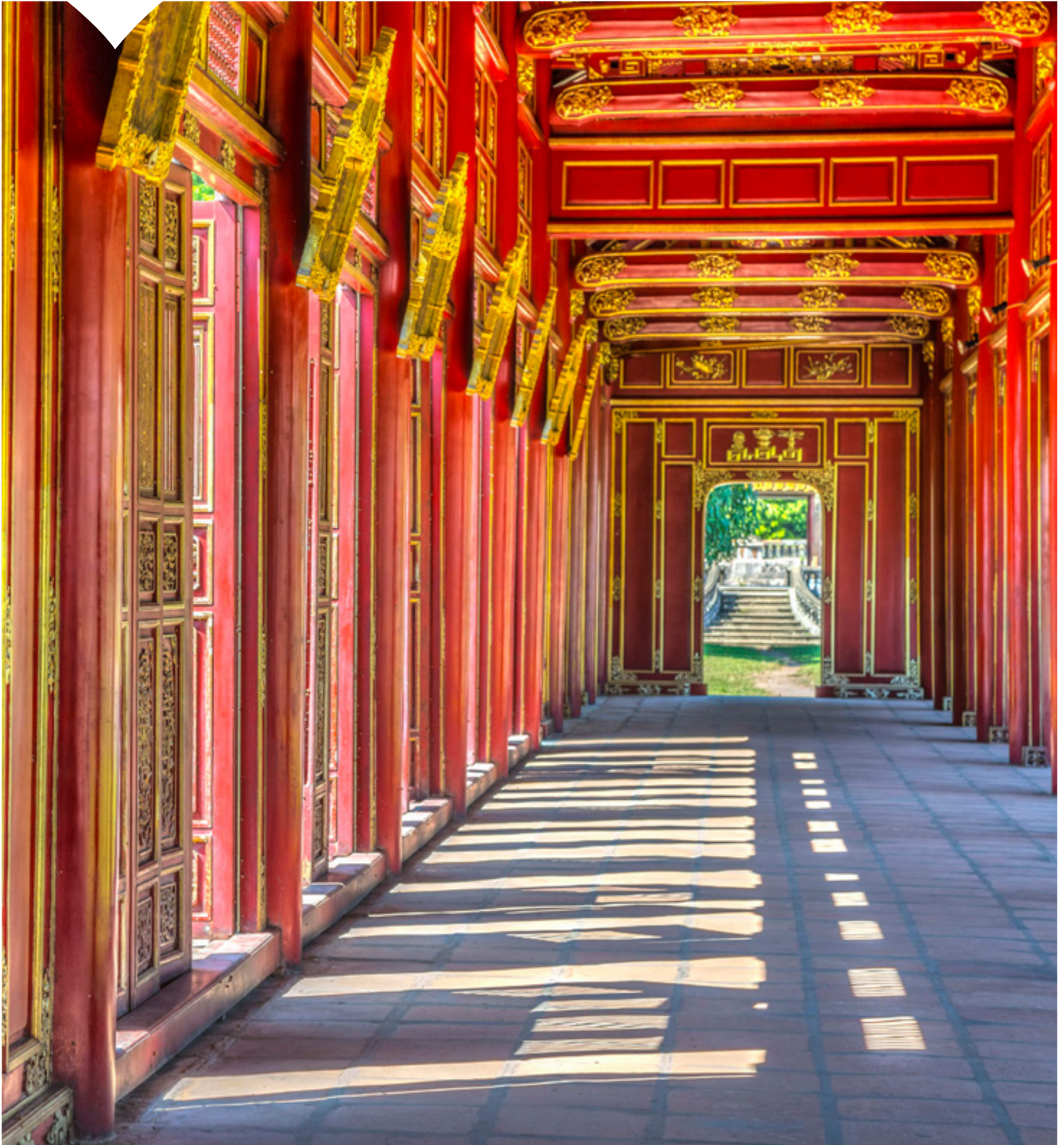


Vietnam Competition Law Series

Merger Control In Vietnam – Moving Towards A More Assertive Enforcement in 2019





MERGER CONTROL IN VIETNAM

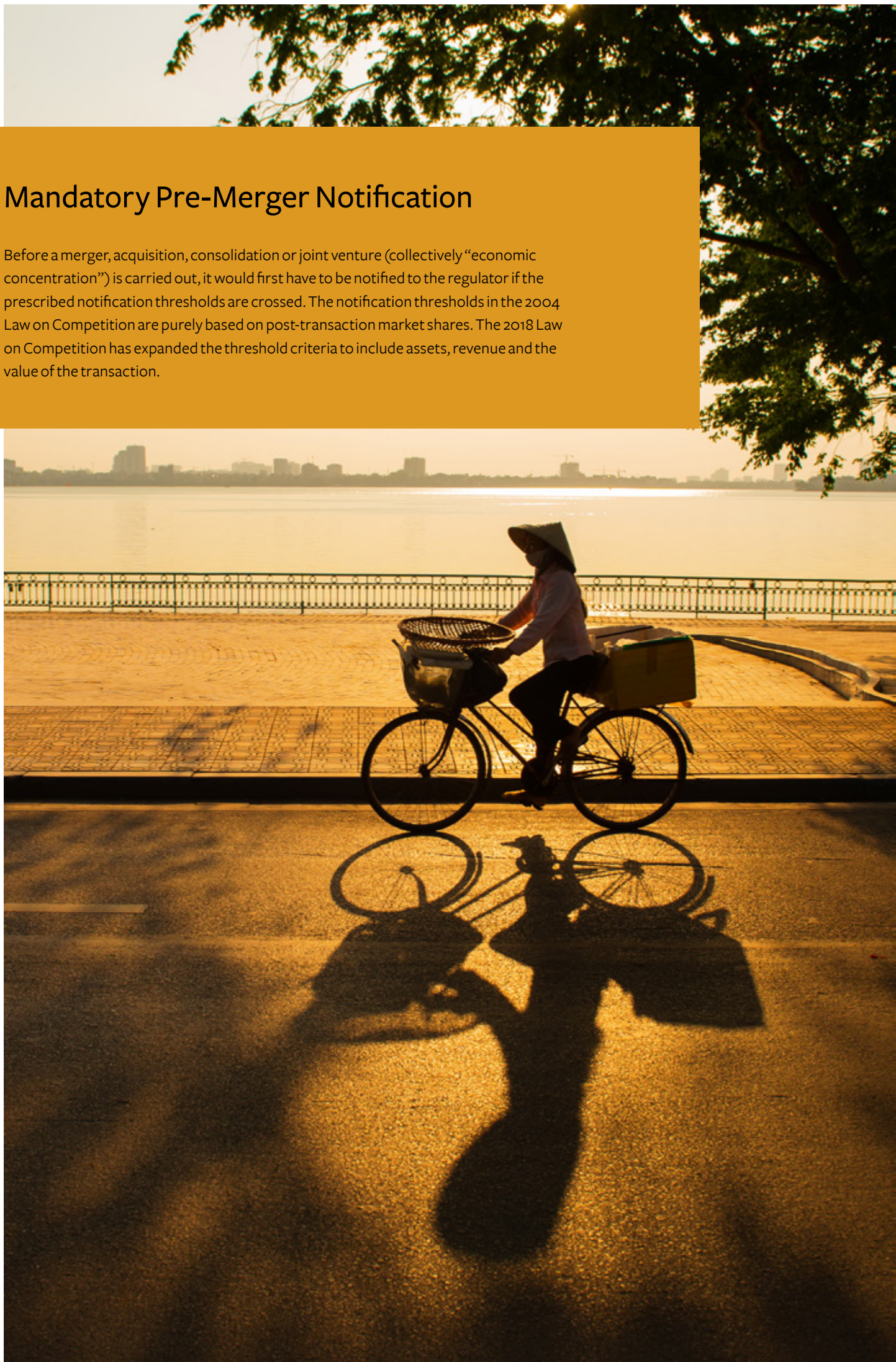
MOVING TOWARDS A MORE ASSERTIVE ENFORCEMENT IN 2019



Vietnam's competition law is poised for big changes, as the new 2018 Law on Competition comes into force from 1 July 2019. Apart from consolidating the two existing regulatory entities (the Vietnam Competition and Consumer Authority (VCCA) and the Vietnam Competition Council) into one consolidated regulator (the National Competition Commission (NCC)), the revised law also introduces significant changes to when mergers have to be notified, and how they will be assessed.

