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## M&A in Vietnam for Thai Investors (Part 1 of 2)

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### Background

M&A is an important channel to attract foreign investment in Vietnam. It is reported, that, despite the global economic recession caused by the Covid-19 pandemic, the value of M&A transactions in Vietnam in 2020 has reached USD 3.5 billion.<sup>1</sup> Amongst foreign investments, deals from Thai investors are a recent rising phenomenon in Vietnam with several highlighted transactions, namely:

- Central Group acquired 100% of the ownership in Big C Vietnam from Casino Group (France)<sup>2</sup>
- Siam Cement Group acquired packaging and construction materials companies in Vietnam (Prime Group, Duy Tan Plastics, Binh Minh Plasco, Kraft Vina etc.)<sup>3</sup>
- TCC group acquired Metro (currently named MM Mega Market) from Metro Group (Germany)
- ThaiBev acquired 53.39% of SABECO to help them indirectly control one-third of the Vietnam beer market<sup>4</sup>
- Super Energy acquired shares in four solar energy projects (Loc Ninh 1, Loc Ninh 2, Loc Ninh 3, and Loc Ninh 4)<sup>5</sup>

A Thai investor once shared that M&A is the most effective and least time-consuming way to access the Vietnamese market, rather than building companies from scratch.

In this article series, we would like to discuss M&A transactions in Vietnam from both legal and practical perspectives. The series will particularly convey the following topics:

- Topic I: Legal theory regarding shares/capital contribution subscription and acquisition in each type of company in Vietnam;
- Topic II: Conditional sectors and caps foreign investment in Vietnam;
- Topic III: M&A procedures;
- Topic IV: Practical issues in M&A activities in Vietnam; and
- Topic V: M&A in some specific sectors.

### I. Subscription and acquisition

Foreign investment activities in Vietnam are regulated by the Law on Investment<sup>6</sup> (“LOI”). The subscription to, and the acquisition of, shares or capital contribution of an enterprise is subject to the Law on Enterprises<sup>7</sup> (“LOE”), and if the target is a public company the Law on Security (“LOS”).<sup>8</sup>

In light of the LOE, an enterprise may be established in the form of a limited liability company (“LLC”), joint stock company (“JSC”), partnership, or private company. In this article, we concentrate on the

<sup>1</sup> <https://baodautu.vn/thi-truong-ma-viet-nam-2019---2020-troi-day-trong-trang-thai-binh-thuong-moi-d134495.html>

<sup>2</sup> <https://hanoimoi.com.vn/ban-in/Kinh-te/844301/nha-dau-tu-thai-lan-lan-luot-trong-lan-song-thau-tom-thi-truong-viet>

<sup>3</sup> <https://s.cafef.vn/ntp-398410/khong-tiec-tien-ma-tap-doan-thai-scg-da-so-huu-khoi-tai-san-5-ty-usd-tai-vn-voi-ca-loat-cong-ty-hang-dau-nganh-hoa-dau-bao-bi-vat-lieu-xay-dung.chn>

<sup>4</sup> <https://vnexpress.net/nguoi-thai-dang-chi-phoi-nhung-linh-vuc-nao-tai-viet-nam-4238918.html>

<sup>5</sup> <https://baodautu.vn/super-energy-dau-tu-vao-4-du-an-dien-mat-troi-d120450.html>

<sup>6</sup> The Law on Investment was adopted by the National Assembly on July 1, 2020, and effective from January 1, 2021.

<sup>7</sup> The Law on Enterprises was adopted by the National Assembly on July 1, 2020, and effective from January 1, 2021.

<sup>8</sup> The Law on Security was adopted by the National Assembly on November 26, 2019, and effective from January 1, 2021.

shares/capital contribution subscription and acquisition of an LLC and a JSC only.

## 1. LLC

Under the LOE, an LLC may be established in the form of an LLC having a single member (“**SLLC**”) or an LLC having two to 50 members (“**MLLC**”).<sup>9</sup> The concept of “capital contribution” (“**vốn góp**” in Vietnamese) is used with the meaning that the equity is held by each member (i.e., each owner) in an LLC. A foreign investor may contribute additional charter capital to the company to become a new member of an LLC, or acquire capital contribution from an existing member.

