



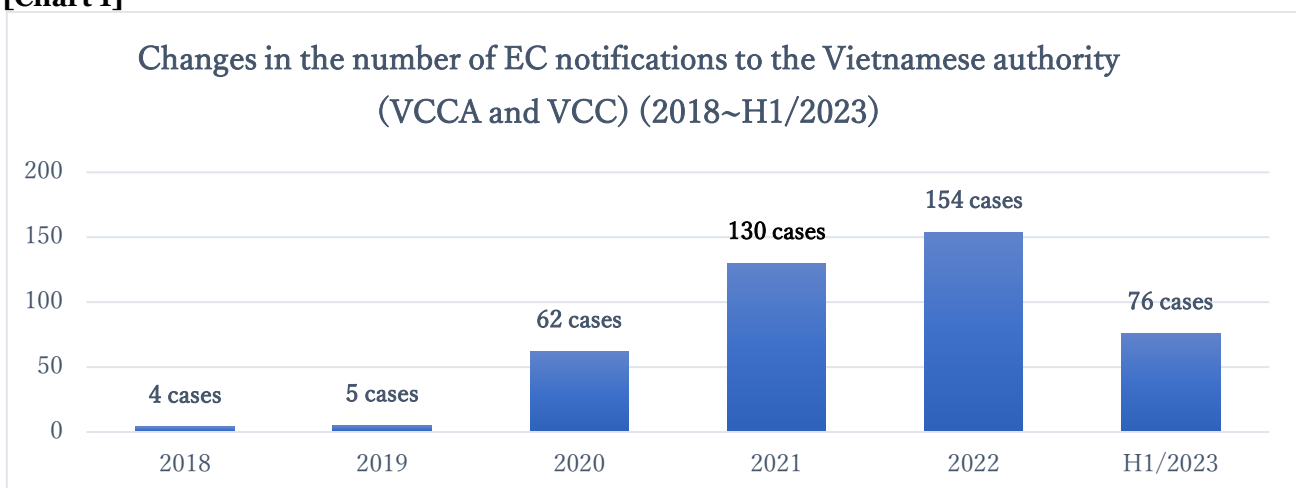
## Current Situation of Vietnamese Competition Law - Focusing on the Enforcement of Merger Control (Economic Concentration Regulation)

### 1. Introduction

The amended Competition Law (No. 23/2018/QH14; hereinafter, the “Law”) implemented on July 1, 2019, and its guidance document came into effect from May, 2020 (Decree No.35/2020/ND-CP; hereinafter, the “Decree”). Along with these amendments, in recent years there have been notable changes in the enforcement of the Law by the Vietnamese authority, in particular in connection with the new notification thresholds introduced under the Decree.

For example, the number of notifiable M&A transactions (Economic Concentration; hereinafter “EC”) have significantly increased since the new notification thresholds introduced under the Decree, and continue to increase every year ([Chart 1]).

[Chart 1]



Source: VCCA’s annual and biannual reports

In April 2023, the Vietnam Competition Commission (VCC) was established, thereby establishing an enforcement system for EC regulations. In this situation, it is useful for foreign companies to closely monitor how EC regulations will be enforced in Vietnam under the leadership of the VCC.