This update covers the key differences between the current 2004 Law on Competition and the 2018 Law on Competition, and also highlights key enforcement trends, going into 2019.

Mandatory Pre-Merger Notification

Before a merger, acquisition, consolidation or joint venture (collectively “economic concentration”) is carried out, it would first have to be notified to the regulator if the prescribed notification thresholds are crossed. The notification thresholds in the 2004 Law on Competition are purely based on post-transaction market shares. The 2018 Law on Competition has expanded the threshold criteria to include assets, revenue and the value of the transaction.



 2004 Law on Competition	Market share based <ul style="list-style-type: none"> • Notification required if post-economic concentration market share is between 30% to 50% • No notification required if post-economic concentration market share is less than 30% or where the post-economic concentration enterprise remains a small or medium enterprise (SME)* 	 2018 Law on Competition	Expanded criteria for notification <ul style="list-style-type: none"> • Notification required if the following proposed** thresholds are met: <ul style="list-style-type: none"> » either party's total assets in the Vietnam market exceeds VND 500 billion (approx. USD 21.5 million); » either party's total turnover exceeds VND 1,000 billion (approx. USD 43 million) in the preceding fiscal year; » the value of the transaction exceeds VND 500 billion (approx. USD 21.5 million); or » the combined market share of the combining entities in the relevant market meets a threshold to be stipulated.
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* Broadly, an SME generally includes an entity that has an annual average of 200 employees who contribute to social insurance, and (i) whose total capital does not exceed VND 100 billion (approx. USD 4.3 million); or (ii) whose total turnover in the immediately preceding year does not exceed VND 300 billion (approx. USD 13 million). These criteria may differ depending on the sector that the entity belongs to.

** While a proposed set of thresholds are currently being considered, further legislation has yet to be issued to confirm these thresholds.

The change in notification criteria calls for a significant shift to the way that businesses comply with merger control rules in Vietnam. Under the 2004 Law on Competition, many businesses found it challenging to be sure of its notification obligations because of the uncertainties surrounding what the relevant market should be, and the difficulties in obtaining market share information.¹ As a result, many transactions have simply not been notified.² A shift to notification based on assets, revenue and value of transaction, which are more objective measures, is expected to provide greater certainty to businesses on when the notification thresholds are met. It also becomes easier for the NCC to enforce the new notification requirements: instead of being involved in a protracted assessment of the correct relevant market to base market share calculations, it can simply point to the clearer and more objective indicia of assets, revenue and value of transaction to establish that the notification thresholds have been crossed.

From 2013 to 2016, the then-Vietnam Competition Authority (VCA) (which has been structured since August 2017 to be the VCCA)³ received an average of four to five economic concentration notification dossiers annually.⁴ Going forward, given the expanded criteria for notification and the relatively low notification thresholds proposed in the 2018 Law on Competition, the number of notifications is expected to increase once the new law comes into force.

1 PaRR, *Vietnam's competition authority to remove market share threshold for merger reviews* (17 July 2017).

2 APEC Economic Committee Report, *Use of Economic Evidence Experience from APEC Members and Implications to APEC Developing Economies and Viet Nam* (March 2018) at 21, 22.

3 ASEAN Secretariat, *Handbook on Competition Policy and Law in ASEAN for Business 2017* (January 2018) at 72.

4 Vietnam Competition Authority, *Annual Report* (2013, 2014, 2015 and 2016).




Prohibition against Anti-competitive Economic Concentrations

The 2004 Law on Competition prohibits economic concentrations that result in the post-transaction entity holding more than 50 percent market share in a relevant market. Exemptions may be granted if, for example, parties to the transaction are at risk of bankruptcy, or if the transaction contributes to socio-economic development and technical or technological progress.

