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**This issue covers the following topics:**

India

**UPDATES TO THE FOREIGN DIRECT INVESTMENT  
POLICY****(Rashmi Grover)**

Malaysia

**BENEFICIAL OWNERSHIP REPORTING FRAMEWORK  
INTRODUCED IN MALAYSIA****(Aizad Bin Abul Khair)**

Vietnam

**GUIDANCE ON IMPLEMENTATION OF THE LAW ON  
COMPETITION****(Long Nguyen)**

India

**UPDATES TO THE FOREIGN DIRECT INVESTMENT POLICY**

本稿ではインドの外国直接投資規制に関する直近の改正について紹介する。外国直接投資規制は時の政権の政策的判断が色濃く反映され頻繁に改正されるものであるが、本年は新型コロナウイルスの感染拡大に伴う改正も行われている。現在インドでもロックダウンが継続中であるが、このような状況下で一時的に企業価値が下落していることを奇貨として外国資本に買収攻勢を仕掛けられることを回避するために、一時的に一部の外国投資家による直接投資が事前の政府承認を必要とされるなど厳格化されている。

**Introduction**

The Government of India has been revising the Foreign Direct Investment (“FDI”) Policy of India from time to time. Some of these changes are made with an intent to liberalize the extant rules and to provide clarity on certain aspects. A key change has been triggered as a result of the COVID-19 pandemic in order to prevent opportunistic takeovers of Indian companies, whose values have been significantly eroded due to the lockdown and business closures. In April 2020, the Ministry of Finance amended the Foreign Exchange Management (Non-Debt Instruments) Rules, 2019 (“NDI Rules”) to give effect to these changes. A brief summary of the key revisions is set out below:

**Key Amendments**

1. **Liberalisation in the Insurance Sector:** On 21 February 2020, the Department for Promotion of Industry and Internal Trade (“DPII”), Ministry of Commerce & Industry introduced Press Note 1 of 2020 to permit 100% FDI in insurance intermediaries under the automatic route, which was earlier capped at 49%. Correspondingly, the requirement of such insurance intermediaries being Indian owned and controlled has also been removed. Insurance intermediaries include insurance brokers, corporate agents and third party administrators. Such investment, however, would be subject to certain stipulated conditions which include:
  - (i) at least one from among the Chairman of the Board of Directors or the Chief Executive Officer or Principal Officer or Managing Director of the insurance intermediary must be a resident Indian citizen;
  - (ii) prior permission of the Insurance Regulatory and Development Authority of India (“IRDAI”) must be obtained for repatriating dividend to foreign parent company;

- (iii) the foreign investor must bring in the latest technological, managerial and other skills to the Indian subsidiary;
- (iv) the Indian company would not be permitted to make payments to the foreign group or promoter or subsidiary or interconnected or associate entities beyond what is necessary or permitted by the IRDAI and shall make disclosures in the formats to be specified by the IRDAI of all payments made to its group or promoter or subsidiary or interconnected or associate entities;
- (v) the composition of the Board of Directors and key management persons shall be as specified by the IRDAI.

IRDAI is expected to issue guidelines on the composition of directors and key managerial persons to ensure independence and operational expertise with respect to the governance of the intermediaries. Further, insurance intermediaries are still required to comply with the IRDAI regulations, which require the prior approval of the IRDAI for any transfer / issuance of shares above a certain threshold.