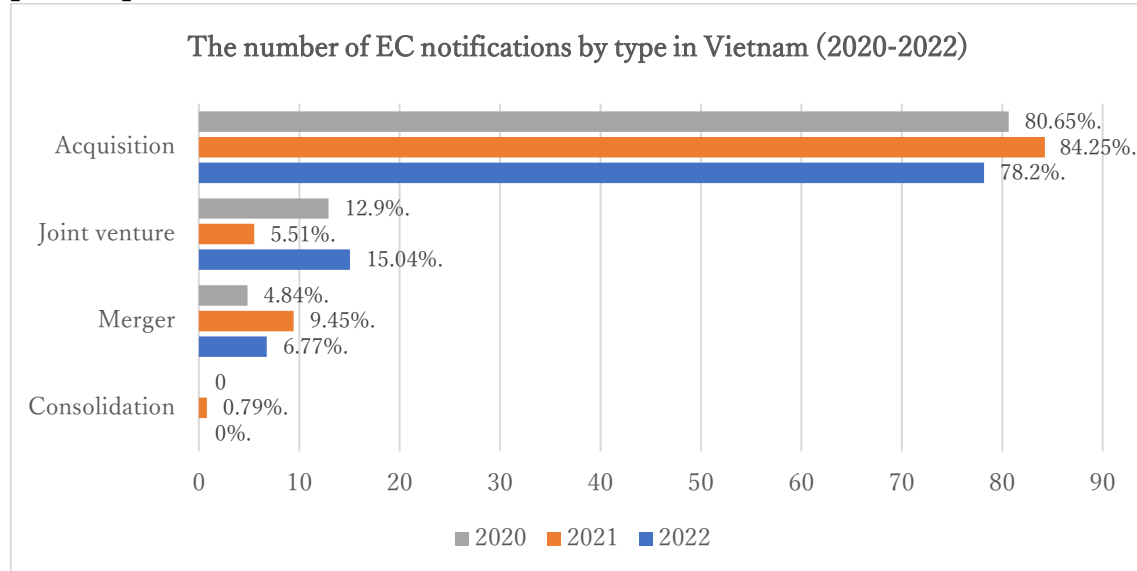
In this regard, the Annual Reports issued by Vietnam Competition and Consumer Authority (VCCA) introduce specific cases of EC, and analyzing these cases may contribute to predictability for companies considering M&A that may affect the Vietnamese market. Therefore, we will explain the main points of EC regulation, introduce specific past cases, and discuss the enforcement of the Law by the Vietnamese authority.

## 2. Key Points of EC Regulation

### (1) Definitions, etc.

EC in Vietnam is mainly classified into (i) Merger, (ii) Consolidation, (iii) Acquisition, and (iv) Joint venture (Article 29 of the Law). However, (iii) Acquisition is adopted for most EC cases in Vietnam ([Chart 2]).

[Chart 2]



Source: VCCA and KPMG, “Report on Economic Concentration Activities in 2022”

Each definition is as follows (Article 29, Paragraph 2~5 of the Law).

- (i) Merger means that one or more than one enterprise transfers all of its/their assets, rights, obligations and lawful interests to another enterprise concurrently with terminating its/their business activities or existence.
- (ii) Consolidation means that two or more enterprises transfer all of their assets, rights, obligations and lawful interests to form a new enterprise concurrently with terminating their business activities or existence.
- (iii) Acquisition is defined as a corporate action in which one company directly or indirectly purchases part or all of another company's equity shares and assets to gain control of that company or one business line of that company. The acquiring party is deemed to control the target entity as a result of the acquisition when the former holds over 50% of the charter capital, or over 50% of the voting shares, or over 50% of the assets in all or one business line of the latter or has right to decide on key corporate matters<sup>1</sup> of the latter (Article 2, Paragraph 1 of the Decree)<sup>2</sup>.
- (iv) Joint venture means that two or more enterprises jointly contribute part of their assets, rights, obligations and lawful interests to form a new enterprise.

In addition, it is prohibited for enterprises to conduct EC that induces or may induce “significant competition restraining impacts” in the Vietnamese market (Article 30 of the Law). Under the Competition Law before the amendment, the criterion was whether the total market share in the relevant market

<sup>1</sup> Key corporate matters include: • direct or indirect appointment or dismissal of a majority or all members of the board of management, chairman of the members' council, the director or general director of the target; amendment of the charter of the target; or making decisions on the business organization form, business lines and the geographical area, business forms, the scale and lines of business; and the form and method of raising, allocating and utilizing business capital of the target (Article 2, Paragraph 1 of the Decree).

<sup>2</sup> We had experience with the VCCA's limited interpretation of this provision, which held that holding “veto rights” over the target company (e.g., having more than 35% of the shares or contractual rights that can veto a special resolution) shall not constitute the controlling or governing of the target company in an acquisition of an enterprise prescribed under the Law.

exceeds 50 percent as a result of EC (form-based approach, Article 18 of the Competition Law before the amendment).

