

# LEXOLOGY®

## Navigator

Download Date: 06 September 2018

# M&A

## in Vietnam



# Table of contents

## Country snapshot

- Trends and climate

## Legal framework

- Legislation
- Regulation
- Types of acquisition

## Preparation

- Due diligence requirements
- Information
- Stakebuilding

## Documentation

- Preliminary agreements
- Principal documentation
- Closing documentation

## Foreign law and ownership

- Foreign law
- Foreign ownership

## Valuation and consideration

- Valuation
- Consideration

## Strategy

- General tips
- Hostile takeovers

## Warranties and indemnities

- Scope of warranties
- Limitations and remedies

## Tax and fees

- Considerations and rates
- Exemptions and mitigation
- Fees

## Management and directors

- Management buy-outs
- Directors' duties

## Employees

- Consultation and transfer
- Pensions

## Other relevant considerations

- Competition
- Anti-bribery
- Receivership/bankruptcy

## Law stated date

- Correct as of





## Contributors

### Vietnam



**Tilleke & Gibbins**  
Dr. Vinh Quoc Nguyen  
vinh.n@tilleke.com



**Tilleke & Gibbins**  
Huyen Cuu Ngoc Dang

**Tilleke & Gibbins**



## Country snapshot

### Trends and climate

#### What is the current state of the M&A market in your jurisdiction?

With its gross domestic product growth rate rising to 6.8% in 2017, Vietnam saw a significant increase in M&A activity and remains one of the most favourable destinations for foreign investment in Southeast Asia. Real estate continues to be the most attractive sector, especially in the residential, office, retail and hotel sectors with the major investors coming from Japan, Korea, Singapore and China in particular. The retail, consumer goods and industrial goods sectors are also active in the M&A market.

#### Have any significant economic or political developments affected the M&A market in your jurisdiction over the past 12 months?

Vietnam's continued integration into the world economy offers new opportunities for M&A activities. The increase in M&A activities has also boosted the government's aim to privatise state-owned enterprises.

#### Are any sectors experiencing significant M&A activity?

The real estate and retail sectors have experienced significant M&A activity in the past 12 months. Notable deals include the following:

- Keppel Land, through a subsidiary, acquired an additional 16% stake in Saigon Centre, a mixed-use complex in Ho Chi Minh City;
- Shinhan Vietnam Bank bought ANZ's retail business; and
- Thanh Thanh Cong Tay Ninh Sugar Joint Stock Company and Bien Hoa Sugar Joint Stock Company completed a merger.

#### Are there any proposals for legal reform in your jurisdiction?

Yes, based on the National Assembly's 2017 Law-making Programme, there are proposals to change the regulatory framework that could affect M&A transactions (eg, the amended Law on Competition).

## Legal framework

### Legislation

#### What legislation governs M&A in your jurisdiction?

There is no single legislation governing M&A in Vietnam. The applicable regulations are scattered among several laws. The main regulations include:

- the Civil Code (91/2015/QH13), passed by the National Assembly on 11 November 2015;
- the Law on Investment (67/2014/QH13), passed by the National Assembly on 26 November 2014;
- the Law on Enterprises (68/2014/QH13), passed by the National Assembly on 26 November 2014; and
- the Law on Securities (70/2006/QH11), passed by the National Assembly on 29 June 2006, as amended by Law (62/2010/QH12) passed by the National Assembly on 24 November 2010 along with its implementing decrees and circulars.

### Regulation

#### How is the M&A market regulated?

The M&A market is regulated by:

- the State Securities Commission;
- the Competition Authority;
- the Ministry of Planning and Investment (and local departments of planning and investment); and
- specific authorities which manage certain specialised sectors.

## Are there specific rules for particular sectors?

Yes. The acquisition of shares in a Vietnamese company operating in certain sectors (eg, in the banking, financial services and insurance industries) is regulated by sector-focused legislation.

### Types of acquisition

## What are the different ways to acquire a company in your jurisdiction?

A company can be acquired by:

- a subscription of newly issued shares;
- a purchase of shares held by existing shareholders; and
- a merger.

## Preparation

### Due diligence requirements

## What due diligence is necessary for buyers?

Legal and financial due diligence is required for acquisitions in Vietnam. Technical, commercial or environmental due diligence may also be required depending on the particulars of the target and its business.

### Information

## What information is available to buyers?

Sellers or target companies are not required to disclose information to a buyer and the level of disclosure will depend on the agreement between the parties prior to the due diligence process. The buyer may obtain:

- general registration information concerning the target from the national portal of enterprise registration information; and
- information that must be made publicly available by a public target company.