### 1.1 **Contribution of additional charter capital**

An SLLC may increase its charter capital by receiving additional capital contribution from its owner, or from a third party (and then converting into an MLLC).<sup>10</sup>

An MLLC may increase its charter capital by (i) increasing the capital contribution of existing members or (ii) receiving contribution from new members. In case (i), the additional capital contribution will be attributed to the existing member pro-rata with their existing capital contribution. A member may transfer its right to contribute additional charter capital to other members or a third party.

### 1.2 **Acquisition of capital contribution**

The owner of an SLLC may transfer their capital contribution, in whole or in part, to one or several transferees.<sup>11</sup> The LOE does not impose any restriction on such transfer with respect to the timing of its establishment date or the permissible transferee. If the transfer results in the company having more than one member, the company must be converted into, and operated as, an MLLC or a JSC, and such changes must be registered with the provincial Department of Planning and Investment (“**DPI**”) within 10 days from the date of completion of the transaction.

A member of an MLLC may assign its capital contribution in whole or in part. The selling member must firstly offer to sell its capital contribution to all other members in proportion to their respective capital contribution in the MLLC under the same terms and conditions. If, within 30 days, the other members do not purchase the entire capital contribution, or any of such capital contribution, then the selling member may assign its capital contribution to any third party under the same terms and conditions offered to other members. Please note an outside buyer will not become a member of the company until such buyer’s information is recorded in the member register of the company.<sup>12</sup>

Where the acquisition of capital contribution results in the company having only one member, the company must be converted into an SLLC within 10 days from the date of transaction completion.

## 2. JSC

Although most enterprises in Vietnam are small and simple in terms of scale and structure, a JSC is the favorable form of enterprise. Under the LOE, a JSC must have at least three shareholders and become a public company if it satisfies any of the following conditions:

- (i) it has a paid-up charter capital of at least VND 30 billion and at least 10% of the voting shares are held by at least 100 non-major shareholders; or
- (ii) it has successfully made its IPO by registration with the State Securities Commission.<sup>13</sup> Shares subscription and/or acquisition in a non-public company is regulated by the LOE, and, in a public company, by both the LOE and LOS.

<sup>9</sup> Regarding an LLC, a shareholder is called a “member” (“**thành viên**” in Vietnamese).

<sup>10</sup> LOE, Art. 87

<sup>11</sup> LOE, Art. 77.5

<sup>12</sup> LOE, Art. 68

<sup>13</sup> LOS, Art. 32

## 2.1 Share subscription

A JSC may issue new shares to increase its charter capital. A share offering may be implemented by offering newly issued shares to its existing shareholders via private placement or public offer.<sup>14</sup>

### a. Offer to existing shareholders

A company must offer newly issued shares to its existing shareholders in proportion to their respective shareholdings. A shareholder may transfer its subscription right to a third party. Where shareholders and transferees of subscription rights do not register to subscribe for all shares intended to be issued, the Board of Management ("**BOM**")<sup>15</sup> has the right to sell the remaining shares to other shareholders and third parties with conditions no more favorable than the conditions offered to other shareholders, except as otherwise approved by the General Shareholders Meeting ("**GSM**").

### b. Private placement

#### *Private placement of non-public company*

The private placement of shares by a non-public company must satisfy the following conditions:<sup>16</sup>

- (i) not made via the mass media; and
- (ii) the shares are offered to less than 100 investors, excluding institutional securities investors; or offered to professional securities investors only.

It is notable that, unlike the old LOE 2014,<sup>17</sup> even in the case of private placement, the existing shareholders still have the priority right to subscribe to newly issued shares in proportion to their existing shareholding ratios, except in the case of company merger or consolidation. A shareholder may transfer its subscription right to another shareholder or third party. The private placement will take place only if the existing shareholders and transferees of priority subscription rights have not registered to subscribe for all of the shares intended to be issued. The terms and conditions of the private placement must not be more favorable than the terms and conditions offered to the existing shareholders, unless otherwise approved by the GSM.

