Hogan Lovells

Public Company Mergers and Acquisitions in Vietnam

Contents

2015

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Last updated: July 2015

Introduction

The legal framework around M&A transactions in Vietnam remains fairly restrictive and practice is relatively under-developed. Although in theory both acquisitions and mergers are possible under Vietnamese law, the absence of detailed implementing regulations regarding mergers means the most common form of investment in an existing Vietnamese enterprise by foreign investors is by way of equity or shares acquisition.

All M&A transactions in Vietnam are governed by the Law on Enterprises and its implementing and guiding regulations, although sector-specific or other regulations may also apply. For instance, an M&A transaction involving a public company will also be subject to the Law on Securities, while an M&A transaction involving a Vietnamese company operating in the banking industry will be further regulated by the Law on Credit Institutions and other specifically applicable legislation[1].

This note addresses legal considerations in connection with M&A transactions involving acquisition by foreign investors in Vietnamese public companies. In general terms these include listed companies, companies who have made a public offer of shares and companies with more than 100 shareholders[2] in joint stock company (JSC) form.

We will look at certain key issues based on the new Law on Enterprises effective as of 1 July 2015, such as:

- restriction on foreign investment;
- methods of acquisition;
- minority protections; and
- structuring considerations, including the use of preference shares and convertibles.

Certain recent high profile transactions will also be covered.

1 Circular 04/2010/TT-NHNN of the State Bank of Vietnam on mergers and acquisitions of credit institutions dated 11 February 2010.

2 Under the Law on Securities, a joint stock company (otherwise known as shareholding company or company limited by shares) is a public company if it: (i) has made a public offer of shares; (ii) has shares listed on a stock exchange; or (iii) has shares owned by at least 100 investors (excluding professional securities investors) and paid-up charter capital of VND 10 billion or more (being approximately USD 465,000). A professional securities investor can be a commercial bank, financial institution, finance leasing company, insurance business organisation or securities business organisation.

Mergers and acquisitions (M&A) in Vietnam

General considerations

1. Eligibility of foreign investors to acquire shares in Vietnamese public companies

Under applicable Vietnamese laws, any entity which is not a Vietnamese national (for an individual) or that is not established in Vietnam (for a corporate entity) is considered a foreign investor. In addition, an entity established in Vietnam but having more than 49% of its equity capital held by one or more foreign parties will also be regarded as a foreign investor.

Before acquiring shares in a public company in Vietnam, a foreign investor must comply with certain formalities, including obtaining a trading code at the Vietnam Securities Depository (the "**VSD**") and opening an account with a depository bank in Vietnam licensed by the State Bank of Vietnam to carry out foreign exchange transactions.

One of the key issues relating to foreign investment in Vietnamese public companies has been the inability of foreign shareholders to have control rights through majority equity holdings, as current law caps the stake that may be held by foreign investors (taken together, whether related or not) at 49% of the total number of issued shares in any Vietnamese public company[3]. However, Decree 60/2015/ND-CP, which was issued on 26 June 2015 and comes into effect on 1 September 2015 ("**Decree 60**"), will for the first time allow for majority control of public companies by foreign investors (which includes for this purpose enterprises incorporated in Vietnam with 51% or more foreign-owned capital) subject to existing limitations in certain sectors. For instance, the total aggregate shareholding of all foreign investors and their affiliated persons may not exceed 30% of the charter capital of a Vietnamese bank. Public companies operating in sectors and/or business lines "subject to conditions applicable to foreign investors" where no specific ownership ratio has been issued will also remain capped at 49%, and it is unclear at this time what sectors this will encompass. The key change is that, aside from these continuing restrictions, up to 100% foreign ownership of a public company will be permitted for the first time.

3 Decision 55/2009/QD-TTg of the Prime Minister dated 15 April 2009 on percentage participation of foreign investors in securities market of Vietnam.