On the other hand, under the Law, in addition to market share, the determination is based on comprehensive consideration of the relationship with other competing businesses, the ability of the business after EC, its competitive advantage and so on (Article 31 of the Law). Also, the VCC may determine the applicability of EC by taking into account not only the negative effects of EC but also the positive effects (effects-based approach, Article 32 of the Law and Article 16 of the Decree).

### (2) EC notification

If the following Notification Thresholds ([Chart 3]) are met, an EC notification must be submitted to the VCC before proceeding with the EC (Article 13, Paragraphs 1~3 of the Decree).

[Chart 3]

		Type of Business			
		Credit institution**	Insurance company	Securities company	Others
Thresholds	Total assets*	20% of total assets of credit institutions in Vietnam	VND 15 trillion	VND 15 trillion	VND 3 trillion
	Total sales turnover or costs for purchase*	20% of total sales turnover of the credit institutions in Vietnam	VND 10 trillion	VND 3 trillion	VND 3 trillion
	Traded value	20% of total charter capital of the credit institutions in Vietnam	VND 3 trillion	VND 3 trillion	VND 1 trillion
	Combined market share	20%	20%	20%	20%

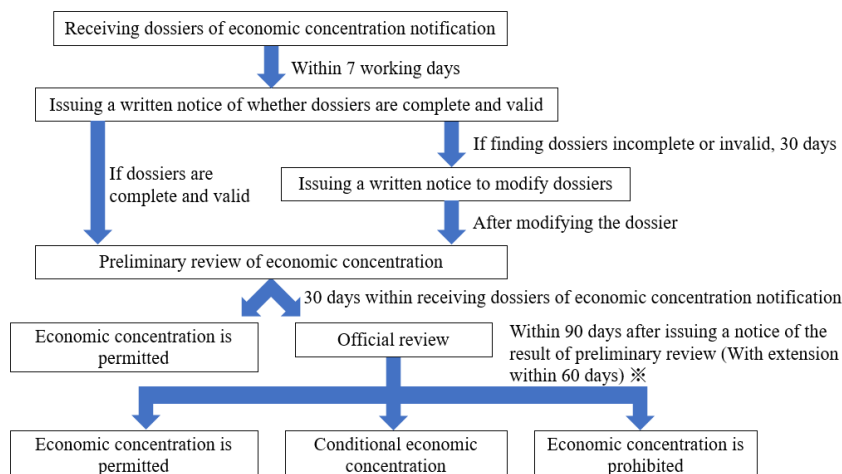
\*If a party belongs to a group of companies, “total assets” and “total sales turnover or costs for purchase” shall be calculated on a consolidated basis of the entire group, not only the party directly participating in the transaction.

\*\* “Credit institution” includes banks and non-banks.

### (3) EC notification procedure

The specific EC notification procedure can be organized as shown in [Chart 4] (Articles 35 through 38 and 41 of the Law).

[Chart 4]



※ The VCC may request supplemental information/documents up to two times, and such periods will not be counted in the official review period.

Source: Prepared by the author

#### (4) Preliminary and official review

The Herfindahl-Hirschman Index (HHI) is used in the preliminary review. Specifically, it provides that an EC shall be cleared if the following criteria are met (Article 14, Paragraph 2 of the Decree).

- (i) Combined market share of enterprises intending to participate in EC is under 20% in a relevant market.
- (ii) Combined market share of enterprises intending to participate in EC is at least 20% in a relevant market and total squares of market share thresholds of enterprises after EC in the relevant market is under 1,800.
- (iii) Combined market share of enterprises participating in EC is at least 20% in a relevant market, total squares of market share thresholds of enterprises after EC in the relevant market is over 1,800, and increase amplitude of total squares of market share thresholds of enterprises in the relevant market before and after economic concentration is under 100.
- (iv) Enterprises participating in economic concentration and interrelated in a production, distribution and supply chain for a certain type of goods or services or business lines of enterprises participating in economic concentration that are inputs of or complementary to one another have a market share of under 20% in each relevant market.

In the official review, the VCC will assess whether or not EC induces or may induce “significant competition restraining impacts” based on the factors to be considered as set forth in Article 31 of the Law and Articles 15 and 16 of the Decree.

#### (5) Penalties

In the event of a violation of the provisions on EC, a fine of not more than 5% of the gross revenues of the fiscal year preceding the year of the violation shall be imposed on the entity that committed the violation (Article 111, Paragraph 2 of the Law).