#### *Private placement of public company*

Subject to approval by the GSM of the plan for the issuance and use of mobilized capital, specific criteria for and the number of purchasers, a public company will offer to sell its shares to strategic investors<sup>18</sup> and professional investors.<sup>19</sup> An investor that is neither a strategic investor nor a professional investor is not permitted to subscribe for private placement shares.

The transfer of shares subscribed for under a private placement plan is restricted for 3 years for strategic investors and 1 year for professional investors from the conclusion of the private placement, except for transfers between professional investors, transfers under an effective court judgment or decision or arbitral decision, and transfers due to inheritance as prescribed by law. The interval between two private placements of a public company must be at least 6 months.

<sup>14</sup> LOE, Art. 123

<sup>15</sup> It means the Board of Directors.

<sup>16</sup> LOE, Art. 125

<sup>17</sup> Regarding the private placement, Article 122 of the LOE 2014 does not require the company to offer shares to existing shareholders.

<sup>18</sup> Article 4 of the LOS defines strategic investors as "the investors selected by the GSM according to their financial capacity, technological capacity and commitment to cooperate with the company for at least 3 years"

<sup>19</sup> According to Article 11 of the LOS, a professional investor is an investor having financial capacity and expertise in securities. For example, banks, securities companies, companies having charter capital exceeding VND 100 billion or listed companies, and certified securities practitioners.

**c. Public offer**

A public offer is implemented in accordance with the law on securities.

**2.2 Share acquisition**

Within 3 years from the date of company establishment, a founding shareholder of a JSC may only transfer its shares to a non-founding shareholder if so approved by the GSM. In the other circumstances, a shareholder is free to transfer its shares to any third party unless the charter of the company otherwise restricts such transfer. A buyer may acquire shares of a JSC through direct negotiation or a stock exchange transaction. A buyer will become a shareholder from the date on which its information is duly recorded in the shareholder register of the company.

**Tender offer**

A tender offer is required for purchasing voting shares held by organizations or individuals and their related persons,<sup>20</sup> where such purchase will directly or indirectly increase their shareholding to at least 25% of the total voting shares of a public company, or increase their shareholding from 25% or more to at least 35%, 45%, 55%, 65%, or 75% of the total voting shares of a public company. Unless all voting shares of a public company have been bid for, if the said persons hold at least 80% of the voting shares of a public company, they are obliged to buy the shares held by the remaining shareholders within 30 days at the same price and by the same payment method offered in the tender offer.

A tender offer is not required in certain cases, for example, the transfer of shares within corporate groups where the transfer does not result in cross ownership, shares acquired through auction of publicly offered securities, and the transfer of shares under an effective court or arbitral decision.

**II. Conditional sectors and caps on foreign investment**

In order to subscribe for, or acquire shares of, a target company, the investor and its investment in the target company must satisfy the conditions applicable to foreign investment in the business lines (i.e., sectors) in which the company is registered to operate. The conditions applicable to a business line will be determined based on the relevant international treaties to which Vietnam and the home country of the investor are parties, as well as national regulations. In the past, due to the absence of a list of conditional business lines, it was difficult for a foreign investor to determine whether or not a target business line was conditional. Fortunately, however, under Appendix I of Decree 31/2021/ND-CP,<sup>21</sup> the Government has established (i) a list of business lines in which foreign investment is prohibited, and (ii) a list of business lines with conditions on foreign investment (“**Conditional Sectors**”). In theory, regarding a business line that is in neither list (i) or (ii), a foreign investor would be treated like a domestic investor with respect to market access conditions.<sup>22</sup> However, in practice, the licensing authorities seem to examine the business lines of a foreign invested enterprise (“**FIE**”) with much more scrutiny than those of a domestic company. As such, they would be likely to consult the relevant ministries regarding an unfamiliar business line for which the conditions have not yet been specified under the laws of Vietnam and/or international treaties.