2. Means of acquiring public company shares

2.1 Issuance of new shares

A foreign investor may acquire newly-issued shares in a Vietnamese public company either through a private share placement or a public offer.

(a) Private placement

Under Vietnamese law, a private placement means an offering of shares to fewer than 100 investors (excluding professional securities investors) without the use of mass media or the internet[4]. Shares acquired through a private placement are subject to a one-year lock-up, subject to limited exceptions.

A resolution approving the private placement and the plan for utilisation of the proceeds and setting out the particulars of the purchaser(s) must be adopted by the General Meeting of Shareholders ("**GMS**") of the issuer, and the private placement must be registered with the State Securities Commission (the "**SSC**") as a condition to the issuance of the new shares. The SSC will notify the registration to the issuer and publish it on the SSC's website within 15 days from receipt of the completed registration documents.

There must be a period of at least six months between two consecutive private placements by an issuer.

Decree 60 further requires that the issuer must not be the parent company of the purchaser and both the issuer and the purchaser must not be subsidiaries of the same parent company.

(b) Public offer

A public offer of shares means an offer of shares via mass media or the internet, or to 100 or more investors (excluding professional securities investors) or to an undefined number of investors[5]. As in a private placement, GMS approval is required for both the issuance and the plan of utilisation of proceeds, and the issuer must also undertake to place the shares for

4 Article 6.12(a) of Law on Securities.
5 Article 6.12 of Law on Securities.

trading on the stock exchange within one year from the date of completion of the public offer.

The offering company must issue a prospectus and obtain a certificate of registration of the public offer from the SSC. The SSC will issue the certificate within 30 days from receipt of the completed application file, and the offer must be completed within 90 days from the date of the certificate (extendable for a maximum of 30 days).

2.2 Purchase of shares held by existing shareholders

A foreign investor may also acquire already issued and outstanding shares from current shareholders of a public company. In general, the acquirer and the seller may agree on the specific sale terms and number of shares to be sold, subject to:

- a three-year restriction on sales by founding shareholders;
- applicable caps on foreign ownership; and
- locked-in shares resulting from a private placement or an equitisation transaction (discussed in Sections 2.1 above).

Acquisitions of listed shares from existing shareholders of a listed public company are subject to the trading rules of the relevant stock exchange in terms of both trading method (i.e. either matching orders or put through depending on a volume of shares set out by the stock exchange) and pricing (i.e. the price must be within the specified fluctuation range on the relevant trading day). Note, however, that any acquisition of listed shares held by the State Capital Investment Corporation (SCIC) will be conducted in accordance with specific rules designed to each transaction as approved by a competent authority (which is the Prime Minister, the Ministry of Finance or the SCIC's members' council depending on the importance and scale of the transaction).

Acquisitions of shares from existing public company shareholders may also trigger mandatory tender offer requirements if certain purchase thresholds are exceeded.

3. Special considerations for minority acquisitions

Vietnamese corporate law provides basic protections to minority shareholders of a joint stock company. In addition to the rights of all shareholders generally, the new Law on Enterprises provides for additional rights to a shareholder or a group of shareholders holding 10% or more of the total ordinary shares (or a smaller shareholding if provided in the company's charter) for a consecutive period of six months or more[6], including:

3.1 Right to nominate candidates to the board of directors

As a matter of law, a shareholder holding a certain percentage of shares as stipulated in the charter of a company has the right to nominate one or more candidate(s) for election to the board of directors. In a public company context, Article 24.2 of the Model Charter[7] permits shareholders to nominate between one (for shareholders holding from 5% to less than 10% of the outstanding shares) and eight (for shareholders holding from 80% to less than 90% of the outstanding shares) candidates out of a maximum of eleven board seats. However, because directors must be elected by the GMS, a shareholder's right to nominate does not guarantee election.

After being elected the duties of a director run to the company and its shareholders and not to the nominating shareholder.

