



Mergers and Acquisitions (M&A) in Vietnam

I. Overview

Vietnamese laws generally allow foreign investors to acquire shares in Vietnamese enterprises at unrestricted levels, unless specific restrictions are provided by the WTO and other Vietnamese laws. However, some local Departments of Planning and Investment (DPI) have shown resistance to this general principle. In particular, local DPIs often demand without legal basis “official letters” from the Ministry of Planning and Investment (MPI), confirming that such acquisitions are permitted. In other cases, local DPIs have unilaterally tried to prevent such acquisitions from being made, or have indefinitely delayed registering such acquisitions. We believe that such practice jeopardizes the attractiveness of Vietnam as an investment destination. In particular, the following issues have been identified:

II. Specific Issues

1. Different registration requirements for foreign and domestic companies: Article 9 of Decree 139 provides that any company with 49% or more foreign investment will require an investment project and thus an investment certificate in accordance with the Law on Investment. Companies with up to 49% foreign investment will follow provisions for domestic companies and thus require only a business registration certificate and a simple procedure which requires relatively little documentation. However, with acquisitions which will lead to foreign investment of 49% or more, the company must follow the procedures listed in Decision 1088 for issuance of an investment certificate. This procedure is long and arduous and requires the same documentation necessary to create a foreign invested company in Vietnam. It thus may make acquiring an existing company in Vietnam less attractive for investors wishing to enter the Vietnamese market through acquisition. Furthermore, some DPIs arbitrarily require any company with equity acquired by a foreign investor, regardless of the percentage, to go through the entire investment certificate procedure. So the burdensome procedures are applied even if the company only has 1% foreign investment.

2. Post acquisition Issues pertaining to Land Use Rights of acquired companies: There is a misperception that exists in some Departments of Natural Resources and the Environment (“DONRE”) with regards to the ownership of Land Use Rights (“LUR”) of acquired companies. In at least one instance a local DONRE has refused to enforce an acquired company’s LUR post acquisition without evidence of a transfer of LUR from the former owner of the acquired company to the new owner of the acquired company. When a company is acquired, there may be some legal necessities for converting the nature of LUR depending on the new owner of the company, however there is no need to have a separate transaction with regards to the assets, including LUR, of the company. This seems to be due to the misconception that the acquisition of a company through capital contribution is a change of ownership of a company, rather than a piece by piece acquisition of assets.



3. Registration for amendment of investment certificate/business registration certificate of LLC with two or more members in case of changing of membership arising from assignment of equity interest: Decree 88/2006/ND-CP dated 29 August 2006 on business registration provides that an application file for registration of a change of membership arising from assignment of equity interest in a limited liability company with two or more members must be accompanied with “documents evidencing the completion of the assignment”. Unfortunately, there is no guidance on what is meant by “documents evidencing the completion”. Accordingly, different DPIs have made arbitrary and discretionary decisions when requesting documents, with some DPIs requesting a company provide proof that the seller has received full payment of purchase price from the purchaser. Consequently, this requirement places the purchasers in a very risky situation where it must pay the purchase price in full and certify the full payment of the purchase price before the receiving final approval of the DPI. This final approval by the DPI is beyond the control of the parties.

4. Restructuring: In the current economic climate, financial restructuring of both Vietnamese and foreign invested entities is necessary to preserve stakeholder (shareholders, funders, employees, tax authorities, etc) interests in the short, medium and longer term. However, experience has shown that the process to obtain regional and Hanoi licensing authority clarity on issues such as tax incentives, LUR, etc. is extremely long, lacks consistency and ultimately places greater financial distress on the businesses requiring restructuring. Having a single department in Hanoi which oversees restructuring and can give decisive judgments on these areas would be welcomed. This is particularly relevant as there would not appear to be any legislative guidelines in place currently for the actual restructuring process or the corporate tax or VAT implications thereof.

5. Availability and quality of information: Currently there is no hard evidence of an ongoing M&A market in Vietnam, as deals remain silent or are poorly publicized. Presently there is very little information in the public realm with regards to transactions, pricing, actual deals, and practice. This means that foreign investors are hesitant to enter a market and M&A practice remains unclear. Those investors that do enter the market looking for acquisition deals tend to spend a lot of money and time gathering whatever information they can before deciding to make a deal or before deciding that the process is too arduous and leaving Vietnam. Furthermore, if any information is gathered it is not necessarily easily verified. As the M&A market lacks transparency and an easy dissemination of information, it does not provide confidence for foreign investors, but rather attracts investors willing to take risks.

6. Clarification of exit mechanisms and enforcement in general: Foreign investors have entered into share purchase agreements in Vietnam with exit mechanisms such as put and call options drafted into such agreements. However, it remains unclear whether these exit mechanisms may be enforced or relied upon since in many cases, specifically with limited liability companies, a change of partners must be registered with the local DPI. This registration acts as de facto approval of the transfer or sale, thus taking away the power of



the exit mechanism. Furthermore, it may encourage local partners from honoring such agreements. Foreign investors need to be able to rely on share purchase agreements, namely that their partners will honor the agreements, that the local courts will enforce such agreements, and that the local authorities will have minimal involvement further than de jure registration with no de facto approvals.

III. Recommendations

We believe that the MPI and the DPIs should take a uniform and predictable approach in allowing foreign investors purchase interests in Vietnamese companies according to WTO-commitments and not delay, unless explicit restrictions are provided by the WTO and other Vietnamese laws. To this end, we recommend both the promulgation of consistent regulations, and training of local DPIs to execute such regulations. We further recommend that the DPIs should take a uniform and predictable approach in applying registration procedures. Burdensome procedures, if at all, should not be applied to any foreign company, but only to companies with at least 49% foreign investment. However, we generally recommend that acquisition procedures for majority foreign owned companies are simplified and closer to the business registration procedures. Further, we suggest that DPIs do not make share purchase agreements subject to any registration or approval procedures. Finally, a central registration body of M&A transactions and their details would shed light on the M&A market in Vietnam, and provide a base for foreign investors to make decisions about entering the Vietnamese market through an acquisition.