The cap of foreign investment (i.e., maximum amount foreign investors are permitted to own in an FIE) applicable to conditional business lines is stipulated in the relevant laws of Vietnam and international treaties, the most important of which are the treaties of WTO, CPTPP, EVFTA, RCEP, and AFAS.<sup>23</sup> If an FIE carries out multiple business lines subject to different conditions and caps, the most severe conditions and lowest cap will apply.

<sup>20</sup> As defined in Article 4.46. (a), (b), (c), (d), (e), and (g) of the LOS

<sup>21</sup> Decree 31/2021/ND-CP was issued by the Government on March 26, 2021, to implement the LOI (“**Decree 31**”).

<sup>22</sup> LOI, Art.9

<sup>23</sup> Respective abbreviations of World Trade Organization, Comprehensive and Progressive Agreement for Trans-Pacific Partnership, EU-Vietnam Free Trade Agreement, Regional Comprehensive Economic Partnership, and ASEAN Framework Agreement on Services.

The cap applicable to a public company will be determined according to the following rules.<sup>24</sup>

- (a) the cap applicable to a public company operating in a sector subject to conditions on market access under the international treaties, or to regulations of the laws of Vietnam, will be determined in accordance with international treaties and the relevant regulations of Vietnam;
- (b) the cap applicable to a public company operating in a Conditional Sector for which no regulation on the cap of foreign investment is available, will be 50% of the charter capital; and
- (c) there is no cap applicable to a company operating in a sector other than those in items (a) and (b).

A public company in the category of (a) or (b) may adopt a cap on foreign investment that is lower than the regulatory cap, provided that such cap must be approved by its GSM and set forth in its charter.

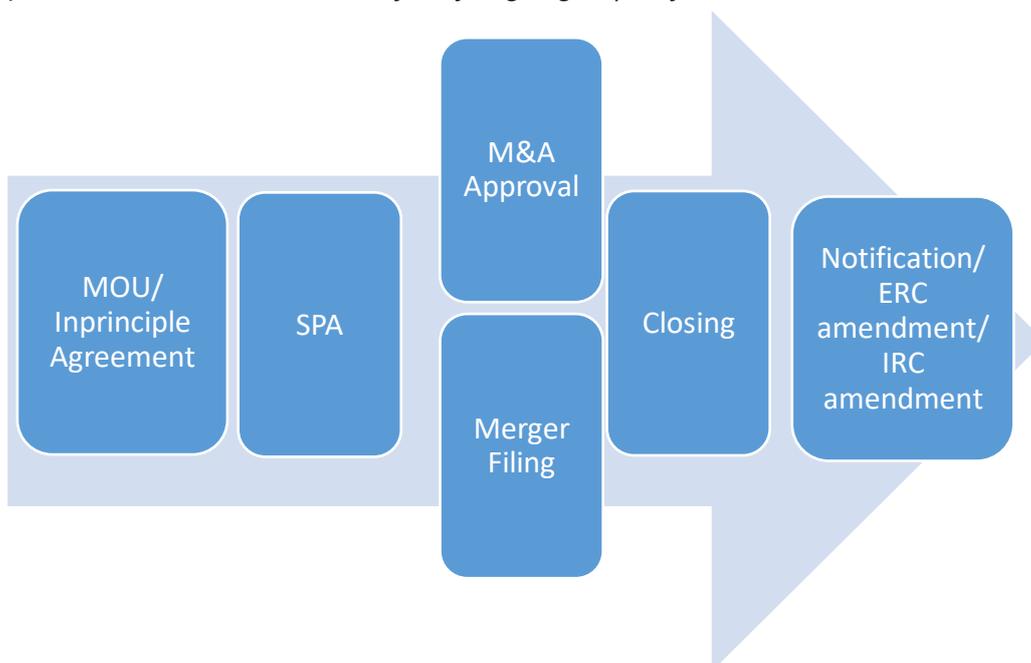
**III. M&A procedures**

Share subscription or acquisition by a foreign investor that constitutes an investment into Vietnam may be subject to the approval of the Department of Planning and Investment (“DPI”) of the province where such target company is located (“M&A approval”) unless the target company is a listed company. A merger filing is also required if the transaction falls under any circumstances prescribed by the Law on Competition (“LOC”).