3.2 Right to request and convene a meeting of shareholders

According to Article 114.3 of the new Law on Enterprises and Article 13 of the Model Charter, a shareholder or group of shareholders holding 10% or more of the total ordinary shares for a consecutive period of six months or more shall have the right to request the convening of a shareholder meeting where the board of directors violates the rights of shareholders or makes a decision which falls outside its delegated authority, or where the term of the board of directors has expired for more than six months and no new board of directors has been elected to replace it.

The board of directors must convene an extraordinary meeting of shareholders within 30 days from the date of receipt of the request or the power to convene will fall to the supervisory board. If the supervisory board also fails to convene the meeting within the subsequent 30 day period, the power to convene then falls to the requesting shareholder(s).

3.3 Other preferential shareholder rights and shareholders agreements

More stringent minority shareholder protections (e.g. increased quorum and/or voting thresholds) may be set

6 Article 114 of the new Law on Enterprises No. 68/2014/QH13.

7 The Model Charter was issued as an attachment to Circular 121/2012/TT-BTC dated 26 July 2012 providing regulations on corporate governance applicable to public companies.

out in the company's charter. However, it is a principle of Vietnamese law that a public listed company should not privilege the rights of one shareholder relative to the others, for example by providing specific consent rights that benefit one shareholder only.

Additional shareholder protections may be (and often are) provided in shareholders agreements between an investor and other major shareholders. For example, a group of shareholders could undertake to vote together on certain designated and agreed issues (e.g. in support of a shareholder's nominee(s) to the board of directors). Put/call options and drag/tag along rights are also frequently included in shareholders agreements, but because they are not expressly provided for under Vietnamese law, their enforceability (as well as that of other contractual -as opposed to statutory- shareholder protections) in the event of a dispute is somewhat uncertain.

4. Structuring considerations

4.1 Preference shares

Although shares in Vietnamese joint stock companies are typically ordinary shares (i.e. shares of the same par value and having equal rights and obligations), a joint stock company may issue several types of preference shares, including:

- Voting preference shares;
- Dividend preference shares;
- Redemption preference shares; and
- Other preference shares as stipulated in the charter of the company.

The use of preference shares is limited in practice by Vietnamese law which only allows for certain entities authorised by the Government (typically State-owned entities) and founding shareholders to hold voting preference shares. In addition, voting preference shares held by founding shareholders are only valid for 3 years from the date of issuance of the enterprise registration certificate of the company and must be converted into ordinary shares upon the expiry of such 3 year period.

Dividend preference shares and redemption preference shares, on the other hand, may not have voting rights, and holders of such shares do not have the right to attend general meetings of shareholders or to nominate candidates for election to the board of directors or supervisory board of the company.

4.2 Convertible securities

In cases where caps (or occasionally outright prohibitions) on foreign ownership apply, or where certain preliminary regulatory requirements are easier satisfied by a purely domestic company, foreign investors will often invest through convertible debt instruments (either bonds or loans) that can be converted into equity at some point in the future (e.g. once foreign ownership restrictions are lifted or regulatory requirements have been satisfied). In a public company context, there is a preference for convertible bonds over convertible loans due in part to the lack of specific guidance under Vietnamese law regarding convertible loans[8].

Convertible bonds may be issued either domestically or on the international market (subject to additional requirements and regulatory approvals). The conversion ratio, window for conversion, conversion price and any collars on share price fluctuation must be included in the issuance plan and approved by the company's shareholders. The issuance plan must also be registered with and approved by the SSC.

Convertible bonds are subject to a lock-up period of at least one year from the date of completion of the issuance, except for transfers to a professional securities investor or between professional investors. There must also be a period of at least six months between successive issuances by an issuer.

[8] Only a simple reference to the convertibility of loans exists in Circular 09/2004/TT-NHNN of the SBV dated 21 December 2004: "*the contents of medium-term and long-term foreign loan agreements of enterprises must be consistent with the current applicable provisions of the laws of Vietnam, such as, <<…>> conversion of debts into shareholding*". In contrast, Decree 90/2011/ND-CP of the Government dated 14 October 2011 on the issuance of enterprise bonds specifically states that convertible bonds may be converted into ordinary shares of the issuer upon the terms and conditions stipulated in the bond issuance plan.