## What information can and cannot be disclosed when dealing with a public company?

Information which can be disclosed comprises, primarily, information that must be made publicly available by a public target company, including:

- periodically disclosed information (eg, audited annual financial statements, annual reports, reports on corporate governance and resolutions of the annual shareholders' general meeting);
- extraordinarily disclosed information (eg, information relating to the freezing of accounts, the temporary suspension of part or all of the business, the revocation of enterprise registration certificates and the redemption of shares by the public target company); and
- information disclosed at the request of the State Securities Commission or stock exchange.

In addition, a public target company may agree to disclose more information on the agreement between the parties. Inside information is prohibited from disclosure.

### Stakebuilding

## How is stakebuilding regulated?

The offer to purchase the shares of existing shareholders in a public or listed company will trigger a tender offer in any of the following cases:

- the purchase of circulating shares which results in a purchaser with no shareholding or less than 25% shareholding passing the 25% threshold;
- the purchase of circulating shares which results in a purchaser (and affiliated persons of the purchaser) with a 25% shareholding or more purchasing a further 10% or more of currently circulating company shares; and

- the purchase of circulating shares which results in a purchaser (and affiliated persons of the purchaser) with 25% shareholding or more purchasing a further 5% to 10% of currently circulating shares of the company within less than one year from the date of completion of the previous tranche.

A buyer is not required to make a tender offer in any of the following cases:

- the subscription of newly issued shares resulting in ownership of 25% or more of voting shares in a public company pursuant to an issuance plan approved by the company's general shareholders' meeting;
- the acquisition of shares by way of transfer from an existing shareholder resulting in ownership of 25% or more of the voting shares in a public company, where such transfer has been approved by the company's general meeting of shareholders;
- the transfer of shares between companies within a group of parent-subsiary companies;
- the donation of bequeathing shares;
- the assignment of capital pursuant to a decision of a court; and
- other cases as decided by the Ministry of Finance.

## Documentation

### Preliminary agreements

#### What preliminary agreements are commonly drafted?

A letter of intent is a common preliminary agreement that usually:

- covers the main terms of a transaction and other provisions such as exclusivity and confidentiality; and
- outlines the envisaged timeline.

### Principal documentation

#### What documents are required?

The required documents depend on the type of transaction. In a share purchase transaction, a share purchase agreement or share subscription agreement is key. If less than 100% of the shares are purchased, a shareholders' agreement may also be necessary. In a merger transaction, a merger agreement is key. In addition, corporate approvals, disclosure letters or other ancillary documentation may be required depending on the particularities of transactions.

#### Which side normally prepares the first drafts?

Normally, the buyer prepares the first drafts.

#### What are the substantive clauses that comprise an acquisition agreement?

An acquisition agreement typically comprises the following substantive clauses:

- the object of the transaction (ie, shares or assets);
- the transaction mechanism;
- the purchase price, adjustment mechanism and payment terms;
- the representations, warranties and indemnities;
- the conditions precedent to the transaction's completion;
- the requirements until the transaction's completion;
- the transaction's cancellation;
- the governing law and jurisdiction; and
- boilerplate clauses.

#### What provisions are made for deal protection?

Provisions made for deal protection include confidentiality, exclusivity, non-solicitation and break fees. Under Vietnamese law, there are no provisions regulating break fees specifically. In practice, break fees can be included in

the relevant share purchase or share subscription agreement.

#### Closing documentation

### What documents are normally executed at signing and closing?

At signing, parties execute the relevant share purchase agreement, share subscription agreement or merger contract and shareholders' agreement (if any). Documents evidencing the satisfaction of conditions precedent to signing are usually executed and delivered between signing and closing, or at closing.

### Are there formalities for the execution of documents by foreign companies?

Vietnamese law does not provide for separate formalities for the execution of documents by foreign companies. The execution would rather be conducted in the same manner applicable to domestic companies. Specifically, the documents must be signed by the authorised representative of each party and affixed with the seal of each party (if any).

### Are digital signatures binding and enforceable?

Digital signatures are binding and enforceable subject to the conditions required for digital signatures as set out in the Law on E-transactions (51/2005/QH11) passed by the National Assembly on 29 November 2005.

#### Foreign law and ownership

##### Foreign law

### Can agreements provide for a foreign governing law?

Parties may select a foreign law to govern cross-border transactions. However, the transfer of shares in a Vietnamese target company would still be subject to Vietnamese law.