- 2. Measures to Curb Opportunistic Takeovers:** On 17 April 2020, the DPII issued a press note amending the FDI policy, pursuant to which prior approval of the Indian Government will now be required for any FDI coming into India (directly or indirectly) by an entity situated in a country which shares a land border with India, i.e., China, Pakistan, Bangladesh, Nepal, Bhutan, Myanmar and Afghanistan. FDI covers any investment in or transfer of equity instruments of an unlisted company or in 10% or more of the post-issue, paid-up equity capital on a fully diluted basis of a listed company. Further, a transfer of ownership of any existing or future FDI in an entity in India, directly or indirectly, resulting in the beneficial ownership falling into an entity restricted as per this amendment, will also require Government approval. The amendment is likely to impact global and multi-jurisdictional transactions as well if they result in an indirect investment in or transfer of an Indian company's equity instruments or change in the beneficial ownership to an entity that is covered by this amendment. To a large extent, the impact of this notification will be on Chinese investors like Alibaba, Tencent and others which have significant investments in Indian companies, specifically start-ups. Start-ups across India have benefitted substantially from Chinese investments, which could now be under increased regulatory scrutiny due the revised rule and even steps like rights issue, inter-promoter transfers resulting in any change in the holding of a Chinese investor would require approval of the Government.
- 3. Pricing Guidelines in relation to Rights Issue:** Prior to the amendment of the NDI Rules, a non-resident shareholder could subscribe to shares renounced by another resident or non-resident shareholder in a rights issue at a price determined by the company (in case of a listed company) or at a price not less than the price offered to a resident shareholder (in case of an unlisted company). Pursuant to the amendment, a non-resident shareholder can subscribe to the renounced shares (which have been renounced by a resident shareholder), only upon compliance with the pricing guidelines stipulated in the NDI Rules. The pricing guidelines in the NDI Rules provide that in case of an unlisted Indian company, the price of equity instruments of such company issued to a person resident outside India shall not be less than the valuation of equity instruments done as per any internationally accepted pricing methodology for valuation on an arm's length basis duly certified by a chartered accountant or cost accountant or a merchant banker registered with SEBI.
- 4. Single Brand Retail Trading (SBRT) Sourcing Norms:** Prior to the amendment, the sourcing norms applied on expiry of 3 years from the commencement of business i.e., opening of the first store for entities undertaking SBRT of products having 'state-of-art' and 'cutting-edge' technology and where local sourcing is not possible. Pursuant to the amendment, sourcing norms shall become applicable on expiry of three (3) years from commencement of the business i.e. opening of the first store or start of online retail, whichever is earlier.
- 5. Further Liberalisation in Defence Sector:** On 16 May 2020, the Finance Minister made an announcement increasing the limit of FDI in the defence sector from 49% to 74% under the automatic route, subject to compliance with certain conditions. An official press note and amendment to the NDI Rules is awaited.

## **Conclusion**

The liberalization of the insurance sector in relation to insurance intermediaries is a welcome move even though it comes with a set of conditions to be complied with. Given the outbreak of the COVID-19 pandemic, foreign investments globally have virtually dried up and in all likelihood we will see the real results of the liberalization only much later. The measures introduced to curb opportunistic takeovers are by and large targeted towards Chinese

investors. This is in line with measures introduced globally where foreign investments are going to be scrutinized by authorities in order to prevent acquisitions of domestic companies which have been disruptively impacted by the lockdowns and business closures and have lost significant value.

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## Malaysia

### BENEFICIAL OWNERSHIP REPORTING FRAMEWORK INTRODUCED IN MALAYSIA

マレーシアの企業委員会（Companies Commission of Malaysia）は2020年3月1日付けで法人の実質的所有者の報告に関するガイドラインを発効した。同ガイドラインと同趣旨の規制は英国、シンガポールやアジアの複数の国でも導入されているところ、マレーシア法人に関しても2020年12月31日までに同ガイドラインが規定する報告義務を満たすことが求められている。本稿ではかかる報告義務の具体的内容について概説する。

## Introduction

The Companies Commission of Malaysia (“CCM”) has on March 1<sup>st</sup>, 2020, issued a Guideline for the Reporting Framework for Beneficial Ownership (“BO”) of Legal Persons (“Guidelines”), which serves as a guide to assist legal persons (companies, limited liability partnerships, sole proprietors and partnerships) to understand and comply with the requirements to obtain, keep and hold up-to-date BO information, and to provide access in a timely manner for the purposes of BO reporting framework pursuant to the Companies Act 2016 (“CA 2016”) and Limited Liability Partnerships Act 2012, as the case may be. The Guideline has already come into force. Companies, limited liability partnerships and businesses have up to December 31<sup>st</sup>, 2020 to obtain and update their BO information (“Transition Period”). After the Transition Period, the necessary disclosures will have to be made to the CCM.

## Key Provisions

### 1. Companies Exempted from Complying with the BO Framework

The following types of companies are excluded from complying with the BO framework, but must still however make a declaration to CCM of their exempted status:

- (a) Companies which are licensed by Bank Negara Malaysia under, among others, the Financial Services Act 2013 and the Islamic Financial Services Act 2013;
- (b) Entities regulated under securities laws, such as entities licensed or registered under the Capital Markets and Services Act 2007;
- (c) Companies whose shares are quoted on a local or foreign stock exchange; and
- (d) Companies whose shares are deposited in the central depository pursuant to the Securities Industry (Central Depositories) Act 1991.

## 2. Definition of BO of Companies

Under the CA 2016, a BO is defined as “*the ultimate owner of the shares and does not include a nominee of any description*”. In respect of companies limited by shares, the BO of a company is an individual (i.e. natural person) who has:

### (a) Significant interest / ownership

The individual must either (i) have a direct or indirect interest in 20% or more of the company’s shares; or (ii) holds directly or indirectly 20% or more of the company’s voting shares.

### (b) Effective control

The individual either (i) has the right or power to directly or indirectly appoint or remove a director(s) who holds a majority of the voting rights at the meeting of directors; or (ii) is a member of the company and, under an agreement with another member of the company, controls alone or through the cumulative effect of the agreement, a majority of the voting rights in the company.