### 3. Enforcement status of EC regulations

#### (1) Before the revision of competition law – Grab/Uber integration case

##### (a) Outline of the case

On March 25, 2018, GrabTaxi Co., Ltd. (GrabTaxi) and Uber Vietnam Co., Ltd. (Uber Vietnam) signed a Bill of Sale which transferred and accepted the obligations regarding the sale of assets by Uber Vietnam, Uber’s business activities and other benefits to GrabTaxi. From 11.5 p.m. on April 8, 2018 (Vietnam time), Uber’s application in Vietnam is officially inactive<sup>3</sup>.

As a result of the acquisition, Uber Vietnam withdrew from its Vietnam operations, giving GrabTaxi a market share of 44.10% and 82.68% in the market for ride-hailing services for 9 passengers or less in Hanoi and Ho Chi Minh City, respectively<sup>4</sup>.

##### (b) Contents of judgment

The VCCA initially ruled that the acquisition was illegal in November 2018, but the Vietnam Competition Council, which had the final decision-making authority at the time, later reversed the decision and concluded that the acquisition was legal in June 2019. The Vietnam Competition Council has outlined the reasons for the above decision as follows<sup>5</sup>.

<sup>3</sup> See VCCA’s Annual Report 2019, page 16, published at [http://www.vcca.gov.vn/default.aspx?page=document&category\\_id=154b131f-af6c-4af7-ae32-a71f70b1f298&current\\_id=7a6db5ba-88dd-4f41-8f46-9ba54b5b05dc#](http://www.vcca.gov.vn/default.aspx?page=document&category_id=154b131f-af6c-4af7-ae32-a71f70b1f298&current_id=7a6db5ba-88dd-4f41-8f46-9ba54b5b05dc#) (last visited on April 17, 2024)

<sup>4</sup> Ha, Binh Thi Thanh. "Developments in the Extraterritorial Application of Vietnamese Competition Law - Grab's Acquisition of Uber's Southeast Asia Operation. IIC - International Review of Intellectual Property and Competition Law Online First (2024): p.6

<sup>5</sup> Conclusion No.26/QD-HDXL of the VCC

- (i) GrabTaxi has not acquired any voting rights in Uber Vietnam as a result of the Acquisition.
- (ii) Uber Vietnam is not registered to provide ride hailing services in Vietnam which is deemed a relevant market in the Acquisition by VCCA, and GrabTaxi did not acquire the Uber App run by Uber B.V., or other services in the Acquisition. Therefore, the Acquisition did not lead to GrabTaxi controlling Uber Vietnam as prescribed by the competition law at that time.

### **(c) Consideration<sup>6</sup>**

The reason why the acquisition was judged to be legal is due to the content of the provisions of the Competition Law before the amendment. That is, since the application of the Competition Law before the amendment was limited to businesses in Vietnam (Article 2 of the Law before the amendment), the authorities were unable to properly assess the impact of Grab's acquisition of Uber on the Vietnamese market in the Southeast Asian region as a whole. In addition, to qualify as an "Acquisition of enterprises" under the Competition Law before the amendment, it was necessary to control the target company through voting rights at authority bodies of the target (Article 17, Paragraph 3 of the Competition Law before the amendment and Article 34 of Decree No. 116/2005/ND-CP). In this case, GrabTaxi did not hold any voting rights in Uber Vietnam as a result of the Acquisition, and thus did not constitute a notifiable EC transaction under the former law at that time.

The content of these provisions has been renewed by the amendment of the Competition Law. After the amendment, the Law is now applicable to business operators outside of Vietnam (Article 2 of the Law), and the requirement for "Acquisition of enterprises" is satisfied by the acquisition of certain assets or business even if no capital is acquired (Article 29.4 of the Law and Article 2.1 of the Article 2, Paragraph 1 of the Decree).

Therefore, under the (revised) Law, it is unlikely that the acquisition would be consummated.