##### Foreign ownership

### What provisions and/or restrictions are there for foreign ownership?

Foreign ownership restrictions under Vietnamese law are as follows:

- The foreign ownership limitations applicable to each sector vary depending on the relevant laws governing such sectors.
- The foreign ownership limitations applicable to companies operating in commercial service sectors are implemented in accordance with the World Trade Organisation's Schedule of Specific Commitments on Commercial Services.

The above principles also apply to public companies. In addition, where a public company operates in sectors which are conditional to foreign investors but have no specific ownership limit, the applicable limit is 49%. Where a public company operates in sectors which are not conditional to foreign investors and have no specific foreign ownership limit, the limit is 100% (ie, unlimited foreign ownership), unless otherwise provided in the public company's charter.

#### Valuation and consideration

##### Valuation

### How are companies valued?

Generally speaking, parties can agree on the company's value.

##### Consideration

### What types of consideration can be offered?

Under Vietnamese law, consideration can be in the form of cash (either Vietnamese or foreign currency) via account transfer, gold, land use rights, the value of IP rights, technology, technical know-how or other assets which can be valued in Vietnamese dong. The value of assets other than cash must be determined by the parties to the transaction or a professional valuation organisation. Further, where the consideration consists of assets that are

subject to registration (eg, IP or land use rights) the buyer must carry out the procedures to transfer the ownership of such assets with the relevant competent authorities.

## Strategy

### General tips

#### What issues must be considered when preparing a company for sale?

When preparing a company for sale, the seller (and its advisers) must determine a realistic valuation of the target company. Further, the seller should also conduct a due diligence investigation on itself to have a clear picture of the target company's status. This self-review should help the seller to identify issues which could affect the acquisition price and see what can be improved to make the target company as attractive as possible.

#### What tips would you give when negotiating a deal?

Both buyers and sellers should engage professional consultants to help advise on the transaction. Understanding the motivation of the other party is also key for negotiations. Further, each party should be prepared to make compromises and should therefore establish their negotiation limits in advance.

### Hostile takeovers

#### Are hostile takeovers permitted and what are the possible strategies for the target?

There is no legal distinction between a normal and hostile acquisition in Vietnam.

## Warranties and indemnities

### Scope of warranties

#### What do warranties and indemnities typically cover and how should they be negotiated?

Warranties typically cover:

- the incorporation and status of the target company;
- the title to shares;
- the title to and status of the target company's assets;
- accounting and financial status;
- taxes;
- employment;
- regulatory matters;
- material contracts;
- environmental matters;
- insurance;
- litigation; and
- indemnities that would be negotiated based on the results of due diligence.

Warranties and indemnities are freely negotiated by parties to a transaction. In practice, the extent of the negotiation would depend on the relative bargaining power of the parties and their motivation to make the deal happen.

### Limitations and remedies

#### Are there limitations on warranties?

Vietnamese law sets out no limitations on warranties.

#### What are the remedies for a breach of warranty?

In case of a breach of warranties, buyers can seek indemnification from the seller. The termination of an agreement may also be an option depending on the magnitude of the breach. Further, buyers may retain a percentage of the



purchase price in escrow for an agreed period.

## Are there time limits or restrictions for bringing claims under warranties?

Under Vietnamese law, the general statute of limitations for initiating a legal action claiming compensation for loss and damages, which would also apply to claims under warranties, is three years from the date on which the aggrieved party knew or should have known that its rights or interests were infringed.

## Tax and fees

### Considerations and rates

## What are the tax considerations (including any applicable rates)?

In the case of an acquisition, an individual seller who is a Vietnam-based resident is subject to personal income tax of 20% while an organisational seller is subject to corporate income tax of 20% on the income generated from the sale. In the case of a merger, the difference between the book value of the merging companies and their re-assessed value as a merged entity will also be taxable at this rate. A separate regime applies to non-resident foreign companies selling shares in listed or public companies, where a 0.1% corporate income tax on sales proceeds will apply.

### Exemptions and mitigation

## Are any tax exemptions or reliefs available?

No tax exemptions or reliefs are available.

## What are the common methods used to mitigate tax liability?

Parties should consult and be advised by tax advisors regarding such matters.

### Fees

## What fees are likely to be involved?

Parties must pay fees for hiring the relevant consultants (ie, legal or tax and financing consultants). In addition, the merger or acquisition will likely result in various changes to the target company's corporate registration information which would be subject to relevant registration or notification fees.