## 3. Steps Companies are Required to Take

The key steps that the companies are required to take are as follows:

- (a) Take reasonable steps to identify the BO;
- (b) Obtain the BO information through notices pursuant to Section 56 of the CA 2016;
- (c) Receive and verify the BO information;
- (d) Enter the verified information into the register of BO;
- (e) Notify CCM of the BO information;
- (f) Keep accurate and up to date BO information in the register or beneficial owners and to update CCM;
- (g) Give access to the information to relevant authorities, the BO and persons authorized by the BO.

## 4. Company is Required to Take Reasonable Measures

The Guideline requires that companies must take reasonable measures to identify the BO, by taking one or more of the following actions:

- (a) To consider all interests in the company which are held by individuals, corporate entities and/or trusts;
- (b) Review all documents and information available to the company – for example, register of members and shareholders’ agreements;
- (c) Have an appropriate internal policy on BO reporting.

## 5. Must Have Appropriate Internal Policy on BO Reporting

The company must consider adopting an appropriate internal policy on BO reporting to require shareholders to notify the company on the identity of the BO and of any changes to the BO. One of the suggestions that the Guideline had specified is that the constitution of the company may be amended to reflect this reporting policy.

### Next Steps

The Guideline is similar to regulations in the UK and Singapore and several other jurisdictions, requiring companies to report their BOs, so that the company as well as CCM are well aware of who actually controls the affairs of the

company and therefore create more transparency and accountability. As mentioned earlier in the article, companies may utilize the Transition Period to retrieve, collect and verify the BO information. After the Transition Period, the necessary disclosures will have to be made to the CCM.. If you require any clarification on this BO reporting framework, please feel free to reach out to us.

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## Vietnam

### GUIDANCE ON IMPLEMENTATION OF THE LAW ON COMPETITION

ベトナムでは新しい競争法（法律第 23/2018/QH14 号）が 2018 年 6 月に成立し、2019 年 7 月 1 日に施行されているにもかかわらず、その施行細則が長らく存在しない状態が続いたが、本年 3 月 24 日付けで新競争法の施行細則となる政令 35/2020/ND-CP 号がようやく成立し、本年 5 月 15 日に施行された。本記事では、この政令 35 号に関し、新たに導入されたアプローチなど、特に実務的に関心が高いと思われる点についてご紹介する。

On 24 March 2020, the Government issued Decree 35/2020/ND-CP (“**Decree 35**”) providing guidelines for implementation of a number of provisions of the Law on Competition.

The Law on Competition which came into effect from 1 July 2019 introduced certain new concepts which required further guidance from the Government.

We therefore summarize the guidelines on new important issues under the Law on Competition Decree 35. Decree 35 came into effect from 15 May 2020.

#### **Significant competition-restraining impact determination**

Under the Law on Competition, there is a new criteria for determination as to whether an agreement in restraint of competition is prohibited as that an agreement causes or has the ability to cause a significant competition-restraining impact. The Law on Competition also sets out certain factors for determination of this criteria but requested the Government to provide further guidelines.

Decree 35 provides the guidelines for the National Competition Committee (“**NCC**”) to assess the impact or ability of an agreement to cause impact based on one or more of the following factors:

- (a) The change or tendency of change of market share of parties to the agreement in comparison with those of competitors which are not parties to the agreement;
- (b) Factors affecting the decision of the enterprises in accessing or expanding the market;
- (c) The impact or the ability to cause impact by the agreement in the fields of research, development, technology innovation or increasing technology ability in the related sectors;

- (d) The level of necessity of the relevant infrastructure for production and business activities and the costs and time for competitors which are not parties to the agreement to access and retain such infrastructure or similar infrastructure;
- (e) The increase of expense, time of customers for purchasing goods or services from participants to the agreement or for changing to purchase other similar goods or services by comparing the expense and time to purchase goods or services from participants to the agreement or change to buy from other entities before and after the agreement;
- (f) The restriction from competition in the market by controlling specific factors in the relevant sector by considering the level of dominance of such factors for competitive activities of enterprises in the market.

In addition, Decree 35 lists certain agreements which are regarded as not causing or having the ability to cause a significant competition-restraining impact. They are:

- (i) horizontal agreements between enterprises having combined market share less than 5%; and
- (ii) vertical agreements between enterprises, each of them having a market share of less than 15%.

### **Significant market force determination**

Under the Law on Competition, an enterprise is deemed to hold a dominant market position when it has (i) significant market force or (ii) 30% or more of the market share in the relevant market. The Law on Competition also sets the criteria to determine as to whether an enterprise has the “significant market force” but the Government has provided more guidance on this issue.