## **(2) After the revision of the Competition Law**

### **(a) A Case Study of Vinamilk and Kido's JV Establishment<sup>7</sup>**

#### **(i) Outline of the case**

On August 25, 2020, the Ministry of Industry and Trade ("MOIT") received the EC notification dossiers between Viet Nam Dairy Products Joint Stock Company ("Vinamilk") and Kido Group Joint Stock Company ("Kido"), intending to contribute capital to the establishment of a joint venture company. Vinamilk and Kido are companies established in accordance with Vietnamese law and had a 9.1% and 43.5% share of the Vietnamese ice cream market in 2020, respectively<sup>8</sup>.

#### **(ii) Contents of judgment**

On October 29, 2020, as a result of a formal review based on the notification, the MOIT announced that the EC was not prohibited under the provisions of Article 30 of the Law. However, since both companies have large market shares in relevant markets, the competition authority will strengthen supervision over enterprises to ensure that they maintain a healthy and effective competition environment on the food ice cream market in Vietnam. Simultaneously, the enterprise must also ensure compliance with the provisions of the Law (conditional EC).

#### **(iii) Consideration**

Since the combined market share of the two companies exceeds 50%, this would have been a case in which the establishment of a joint venture would have been judged to have the potential to induce a "significant competition restraining impacts" based on the form-based approach under the Competition

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<sup>6</sup> Note 3 above, p. 13 and below.

<sup>7</sup> VCCA "Annual Report 2020" p.29

<sup>8</sup> Ministry of Agriculture, Forestry and Fisheries, "Report on Export of Dairy Products to Vietnam" (<https://www.maff.go.jp/j/kokusai/kokkyo/platform/pdf/platform-184.pdf>) (last viewed on April 17, 2024)

Law before the amendment. It is considered that the MOIT took other factors into consideration (such as the relationship with other competing businesses, the ability of the business after the EC, and the competitive advantage of the business, etc.) before deciding it. However, the specific decision-making process is not clear.

## **(b) A Case Study of SOGEC and LOOP's JV Establishment<sup>9</sup>**

### **(i) Outline of the case**

On September 27, 2021, the MOIT received the EC notification dossiers between Sojitz Osaka Gas Energy Company Ltd. ("SOGEC") and LOOP INC Company ("LOOP"), the parties intending to contribute capital to the establishment of a joint venture company ("SOL Energy") (capital ratio: SOGEC: 70%, LOOP: 30%).

SOL Energy will purchase solar photovoltaic systems from overseas suppliers and install these systems on the roofs of industrial customers who need to use rooftop solar power in the Long Duc Industrial Park in Vietnam's southern province of Dong Nai. After that, SOL Energy will continue to own and operate the rooftop solar power system and sell the electricity produced to customers based on the direct power purchase agreement signed by the two parties. In addition, the VCCA's annual report discusses the characteristics of Vietnam's rooftop solar power market, including as follows;

- The year 2020 is considered an exciting year for the rooftop solar power market in Vietnam, when many policies and mechanisms of the Government are issued in turn, stimulating, and removing many obstacles for individuals and businesses in investing and operating rooftop solar power systems.
- The power supplied from the rooftop solar power system is only an additional backup power source in case of power failure, accounting for a tiny proportion of the total electricity demand of an industrial park.
- The rooftop solar power system plays a vital role in reducing pressure on the national power grid and helping to increase business efficiency. It can be seen most clearly in business investors, especially manufacturing businesses, when the rooftop solar power system helps these businesses optimize production capacity and increase the life of the machine system.
- The rooftop solar power market is a new, fast-growing, and very competitive market with many competitors entering the market. It is expected that the total installed capacity will increase in the coming time.

### **(ii) Contents of judgment**

On October 11, 2021, as a result of a formal review based on the notification, the MOIT announced that the EC was not prohibited under Article 30 of the Law and is allowed to conduct in compliance with Clause 1, Article 41 of the Law.

### **(iii) Consideration**

Although the specific process of this decision is not clear, based on the contents of the VCCA's annual report, it is expected that the VCCA considered not only the market share, but also the positive (such as reducing the burden on the national power grid) and negative (such as the fact that the electricity supplied by rooftop solar power is a small portion of the total electricity demand of the industrial park and the fact that the rooftop solar power market is a competitive market) effects of establishing SOL Energy. The establishment of SOL Energy is not expected to have "significant competition restraining impacts".