The 2018 Law on Competition represents a fundamental shift in approach to assessing economic concentrations. Instead of prohibiting economic concentrations purely based on market shares, they will be assessed depending on whether they cause or are capable of significantly restricting competition in the Vietnam market.

The move from a market share based prohibition to an effects based prohibition recognises that anti-competitive effects arising from an economic concentration cannot be solely assessed on market shares alone – an economic concentration that results in a post-concentration entity with significant market shares does not necessarily restrict competition if, for example, barriers to entry are low or countervailing buyer power is high. This change also opens the way for the NCC to consider other theories of harm (e.g. vertical, conglomerate) apart from horizontal theories of harm that comes from a narrow focus on combined market shares.⁵ Moving forward, a greater level of analysis and sophistication of review is expected, as the regulator moves from a purely market share based-approach to an effects based approach to assessing economic concentrations.

 2004 Law on Competition	Prohibition based on market share <ul style="list-style-type: none"> • Economic concentrations that result in a market share over 50% are prohibited (50 Percent Market Share Prohibition) • An economic concentration may be exempted if: <ul style="list-style-type: none"> » one or more parties to the concentration are at risk of dissolution/ bankruptcy » it extends exports or contributes to socio-economic development and/or technical or technological progress (Article 19 Exemptions) • Not prohibited if post-concentration entity remains an SME 	 2018 Law on Competition	Prohibition based on effect <ul style="list-style-type: none"> • Removed prohibition solely based on market share • Prohibits concentration that causes or is capable of causing the effect of significantly restricting competition in the Vietnam market • Factors to consider when assessing the positive impact of economic concentration: <ul style="list-style-type: none"> » positive impact on development of industries, science and technology in accordance with State strategies and masterplans » development of SMEs » enhance Vietnamese enterprise's competitiveness in the international market
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⁵ APEC Economic Committee Report, *Use of Economic Evidence Experience from APEC Members and Implications to APEC Developing Economies and Viet Nam* (March 2018) at 21, 22.



Foreign to Foreign Economic Concentrations

The merger control provisions apply to foreign to foreign economic concentrations, both under the 2004 Law on Competition, and under the 2018 Law on Competition.

While the 2004 Law on Competition does not expressly provide that the merger control provisions would apply to foreign to foreign economic concentrations, the VCA's practice has been to review such foreign to foreign concentrations.

In December 2016 for example, the VCA looked into Boehringer Ingelheim's acquisition of Sanofi SA's worldwide veterinary drug business. While the acquisition involved parties outside Vietnam, the parties had business in Vietnam through local subsidiaries. The VCA considered that the transaction was covered by merger control provisions under the 2004 Law on Competition. It was eventually cleared as the parties' combined market shares for the production and distribution of veterinary drugs in Vietnam was less than 50 percent, and the acquisition did not give rise to competition concerns.⁶

The 2018 Law on Competition now clearly states that it applies to any acts by foreign individuals or entities which have or may have the effect of restricting competition in Vietnam's markets. It also expands the scope of entities caught under the law to include related foreign agencies, organisations and individuals, and public professional entities and professional associations operating in Vietnam. The head of VCA's economic concentration control department has reportedly acknowledged the scope for the revised law to cover anticompetitive conduct outside Vietnam that negatively impacts local competition, and the possibility of coordinating with foreign agencies on future investigations.⁷



No Express Extra-Territorial Reach

- No express provision stating that the law applies to foreign entities that do not operate in Vietnam although in practice the VCA has applied it extra-territorially to foreign to foreign economic concentrations



