



## LEGAL UPDATE

### DECREE 35 PROVIDES GUIDANCE ON THE COMPETITION LAW

The Competition Law entered into force on 1 July 2019. Decree No. 35/2020/NĐ-CP (**Decree 35**) which offers detailed instructions on Articles 9, 10, 13, 26, 31, 32, 33, 36, 56 and 82 of the Competition Law, will enter into force on 15 May 2020.

In this update, we will set out the most important guidance of Decree 35.

#### 1. Relevant Market and Market Share

The method of determination of the relevant market and market share prescribed in Decree 35 is similar to the superseded decree. In particular, the *relevant market* shall be determined based on the *relevant product market and relevant geographical market*; and the *market share* of an enterprise shall be determined by the methods of *turnover from sales, turnover of inward purchases, or market share of a group of affiliated enterprises*.

However, Decree 35 now provides more specific figures to be used in determination of *relevant market*, e.g. for determination of goods or services deemed to be interchangeable in terms of their price; or for determination of ability to switch supply.

For determination of *market share*, the Competition Law supplements the methods of determination of market share based on quantity of units of goods or services sold or purchased, based on that, Decree 35 provides guidance on such methods.

It is important to note that Decree 35 no longer provides separate principles for determination of turnovers of insurance enterprises and credit institutions.

#### 2. Economic Concentration

##### 2.1 Definition of Controlling or Governing

Pursuant to the Competition Law, one of the forms of economic concentration is *acquisition of an enterprise*, which is defined as a *direct or indirect purchase by one enterprise of the whole 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*.

For the purpose of determining *acquisition of an enterprise* as one of the forms of economic concentration, Decree 35 provides the following definition. *Controlling or governing* of a business line of an enterprise is defined as the acquiring enterprise:

- a. gains ownership of more than 50% of the charter capital or more than 50% of the total voting shares of the acquired enterprise;
- b. gains ownership of or the right to use more than 50% of the assets of the acquired enterprise in one or more business lines of the acquired enterprise; or
- c. has one of the following rights:
  - to directly or indirectly decide the appointment, dismissal or removal of a majority or all of the members of the board of management, chairman of the members' council, director or general director of the acquired enterprise;
  - to decide the amendment or supplement to the charter of the acquired enterprise;
  - to decide important matters regarding the business operations of the acquired enterprise, including selection of the form of the business organisation, business fields, business lines, locations, and business model; selection of modification to the scope of business and business lines, selection of forms and methods of mobilising, allocating, and utilising business capital of the acquired enterprise.

##### 2.2 Economic Concentration Notification

The Competition Law stipulates the criteria for determination of the thresholds where a notification on economic concentration is required. Decree 35 now provides the specific thresholds for economic concentration notification. It also stipulates separate threshold amounts for credit institutions, insurance companies and securities companies.

In brief, when carrying out a transaction of economic concentration such as a merger, consolidation, acquisition, or a joint venture, enterprises other than credit institutions, insurance companies and securities companies,



participating in such transaction shall be subject to economic concentration notification if:

- a. in the financial year preceding the economic concentration for (i) one of the enterprises participating in the transaction or (ii) the group of affiliated enterprises of which such participating enterprise is a member, one of the following thresholds is reached:
  - i. the total assets in the Vietnamese market, reaches at least VND3,000 billion (~USD129 million); or
  - ii. the total sales turnover or inward purchase turnover in the Vietnamese market reaches at least VND 3,000 billion (~USD129 million);
- b. the transaction value of the economic concentration is at least VND 1,000 billion (~USD43 million); or
- c. the combined market share of the enterprises proposing to participate in the economic concentration transaction is 20% or more in the relevant market in the financial year preceding the economic concentration.

### 2.3 Economic Concentration Notification for Offshore Transactions

In addition, Decree 35 stipulates that in case the economic concentration takes place outside Vietnam, the thresholds set out under a. and c. in section 2.2. will be considered when determining whether such economic concentration will be subject to notification requirements.

### 2.4 Impact of Economic Concentration

Further to the abovementioned provisions, Decree 35 also provides detailed guidance on the following provisions of the Competition Law:

- a. assessment of the significant competition-restraining impact or ability to cause the impact of an economic concentration,
- b. assessment of the positive impact of an economic concentration, and
- c. preliminary appraisal of an economic concentration.