## **(3) Examples of public announcements after the launch of the VCC**

Since the VCC was established on April 1, 2023, until the time of this writing (April 17, 2024), four published cases have been posted on the VCCA's website (all of which are conditional EC decisions)<sup>10</sup>.

<sup>9</sup> VCCA "Annual Report 2021" p.27, Sojitz Corporation website (<https://www.sojitz.com/jp/news/article/20211022.html>) (Last viewed on April 17, 2024)

<sup>10</sup> VCCA website ([http://www.vcca.gov.vn/default.aspx?page=news&do=browse&category\\_id=e0904ba0-4694-4595-9f66-dc2df621842a&current\\_id=48caff09-211e-4400-b9b8-ab2de0dfe989&p=1](http://www.vcca.gov.vn/default.aspx?page=news&do=browse&category_id=e0904ba0-4694-4595-9f66-dc2df621842a&current_id=48caff09-211e-4400-b9b8-ab2de0dfe989&p=1)) (last visited on April 17, 2024)

However, even the outlines of the cases are unclear, and the conditions imposed by the VCC only mildly reminded the parties to comply with the regulations on abuse of market dominance and cartel regulations, as well as their reporting obligations when requested. It is not intended to provide an insight into the decision-making process of the VCC.

## 4. Conclusion -Current Situation of Vietnamese Competition Law-

As mentioned above, it is expected that more detailed information on the decision-making process for EC regulations will be disclosed by the VCC in the future. Companies considering M&A that may affect the Vietnamese market should continue to monitor the activities of the VCC and take appropriate measures according to the situation.

Finally, based on the information available when writing this article, we discuss below the current situation of Vietnamese competition law.

### (1) The effects-based approach

The descriptions in the VCCA's annual report suggest that the Vietnamese authority is taking into account not only formal figures such as market share values, but also the overall impact of such concentration on the market.

For example, in the case of the JV between Vinamilk and Kido, it was determined that the JV was not prohibited under the EC regulations, even though the combined market share exceeded 50%. Although the process of the decision is not clear, it seems that one of the factors taken into consideration was the fact that this was a case of JV establishment, and that there was no direct shareholding relationship between the investing companies, but only an indirect influence on each other through the JV<sup>11</sup>.

### (2) Evaluation of the positive impact

The case of the establishment of the JV between SOGEC and LOOOP is unique in that the VCCA's annual report describes in detail the positive impact of the establishment of this JV and the nature of the market. Although the decision-making process is unclear in this case, as well, it is assumed that the Vietnamese authority is analytically evaluating the specific impact of EC based on the actual market environment and other factors.

### (3) Notification thresholds are set too low and lack of exemptions

Notification thresholds of the Law seem too low. For example, EC transactions in the sectors like real property development, energy, and logistics are easily captured by the "total assets", "total turnover" and "transaction value" thresholds<sup>12</sup>.

In parallel to low thresholds, there are no exemptions on Notification thresholds in the Law. Lack of exemptions results in excessive control over the transactions unlikely to distort the market, such as intra-group restructuring transactions<sup>13</sup>. The number of EC notifications has steadily increased (see [Chart 1]) since the new rule came into effect from May, 2020. Yet, very few transactions proceeded to the official appraisal phase (10 of a total 422 EC notifications reported during the period from 2020 to the 1<sup>st</sup> Half of 2023 and all 10 had combined market shares exceeding 20%) and no transaction was blocked by the Vietnam authorities.

It is expected that adjustment of Notification thresholds and the introduction of exemptions are planned to improve the efficiency of merger reviews by the authority.

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<sup>11</sup> See Fair Trade Commission, "Operational Guidelines of the Antimonopoly Act Concerning Examination of Business Combination," 1.1 (1) (c) (<https://www.jftc.go.jp/dk/kiketsu/guideline/guideline/shishin.html>) (last viewed on April 17, 2024).

<sup>12</sup> Similarly, China had to increase its notification threshold for the same reason early this year.

<sup>13</sup> Notably, intra-group transactions were cleared by the VCCA in some cases due to the absence of a negative effect on competitiveness (such as the merger by and between PV Drilling and PVDI in 2009).

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