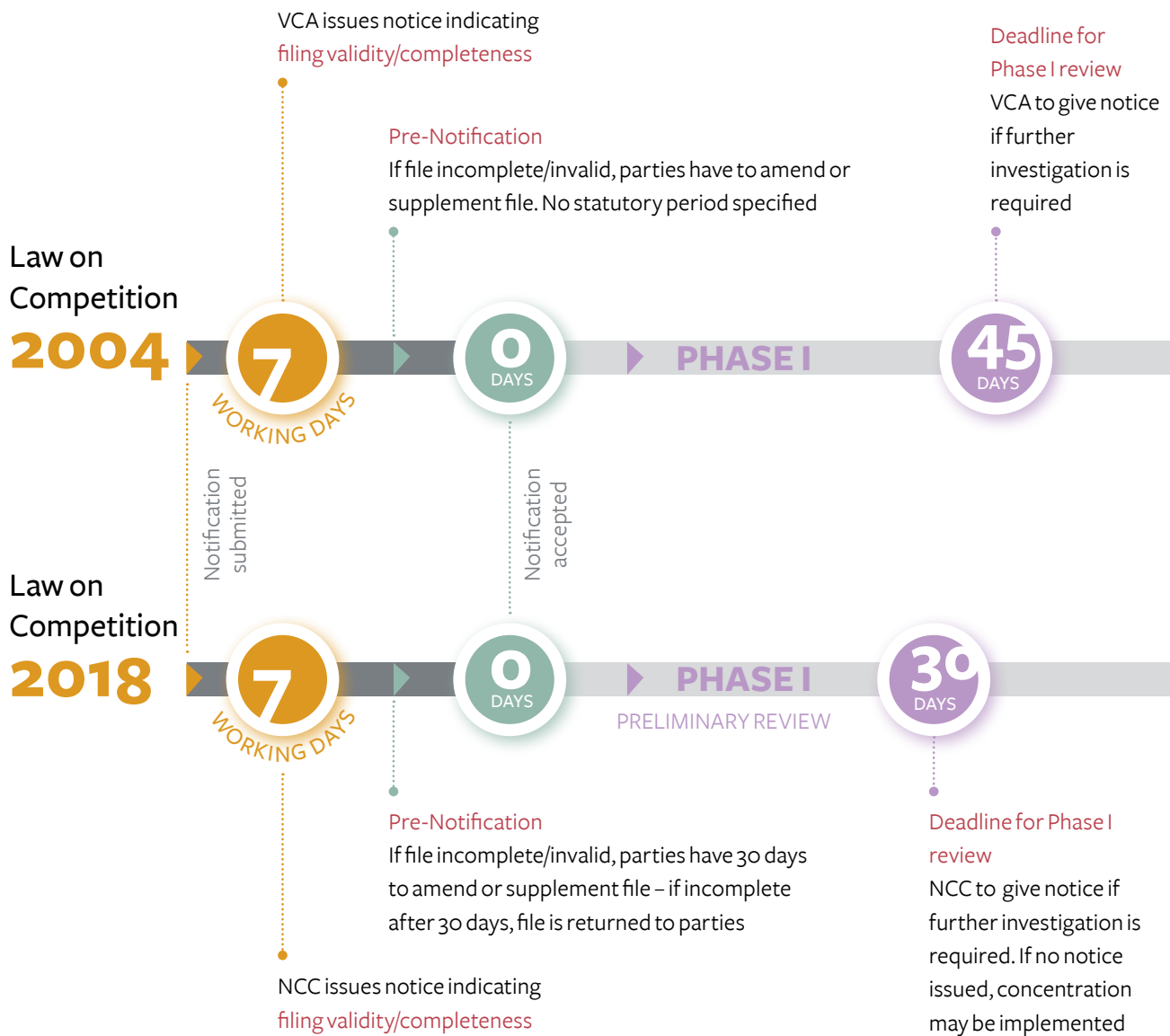
Express Extra-Territorial Reach

- Applies to any acts, whether by Vietnamese or foreign individuals or entities, which have or may have a competition restraining impact on Vietnam's market
- Provisions cover public professional entities and professional associations operating in Vietnam and related domestic and foreign agencies, organisations and individuals

⁶ Vietnam Competition Authority, *Annual Report* (2016).

⁷ PaRR, *Vietnam's revised competition law to cover manipulation by foreign firms* (14 September 2018).