### 2.5 Timeline

It is important to take all the requirements mentioned in sections 2.2-2.4 into consideration when setting the timeline between signing and closing in a transaction. The timeline for a preliminary appraisal is 30 days. This can be followed by 90 days for an official review which can be extended by an additional 60 days.

Given the notification, assessment and appraisal procedures required, as mentioned before, it is expected that more requests for an M&A approval will be submitted.

## 3. Anti-competitive Agreement

### 3.1 Introduction

The Competition Law stipulates for types of anti-competitive agreements which are always considered illegal and therefore prohibited:

- a. *horizontal* anti-competitive agreements such as agreements on price fixing, customer allocation, exclusion of market participation, market entry prevention, output restriction, or bid rigging;
- b. *vertical* anti-competitive agreements such as agreements on bid rigging, exclusion of market participation, market entry prevention.

Other horizontal or vertical agreements are prohibited if such agreements *cause or potentially cause a significant anti-competitive impact in the market*.

### 3.2 Factors to Determine Anti-competitive Impact

The Competition Law also stipulates a number of factors to determine whether *an agreement causes or potentially causes a significant anti-competitive impact in the market*.

These factors are clarified in Decree 35:

- a. changes or trend of changes in the market share of the enterprises engaging in the agreement in comparison to other competing enterprises;
- b. barriers to market entry or expansion, based on factors influencing the decision of an enterprise when accessing or expanding the market;
- c. restrictions of technological research, development and innovation or on technological capacity in relevant industries and sectors;
- d. reduction in accessibility or ownership to essential infrastructure, based on the level of necessity of such infrastructure for production and business activities, and the costs and time for competing enterprises to access and retain such infrastructure;
- e. increase of customers' costs and time for purchasing goods and services of the enterprises engaging in the agreement or for switching to purchase other relevant products, based on a comparison of such costs and time before and after such agreement;
- f. obstructions to competition in the market through control of other specific factors in the sectors and



domains related to the parties engaging in the agreement, based on the level of dominance of such particular factors to competitive activities of enterprises in the market.

### 3.2 Combined Market Share Thresholds

The Competition Law no longer stipulates the combined market share threshold for determination of prohibited anti-competition agreement, which was 30% under the 2004 Competition Law. However, Decree 35 amends and supplements the threshold. Accordingly, and notwithstanding the factors mentioned in Section 3.1 before, the following anti-competitive agreements shall be deemed as *not causing or potentially causing a significant anti-competitive impact*:

- a. *horizontal* agreements between enterprises of which the combined market share is less than 5%;
- b. *vertical* agreements between enterprises of which each enterprise has a market share less than 15%.

### 4. Significant Market Power

The Competition Law stipulates the thresholds to determine whether an enterprise or a group of enterprises has a dominant market position or not. In addition, the Competition Law also provides another basis to determine the dominant market position when such thresholds are not met, namely significant market power of an enterprise. Decree 35 provides guidance to determine the significant market power of an enterprise, including:

- a. the correlation of the market share of enterprises in the relevant market, which shall be determined based on a comparison of market shares between enterprises or groups of enterprises in the relevant market;
- b. 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, network of distribution and sale of goods or services of such enterprise or group of enterprises in relation to other competing enterprises;
- c. 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;

- d. the capability of accessing and controlling the distribution or consumption market, based on the advantages of the enterprise or group of enterprises having ability to access and control the relevant networks in comparison with other competing enterprises;
- e. the advantages of technology and technical infrastructure of the enterprise or group of enterprises, based on the advantages owned or used by such enterprise or group of enterprise in comparison with other competing enterprises;
- f. the ownership and right to hold and access infrastructure, which shall be determined based on the level of necessity and ability to access infrastructure for production and trading of goods or services;
- g. the ownership and right to use objects of intellectual property rights, which shall be based on the level of necessity and ability to access objects of intellectual property rights during production and trading of goods or services;
- h. ability to switch to sources of supply and demand of other relevant goods or services, which shall be determined on the basis of the necessary costs and time for customers and enterprises to switch to the purchase and sale of goods and services of other enterprises in the same relevant market; and
- i. special factors in the industry or sector in which the enterprise or group of enterprises is currently conducting business, which shall be determined in specific conditions of such industry or sector.

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