Once the M&A approval and merger filing approval (if required) are obtained, the parties may implement the M&A transaction. In order to reflect the capital contribution or shares acquired/subscribed by the purchaser, the target company will need to notify the DPI of the changes with respect to its shareholders/members and other changes in the contents of its business registration (if any). The LOI 2020 does not require an FIE running a project that has already been implemented before the share acquisition by a foreign investor, to obtain an Investment Registration Certificate (“IRC”) upon its acquisition/subscription.<sup>25</sup>

**Procedures of an M&A transaction**

*(\*) As discussed below, the order of the foregoing steps is flexible.*



<sup>24</sup> Decree 155/2020/ND-CP implementing the LOS, Art. 139  
<sup>25</sup> LOE 2020, Art. 37.2

## 1. **M&A approval**

Regarding an intended investment by an investor in a target company, before implementing its shares/charter capital contribution acquisition or subscription, the investor and the target company will jointly sign an application to seek M&A approval. Under the new Decree 31, the target company will be in charge of submitting the application dossier to the DPI. M&A approval is required in the following cases:

- (a) investment by a foreign investor causes the percentage of ownership by foreign investors to increase in the company doing business in any of the Conditional Sectors;
- (b) investment by a foreign investor causes the ratio of charter capital owned by foreign investors to increase from 50%, or below 50%, to more than 50%, or increases the percentage of ownership of a foreign investor that already owned more than 50% of the charter capital of the company; and/or
- (c) the target company uses land on an island, or on a coastal or border commune, ward, or town, or in any other area, which affects national defense and security.

The application dossier for M&A approval must include, inter alia, an in-principle agreement on the capital contribution or shares acquisition. The regulatory timeframe for the DPI to examine the application is 15 days from the date of receipt of such documents.

## 2. **Merger filing**

### a. **Circumstances creating economic concentration**

The LOC stipulates that the following type of transaction will be subject to the regulations on economic concentration: *“The purchase by one enterprise of all or part of the capital contribution or assets of another enterprise sufficient to control or govern the acquired enterprise or any of its trades or business lines.”*<sup>26</sup> The concept of “control or govern” is then elaborated in Decree 35/2020/ND-CP implementing the LOC (*“Decree 35”*), to cover the following circumstances:<sup>27</sup>

- (i) acquisition of more than 50% of the charter capital/voting shares of the target company;
- (ii) acquisition of the ownership of or the right to use more than 50% of the assets of the target company in one or all of its business lines;
- (iii) the buyer has one of the following rights:
  - to decide directly or indirectly on the appointment, removal, or dismissal of: a majority or all of the members of the BOM, chairman of the members’ council, director, or general director (i.e. chief executive officer) of the target company;
  - to decide on the amendment of the charter of the target company; and
  - to decide important issues during the course of operation of the target company.

### b. **Thresholds in respect of notification of economic concentration**

When any one of the following thresholds is reached, the enterprises participating in a transaction involving economic concentration must notify the National Committee Commission (*“NCC”*)<sup>28</sup> before conducting the transaction:

- (i) the total assets, in the market of Vietnam of the enterprise, or group of affiliated enterprises of which such enterprise is a member, was/is VND 3 trillion VND or more in
- (ii) the financial year immediately preceding the year of economic concentration. This threshold increases to VND 15 trillion for insurance companies or securities companies. Regarding banks, the threshold is 20% of the total assets of all credit institutions [licensed to operate] in Vietnam;
- (iii) the total sales turnover or input purchase turnover in the market of Vietnam of the enterprise

<sup>26</sup> LOC, Art. 29.4

<sup>27</sup> Decree 35, Art.1

<sup>28</sup> Because the NCC has not yet been established, the Vietnam Competition and Consumer Authority is the state agency in charge of economic concentration.