## Management and directors

### Management buy-outs

## What are the rules on management buy-outs?

Vietnam has no specific rules on management buy-outs.

### Directors' duties

## What duties do directors have in relation to M&A?

The relevant duties of directors in relation to M&A include:

- recommending (for approval by the general shareholders' meeting) the classes and total number of shares of each class which may be offered for sale;
- making decisions on the sale of new shares within the number of shares of each class which are eligible to be offered for sale;
- making decisions on the sale price of shares and bonds of the company offered for sale;
- making decisions on the establishment of subsidiaries, branches and representative offices and acquiring equity in other enterprises; and
- recommending (for approval by the general meeting of shareholders) the company's reorganisation, dissolution or bankruptcy.

## Employees

### Consultation and transfer

#### How are employees involved in the process?

There is no general requirement for existing shareholders or the target company to consult company employees regarding an acquisition. In the case of a merger, a notice of the relevant merger contract (specifying an employment plan) must be given to employees of the target company within 15 days from the date of its approval by the relevant company's corporate body. If the merger results in a reorganisation of personnel, an employee placement plan must be prepared and agreed on with the relevant trade union.

#### What rules govern the transfer of employees to a buyer?

The rules governing the transfer of employees are found in the Labour Code (10/2012/QH13) passed by the National Assembly on 18 June 2012 and its implementing regulations.

In general, a share acquisition is not a triggering event for rearrangement of the workforce, so the employment relationship between employees and a target company will therefore remain unaffected and there would be no transfer of employees. In the case of a merger, the succeeding employer is responsible for:

- continuing to employ the current employees; and
- amending and supplementing their labour contracts.

If the succeeding employer is unable to employ all current employees, it must prepare and implement a labour usage plan.

### Pensions

#### What are the rules in relation to company pension rights in the event of an acquisition?

There is no scheme for pension plans under Vietnamese labour law. Vietnamese law provides that both employers and employees must contribute to the compulsory social insurance fund that pays pensions to employees when they retire. In the case of a share acquisition, as the employment relationship between the employees and the target company will remain unaffected, the target company, together with the employees, will continue to contribute to the compulsory social insurance fund. In the case of a merger, the new employer will contribute to the compulsory social insurance fund.

### Other relevant considerations

#### Competition

#### What legislation governs competition issues relating to M&A?

The legislation governing competition issues relating to M&A includes the Law on Competition (27/2004/QH11), passed by the National Assembly on 3 December 2004, and its implementing regulations. As a general comment, a business combination involving a Vietnamese company may be subject to a reporting requirement. Specifically, if the parties to a business combination have a combined market share of between 30% and 50% of the relevant market, they must notify the Competition Authority of the contemplated combination in advance. The combination will be prohibited if the combined market share is above 50% in the relevant market.

This law will be replaced by a new Law on Competition as of 1 July 2019. Under the new law, acts of economic concentration by enterprises (defined as mergers, consolidations, acquisitions, joint ventures and other acts of economic concentration prescribed by law) are prohibited if they are evaluated to "have or potentially have the effect of significantly restricting competition in the Vietnam market". The National Competition Commission will evaluate factors such as:

- the combined market share of the participating companies;
- the level of concentration in the relevant market before and after the economic concentration; and
- competitive advantages gained from the economic concentration.

The National Competition Commission must also evaluate the positive impact of economic concentration, although there is no further guidance as yet on whether this could lead to exemptions.



## Anti-bribery

### Are any anti-bribery provisions in force?

Vietnam's Penal Code criminalises the giving and promising of bribes to any person or organisation, whether public or private. The bribery may be committed directly or through an intermediary. The penalty for giving or promising to give a bribe mostly depends on the value of the benefit given or promised. The minimum value of tangible benefits to trigger a violation of the law is D2 million (approximately \$88). Penalties range from D20 million (approximately \$880) and six months' to 20 years' imprisonment. There is no death penalty or life sentence for giving bribes.

## Receivership/bankruptcy

### What happens if the company being bought is in receivership or bankrupt?

Where there is a decision to commence bankruptcy procedures, a company must report its shares or transfer its property to the asset management officer or asset management and liquidation enterprise prior to sale. The company may sell its shares or transfer its property subject to the decision of the asset management officer or asset management and liquidation enterprise.

## Law stated date

### Correct as of

### Please state the date as of which the law stated here is accurate.

11 June 2018.

