm" is an international legal practice that includes Hogan Lovells International LLP, Hogan Lovells US LLP and their affiliated businesses. The word "partner" is used to describe a partner or member of Hogan Lovells International LLP, Hogan Lovells US LLP or any of their affiliated entities or any employee or consultant with equivalent standing. Certain individuals, who are designated as partners, but who are not members of Hogan Lovells International LLP, do not hold qualifications equivalent to members. For more information about Hogan Lovells, the partners and their qualifications, see www.hoganlovells.com. Where case studies are included, results achieved do not guarantee similar outcomes for other clients. Attorney advertising. Images of people may feature current or former lawyers and employees at Hogan Lovells or models not connected with the firm.
© Hogan Lovells 2020. All rights reserved.