Recent significant transactions

There was an increase in M&A activity in a variety of sectors in Vietnam last year. The Institute of Mergers, Acquisitions and Alliances reported 313 M&A transactions in 2014 with a total deal value of USD 2.5 billion (an increase of 15% over the previous calendar year), while StoxPlus' database recorded 265 completed M&A deals with value totaling USD 4.66 billion (an increase of 33.1%). A summary of some noteworthy recent transactions (involving both public and private companies) is shown below.

- **Masan Consumer**

  In January 2013, KKR doubled its investment in Masan Group company Masan Consumer by USD 200 million to increase its stake to 18%[9]. KKR's total investment in Masan is now USD 359 million.

- **Vincom Retail**

  In May 2013, Warburg Pincus agreed to invest USD 200 million in a strategic partnership with Vietnam's largest private sector real estate operator, Vingroup. In addition to the purchase of a 20% stake in Vingroup subsidiary Vincom Retail, Warburg Pincus agreed to participate in a future capital-raising of up to USD 25 million and may also invest an additional USD 100 million to explore future retail property-related opportunities[10].

- **An Giang Plant Protection Joint Stock Company**

  In September 2014, Standard Chartered Private Equity acquired a 34.2% stake in An Giang Plant Protection Joint Stock Company for a total purchase price of approximately USD 90 million[11].

- **Ocean Retail**

  In October 2014, Vingroup acquired a 70% stake in Ocean Retail. Vingroup is expected to have 100 supermarkets and 1,000 convenience stores across the nation by 2017.

- **Kinh Do Binh Duong Joint Stock Company**

  In November 2014, Kinh Do Corporation agreed to the sale of an 80% stake in its subsidiary Kinh Do Binh Duong JSC to a subsidiary of multinational corporation Mondelēz International Inc. Mondelēz has the right to purchase the remaining 20% after 12 months from completion of the sale of the first stake. The total value for both transactions is approximately VND 9,808 billion (around USD 456 million)[12]. The closing of the 80% sale is expected to take place around mid-2015[13].

- **International Dairy Products Joint Stock Company**

  In December 2014, VinaCapital Vietnam Opportunity Fund (VOF) and Japanese leading financial investor Daiwa PI Partners Co. Ltd. together acquired a 70% stake in International Dairy Products Joint Stock Company for a total deal value of approximately USD 45 million[14].

- **BIDV Insurance Corporation**

  In May 2015, Fairfax Asia Limited entered into an agreement with BIDV Insurance Corporation to acquire 41,046,913 shares (equivalent to approximately 35% of registered share capital) of BIC through a private placement. After the transaction, Fairfax Asia Limited will become BIC's strategic shareholder. The transaction is expected to close in the third quarter of 2015[15].

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9 http://www.dealstreetasia.com/stories/singapore-fund-reduces-holdings-in-vietnams-masan-group-5202/

10 http://english.thesaigontimes.vn/29379/Warburg-Pincus-Consortium-to-invest-US$200-million-in-Vincom-Retail.html

11 http://www.thesaigontimes.vn/122126/SCPE-so-huu-tren-34-co-phan-cua-Bao-ve-Thuc-vat-An-Giang.html

12 http://s.cafef.vn/kdc-145207/kinh-do-cong-bo-chi-tiet-thuong-vu-mondelz-mua-80-co-phan-kinh-do-binh-duong.chn

13 http://www.thestreet.com/story/13132202/1/mondelez-international-mdlz-earnings-report-q1-2015-conference-call-transcript.html

14 http://www.vinacapital.com/news.php?id=1425

15 http://www.dealstreetasia.com/stories/vietnams-insurer-bic-to-offload-35-to-canadian-fairfax-in-strategic-partnership-5970/

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