Merger Review Timelines



Review Timelines

Before filing a notification, it is important for parties to consider whether it would be helpful to have a pre-merger consultation with the regulator to clarify whether their transaction would need to be notified or if it would be prohibited. This tends to be an informal process that is not set out in any statutory instruments or governed by fixed timelines, but is an important and cost-free first step to clarifying the merger control obligations.

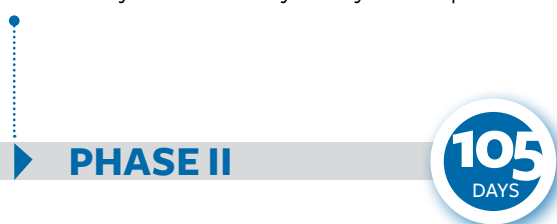
Once parties have submitted a complete notification that has been accepted by the regulator, the statutory timelines start to run. The 2004 Law on Competition provides for an economic concentration to be cleared within 45 days from notification if the review is not complex. This may be extended by a further 60 days in complex cases.

The new 2018 Law on Competition extends the review timelines. Under the new regime, the preliminary review would be completed within 30 days from notification. If a more detailed official appraisal is required, the NCC is given a further 90 days to conduct the review. This can be further extended by 60 days in complex cases. The clock may also be stopped during the process if the NCC requests parties to provide additional information and documents as part of the review.

Separate timelines for Art 19 exemptions

Separate timelines apply when the concentration is being cleared under Art 19 exemptions (e.g. risk of bankruptcy, contribute to socio-economic development, etc.)

Review may be extended by 60 days in complex cases



Clock Stop

During official appraisal, NCC may request for additional info/docs on at most two occasions – clock is stopped while parties provide info/docs



Sanctions

A violation of the merger control provisions could lead to warnings, fines, revocation of business licences, and divestiture/unwinding orders amongst others.



Under the 2004 Law on Competition, a violation of merger control provisions could lead to warnings, fines, revocation of business licences, and divestiture/unwinding orders amongst others. In particular, Decree 120 on Dealing with Breaches in the Competition Sector (2005) specifies the following penalties:

Type of Economic Concentration	Sanctions
Prohibited Mergers	<ul style="list-style-type: none"> • Fine of up to 10% of total turnover* of the merging and merged enterprises • Unwinding/split of post-merger entity
Prohibited Consolidation	<ul style="list-style-type: none"> • Fine of up to 10% of total turnover of the consolidating enterprises • Withdrawal of business registration certificate; division or unwinding
Prohibited Acquisitions	<ul style="list-style-type: none"> • Fine of up to 10% of total turnover of the acquiring enterprise • Compulsory sale of acquired assets
Prohibited Joint Ventures	<ul style="list-style-type: none"> • Fine of up to 10% of total turnover of each JV party • Business registration certificate of JV and JV parties may be withdrawn
Failure to notify Economic Concentration	<ul style="list-style-type: none"> • Fine of up to 10% of total turnover
Completing an economic concentration before an Article 19 Exemption is granted	<ul style="list-style-type: none"> • Fine of VND 100 – 200 million (USD 4,300 – 8,600)

* “Total turnover” in this table = total turnover in the financial year prior to the year of breach
Maximum fines: 10 % of the enterprise’s total turnover

While further implementing legislation is needed to provide details on the specific sanction that would apply for a breach of the merger control provisions under the 2018 Law on Competition, the general sanctions contained in the 2004 Law on Competition continue to apply (e.g. warnings, fines, revocation of business licences, divestiture/unwinding orders) under the new law. The 2018 Law on Competition further introduces supplementary sanctions, including the possibility of having trading terms and prices being subject to the control of a state agency. It also stipulates a new maximum fine for breach of merger control provisions – the percentage cap has been lowered from 10 percent to 5 percent of total turnover, and the calculation of total turnover has been limited to the infringing enterprises’ total turnover in the relevant market.

Enforcement Trends

In the past, compliance with the merger control provisions on the 2004 Law on Competition had been described by commentators as being “very poor”.⁸ Several significant economic concentrations were carried out that apparently ignored the merger control requirements.