or group of affiliated enterprises of which the enterprise is a member was/is VND 3 trillion or more in the financial year immediately preceding the year of economic concentration. This threshold increases to VND 10 trillion for insurance companies and VND 3 trillion for securities companies. Regarding banks, the threshold is 20% of the total turnover of all such credit institutions [licensed to operate] in Vietnam;

- (iv) the transaction value of the economic concentration is VND 1 trillion or more. This threshold increases to VND 3 trillion for insurance companies or securities companies. Regarding banks, the threshold is 20% of the total charter capital of all such credit institutions licensed to operate in Vietnam;
- (v) the combined market share of the enterprises proposing to participate in the economic concentration was 20% or more in the relevant market in the financial year immediately preceding the year of economic concentration.

The regulatory timeframe for the NCC to examine the notification dossier and give its response is 30 days from the date of receipt of the dossier. Based upon the respective squares of (a) the combined market shares and (b) the total market share, the NCC may decide to accept the transaction or to apply the official examination process in respect of economic concentration. If NCC fails to give any feedback within the above 30-day period, the economic concentration is deemed to have been accepted.

### **3. Order of M&A approval, merger filing, and SPA**

The LOI and LOC are silent on the order in respect of M&A approval and merger filing. It is unclear whether the M&A approval must be obtained prior to the merger filing or vice versa. Based on the wording of the LOI and LOC respectively, it appears that the merger filing should be made first. Currently, the state authorities seem not to be very severe in considering this order. In practice, the application for M&A approval may be filed in parallel with, or even before, the merger filing.

Similarly, there is no strict regulation on the timing of execution of the SPA although, in theory, the SPA should be executed after the M&A approval and the merger filing. In fact, M&A approval and a merger filing are often set forth as conditions precedent in an executed SPA. The licensing authorities seem to accept, and not challenge, this practice.

### **4. IRC/ERC amendment**

IRC amendment may be required for certain deals (*e.g.* where a foreign investor acquires shares from another foreign investor in a Vietnamese company). In such case, the investor shall submit to the authority an application to amend the investment project. Application dossiers and procedures in respect of IRC amendments shall comply with Decree 31. The authority shall proceed with the amendment no later than 10 days after the submission of the application.

In most M&A cases, ERC amendment is mandatory. ERC amendments include, among others, changes in: business lines, owner/foreign shareholders, legal representatives, and directors/general director. Application dossiers and procedures in respect of ERC amendments shall comply with Decree 01/2021/ND-CP of the Vietnam Government providing guidance on enterprise registration. Such application shall be conducted by the target company at the provincial DPI. In theory, it takes 3 days for the DPI to consider amendments.

### **5. Capital accounts and payment**

The payment of the price of the shares/capital contribution purchase or subscription shall comply with the regulations on foreign exchange. The Ordinance on Foreign Exchange requires that the payment by a foreign investor in a direct investment transaction be made through a direct investment capital account (“**DICA**”) opened by the target company at a bank licensed to operate in Vietnam. With respect to an indirect investment transaction, the foreign investor must open an indirect investment capital account (“**IICA**”) in Vietnamese dong at a bank licensed to operate in Vietnam.

The indirect investment by a foreign investor must be made through the IICA. In the past, due to the absence of definitions of “direct investment” and “indirect investment”, both a DICA of the target company and an IICA of a foreign investor could be required for the capital transfer. Currently Circular 06/2019/TT-NHNN<sup>29</sup> specifies the FIEs and foreign investment that are subject to the DICA requirement. Accordingly, the transaction price must be remitted to/via the DICA if a target company which is not a public company listed or registered for transactions on a stock exchange (i) must obtain an IRC, or (ii) has foreign investors which hold or will hold (as a result of the intended transaction) at least 51% of the total charter capital. In other cases, in general, a foreign investor is required to open an IICA.

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<sup>29</sup> Circular 06/2019/TT-NHNN guiding the foreign exchange management for the foreign direct investment in Vietnam issued by the State Bank of Vietnam on June 26, 2019 (“Circular 06”).

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