

Vietnam Decree 35/2020/ND-CP

Summary:

Over a year after the passage of the Competition Law, the highly anticipated Decree No. 35/2020/ND-CP on detailed regulations for a few provisions of the Competition Law ("Decree 35") was finally passed by the Vietnam Government on 24 March 2020. Decree 35 will take effect on 15 May 2020.

This Decree provides detailed guidance on, among other things, the specific threshold figures for merger control notification, the definition of "control or influence" for merger control purposes, assessing the significant anti-competitive effects, and measuring market dominance based on "significant market power". Notable changes have been described below.

1. Definition of "control or influence" for merger control purposes

Under the Competition Law, an acquisition, for merger control purposes, is defined as a direct or indirect acquisition of the whole or part of the contributed capital or assets of another enterprise sufficient to control or influence the acquired enterprise, or all or one of the business lines of the acquired enterprise. Decree 35 introduces a broad test for determining "control or influence". Specifically:

"Controlling or influencing" an enterprise or a business line of an enterprise (the "acquired enterprise") means:

- the acquiring enterprise gains ownership of more than 50% of charter capital or more than 50% of the total voting rights of the acquired enterprise;
- the acquiring enterprise gains ownership or the right to use more than 50% of the assets of all or one business line of the acquired enterprise; or
- the acquiring enterprise has one of the following rights [with respect to the acquired enterprise]:
 - a. the right to directly or indirectly decide on the appointment, dismissal or removal of a majority or all members of the board of management, the chairman of the board of members, the director or general director of the acquired enterprise;
 - b. the right to decide on the amendment or supplements to the Charter of the acquired enterprise; or
 - c. the right to participate in important decisions regarding the business operations of the acquired enterprise, including selection of: (i) the form of the business organization; (ii) the industry, business lines, location, and business model; (iii) adjustment to the scope and business lines; (iv) selection of the form and method of mobilizing, allocating, and utilizing business capital of the acquired enterprise.

It follows that entities engaging in an acquisition will need to consider possible notification/approval requirements if certain control/influence as defined under Decree 35 is gained by virtue of such acquisition.

2. Specific threshold figure for merger control notification

While the Competition Law had introduced more concrete thresholds to determine when an economic concentration (i.e. mergers, consolidations, acquisitions, and joint ventures) will be subject to competition notification/approval, the law did not specify the amount which would trigger such thresholds.

Decree 35 provides clarity on the specific threshold amount. Unlike previous drafts, however, this Decree also introduces a separate threshold amount for credit institutions, insurance companies, and securities companies. In short, entities (with exceptions to credit institutions, insurance companies, and securities companies) shall be subject to notification/approval when one of the following thresholds is met:

- the total assets in the Vietnamese market of (i) one of the enterprises participating in the transaction or (ii) the group of affiliated companies, of which one of the parties participating in the economic concentration is a member, reaches VND 3,000 billion (approximately USD 129 million) or more in the financial year preceding the economic concentration;
- the total revenue in the Vietnamese market of (i) one of the enterprises participating in the economic concentration or (ii) the group of affiliated companies, of which one of the parties participating in the economic concentration is a member, reaches VND 3,000 billion (approximately USD 129 million) or more in the financial year preceding the economic concentration;
- the transaction value of the economic concentration is VND 1,000 billion (approximately USD 43 million) or more; or
- the combined market share of the enterprises to the economic concentration is 20% or more in the relevant market in the financial year preceding the economic concentration.

Where the economic concentration takes places outside the territory of Vietnam, the transaction value threshold will not be considered when determining whether such economic concentration will be subject to notification/approval requirements. Further, as mentioned, credit institutions, insurance companies, and securities companies participating in an economic concentration will be subject to separate notification/approval thresholds. We will provide a separate alert focusing on these specific updates.

Moving forward, entities engaging in economic concentrations inside or outside of Vietnam will need to take into account these threshold amounts.

3. Assessing the significant anti-competitive effects for horizontal and vertical agreements

The Competition Law removed the previous 30% combined market share threshold in the determination of whether an agreement is anti-competitive.

Now, horizontal agreements – including price fixing, customer allocation, restriction of output, bid rigging, prevention of market entry, and exclusion of market participation, are considered hard-core agreements and per se illegal. Other horizontal agreements are prohibited if they cause or potentially cause a "significant anti-competitive effect" in the market.

With regards to vertical agreements, agreements on bid rigging, prevention of market entry, and exclusion of market participants are prohibited. Other vertical agreements are prohibited if they cause or potentially cause a "significant anti-competitive effect" in the market.

Decree 35 further clarifies a number of factors for determining whether an agreement causes or potentially causes a significant anti-competitive effect in the market include. These include, but are not limited to, the following:

- market share of the parties to the agreement in comparison to other competing enterprises not a party to such agreement;
- barriers to market access or expansion, based on factors influencing the decision of an enterprise when accessing or expanding the market;
- restrictions on research, development and technological innovations;
- limitations on the ability to access or possess essential infrastructure, based on the level of necessity of such infrastructure for production and business activities, and based on the costs and time for competing enterprises not a party to the agreement to access and retain such infrastructure;
- increase of costs and time for customers to purchase goods or services from enterprises which are parties to the agreement; or
- hindrances on competition in the market through the control of industry/sector specific elements in relation to the parties to the agreement, based on the level of dominance of such particular factors.

Such a move away from the market share assessment towards an effect-based assessment leaves more discretion in the hands of competition regulators to determine whether an agreement may have a significant anti-competitive effect on the market.

4. Measuring market dominance based on "significant market power"

In addition to the 30% market share threshold, the Competition Law looks towards the "significant market power" of an enterprise to determine whether such enterprise holds a market-dominant position within the market. Decree 35 provides further guidance on the factors to determine significant market power of an enterprise. These factors include, but are not limited to, the following:

- the correlation of market share among enterprises in the relevant market, based on a comparison of market shares between enterprises and group of enterprises in the relevant market;
- the financial strength and scale of the enterprise or group of enterprises, based on the financial capacity, ability to access capital sources, credit capital and other financial sources, total capital sources, total assets, number of employees, production scale, distribution network, and sale of goods or services of such enterprise in relation to other competing enterprises;
- the barriers on other enterprises from market entry or expansion, based on factors influencing the decision of such enterprise when accessing or expanding the market;
- the capability of accessing and controlling the consumption/supply market;

- the advantages of technology and technical infrastructure of the enterprise or group of enterprises as compared to their competitors;
 - the advantages of ownership and right to hold and access infrastructure as compared to other competitors, based on the level of necessity and ability to access infrastructure for production and trading of goods or services; and
 - the advantages of ownership and right to use objects of intellectual property rights as compared to other competitors, based on the level of necessity and ability to access objects of intellectual property rights during production and trading of goods or services.
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