Decree 35 provides guidelines by requesting the NCC to consider/compare the following issues in order to decide as to whether an enterprise has significant market force:

- (a) the market share of the enterprise or group of enterprise in the relevant market in order to decide the correlation of market share among enterprises in the relevant market;
- (b) the financial capacity, the ability to access capital sources, credit capitals and other financial sources, total assets, number of employees, manufacturing scale, distribution network of the enterprise or group of enterprises in comparison with others to determine the financial strength and scale of the enterprise(s);
- (c) the factors affecting the decision of enterprise on accessing or expanding the market to determine the barriers to another enterprise entering or expanding the market;
- (d) the advantages of the enterprise or group of enterprises in comparison with its competitors due to its ability to possess, access and control the market of distribution and/or consumption of goods or services or supply sources of goods or services in the market to determine the ability to possess, access and control the market of distribution and/or consumption of goods or services or supply sources of goods or services;
- (e) the advantages of technologies and technical infrastructure owned or used by such enterprise or group of enterprises for its production and business in comparison with competitors to determine the advantages of technologies and technical infrastructure;
- (f) the necessary level and ability to access infrastructure for production and trading of goods or services to determine the advantages of the enterprise or group of enterprises over their competitors in this regard;
- (g) the necessary level and the ability to access intellectual property during the production and trading of goods or services to determine the advantage of the enterprise with competitors;
- (h) the expense and time necessary for customers and enterprise to purchase goods or services of other enterprises in the relevant market to determine the ability to switch to sources of supply and demand of other relevant goods or services;

- (i) other special factors in the industry or sector in which the enterprise or group of enterprise is conducting business to determine the advantage of the enterprises with competitors regarding specific conditions of such industry or sector.

### **Economic concentration regulations**

Under the Law on Competition, enterprises participating in an economic concentration (including M&A and joint venture transactions) must notify the NCC prior to carrying out the transaction if such economic concentration reaches the specified thresholds decided by the Government from time to time. These transactions can only be completed if the NCC permits or does not object to the transaction within a statutory period. In addition, an economic concentration which causes the effect or is capable of causing the effect of significantly restricting competition in the market of Vietnam will be prohibited.

Decree 35 provides guidance on notification thresholds, permitted transactions and the criteria to consider as to whether an economic concentration causes or is capable of significantly restricting competition.

#### **The threshold requiring notification of economic concentration**

Decree 35 sets out the following thresholds:

- (a) Total assets in Vietnam of the enterprise or its group was VND3 trillion or more in the preceding fiscal year
- (b) Total sales or purchase turnover in Vietnam market of the enterprise or its group was VND3 trillion or more in the preceding fiscal year
- (c) The value of the transaction is VND1 trillion or more
- (d) The combined market share of enterprises participating in the transaction in the preceding fiscal year was 20% or more in the relevant market

If the concentration is not concluded in Vietnam, threshold (c) will not apply.

Decree 35 also sets out specific threshold for notification by credit institutions, securities companies and insurance companies.

#### **Permitted economic concentration**

If the combined market share of enterprises participating in the economic concentration is less than 20% in the relevant market, the transaction is permitted. If the combined market share of participating enterprises is 20% or more in the relevant market, the sum of the squares of their market shares and the increase of such sum after the transaction will also be considered to determine whether the transaction is permitted.

The economic concentration is also permitted if the market share of each of the participating enterprises having a relationship with each other in the chain of production, distribution and supply of goods or services or ancillary support is less than 20% in each relevant market.

#### **Significant competition-restraining impact of economic concentration**

Decree 35 requires NCC to consider the following issues to determine as to whether the concentration causes or is capable of causing the effect of significantly restricting competition and therefore is prohibited:

1. The combined market share of the enterprises participating in the economic concentration in the relevant market, both before and after the economic concentration;
2. Extent of concentration in the relevant market both before and after the concentration in order to determine the danger of creating or strengthening the market power of enterprises and the ability to increase coordination or collusion between enterprises;

3. Relationship of the enterprises participating in the economic concentration in the chain of production, distribution and supply of goods or services to determine the ability of the parties after the economic concentration to create superior competitive advantages aimed at preventing or excluding competition in accessing the market;
4. The competitive advantage as the result of the economic concentration regarding product characteristics, production and distribution chain, financial capacity, brand name, technology, intellectual property rights and other advantages of the enterprises after the economic concentration compared to competitors;
5. The ability of an enterprise to increase prices or its profit margin after the economic concentration, due to the change in demand of goods or services, the supply of the competitors, transaction conditions and other factors;
6. The ability of an enterprise after the economic concentration to exclude or prevent other enterprises from accessing or expanding the market due to the change of level of control of input factors for production or business, the special factors of the industry or sectors and other factors;
7. Particular factors in the industry or sector which may directly influence or significantly change the results of the assessment.

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