However, in more recent years, there appears to have been increasing levels of enforcement, the VCA reportedly stating in 2014 that merger control enforcement was going to be a priority.⁹



Earlier Cases that Had Not Been Notified

In a Prime Minister approved merger in 2011 between two wholly state owned enterprises (Viettel and EVN Telecom), the post-transaction entity reportedly held a market share of between 30 – 50 percent in the market for 3G mobile phone services,¹⁰ but the transaction was not notified to the VCA. This was despite complaints from a competitor that the transaction violated the 2004 Law on Competition.¹¹

In 2012, the Ministry of Transportation's proposed merger between Jetstar Pacific Airline and Vietnam Airlines was approved without any scrutiny from the VCA. The transaction allowed the post-merger entity to hold nearly 100 percent market share in the domestic air transportation market.¹² The Prime Minister had released a decision approving the merger.

Recent Review Cases

In 2014, the VCA reviewed a merger between the Vietnam National Financial Switching Joint Stock Company and Smartlink Card Services Joint Stock Company, which were companies active in the field of intermediary bank for payment. The merger would have created a monopoly, with the existence of only one united card union on the market. While the VCA noted that the transaction would have been prohibited under the 50 Percent Market Share Prohibition, it evaluated the parties' request for an exemption and submitted its report to the Prime Minister for consideration.¹³ An exemption was granted for a period of five years, and would be automatically renewed every five years on the condition that the post-merger entity fulfilled various conditions, including the requirement not to discriminate amongst customers, and to comply with the State Bank of Vietnam's instructions and regulations when adjusting service fees. This was the first time that an exemption was granted for a merger that would have otherwise been prohibited under the 50 Percent Market Share Prohibition.

On 18 May 2018, the Vietnam Ministry of Industry and Trade commenced a formal investigation into Grab's acquisition of Uber's operations in Southeast Asia, after preliminary investigations indicated that the post-transaction entity could have a market share of more than 50 percent in Vietnam.¹⁴ This followed an announcement in March 2018 that Grab had agreed to purchase Uber's Southeast Asian business in consideration of Uber having a 27.5 percent share in Grab. The Vietnam regulator has never prohibited an economic concentration since the Vietnam 2004 Law on Competition was passed, and this in-depth scrutiny of the Uber/Grab transaction represents a more assertive approach.

8 Luu Huong Ly, *Competition Law in Vietnam* (August 2015) 1 CPI Antitrust Chronicle.

9 DFDL, *Focus on Merger Activity by the Vietnam Competition Authority* (16 April 2014).

10 Phan Cong Thanh, *Competition Law Enforcement of Viet Nam and the Necessity of a Transparent Regional Competition Policy* (December 2015), ERIA Discussion Paper Series.

11 The Saigon Times, *Viettel bid for EVN Telecom violates Law: Hanoi Telecom* (14 November 2011).

12 Luu Huong Ly, *Competition Law in Vietnam* (August 2015) 1 CPI Antitrust Chronicle.

13 Vietnam Competition Authority, *Annual Report* (2014).

14 Ministry of Industry and Trade of the Socialist Republic of Vietnam, *Cục Cạnh tranh và Bảo vệ người tiêu dùng - Bộ Công Thương quyết định điều tra chính thức vụ việc tập trung kinh tế giữa Grab và Uber tại thị trường Việt Nam* (18 May 2018); Ministry of Industry and Trade of the Socialist Republic of Vietnam, *Kết thúc điều tra sơ bộ vụ việc Grab mua lại hoạt động của Uber tại thị trường Việt Nam* (16 May 2018).



Conclusion

There is a clear trend toward more assertive enforcement of merger control laws in Vietnam in recent years. Coupled with the introduction of a more expansive notification obligation under the 2018 Law on Competition which will come into force on 1 July 2019, compliance with competition law in Vietnam is expected to become more stringent. It is therefore important for businesses, in the course of deal-making, to be aware of their evolving competition law compliance obligations to avoid the potential pitfalls.



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