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Corporate M&A 2024

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Vietnam: Law and Practice and Trends & Developments

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VIETNAM



Law and Practice

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LE & TRAN was founded in 2011, and since then its formidable attorneys have worked hard and intelligently to garner widespread acclaim from both the local and international business community, thereby solidifying Le & Tran as a noteworthy presence in the legal realm. The firm's strength is based upon its top-tier lawyers with years of experience in handling a wide array of legal topics, including corporate counsel matters such as M&A deals, investment ad-

visory, business structures and compliance. In addition, the firm pursues a uniquely multidisciplinary and holistic approach to clients' issues, spotting underlying problems and recommending appropriate solutions for them. Le & Tran's lawyers are highly skilled at identifying clients' needs, then meticulously crafting the most sufficient strategy to encompass a satisfying outcome.

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1. Trends

1.1 M&A Market

According to data from KPMG Vietnam, the total value of M&A transactions in Vietnam for the first ten months of 2023 has dropped by 23% compared to the same period in 2022 (first ten months of 2022: USD5.697 billion; first ten months of 2023: USD4.4 billion).

While the COVID-19 pandemic and its consequences, such as travel restrictions and strict lockdown, posed major challenges for M&A activities in 2021, such challenges have been phasing out with the gradual unwinding of said restrictions since 2022.

1.2 Key Trends

Major M&A deals in 2023 showed promise in finance, infrastructure development, real estate, medical service, and the domestic consumer industry. Some notable deals are listed below.

- SMBC, a Japanese consumer finance company, acquired a 15% stake in Vietnam Prosperity Joint Stock Commercial Bank (VPBank) for USD1.45 billion in 2021 after acquiring FE Credit.
- ESR Group Limited paid USD450 million for strategic shares of BW Industrial Development Joint Stock Company (BW Industrial), a leading Vietnamese industrial and logistics developer.
- For USD316 million, Gamuda Land (Malaysia) acquired 100% of Tam Luc Real Estate Group shares in Vietnam, with plans to build a USD1.1 billion complex project in Thu Duc City centre.
- Thomson Medical Group (Singapore) entered the Vietnamese medical sector by acquiring controlling shares in Viet Phap Hospital for USD380 million.

- The domestic consumer industry reached a milestone when Bain Capital invested USD200 million in Masan Group's equity.

1.3 Key Industries

The following industries experienced significant M&A activities in the past 12 months, with their respective percentages in Vietnam's total M&A value as follows.

- Finance: 47%.
- Real estate: 23%.
- Healthcare: 10%.
- Non-essential consumer goods: 8%.

During the COVID-19 pandemic, the tourism sectors were particularly affected. In 2020 and 2021, travel businesses were no longer able to maintain minimum operating conditions and opted to stop applying for new licences and having their licences revoked, and many of which ultimately closed down. Post-COVID-19, as a measure to cut loss, and as small-scale hotels and resorts are vulnerable to the circumstances, the number of M&A deals considerably increased; however the value of each individual transaction decreased compared to previous years.

2. Overview of Regulatory Field

2.1 Acquiring a Company

There are several means for acquiring a company in Vietnam as follows.

Acquiring Private Companies

The acquiring party can either buy all of the target company's equity shares from the owner, or buy the assets of the target company. The legal regulations focus on the licensing process for changing of ownership of the target asset.

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Alternatively, another method is acquiring companies through business mergers. In practice, these are uncommon in Vietnam due to the complexity of the consolidation process between two businesses with different structures. The licensing procedures for conditional business are also frustrating in M&A.

Acquiring Listed Companies

Acquiring a listed company in Vietnam can be done through:

- tender offers (if subject to a mandatory threshold);
- buying the shares through negotiations;
- buying the shares through the stock exchange; and
- acquiring assets or business restructuring (merger, acquisition, or separation) – could be used, but uncommon.

2.2 Primary Regulators

Ministry of Planning and Investment (MPI): The MPI is mainly responsible for overseeing foreign investment in Vietnam, including M&A transactions. It reviews and approves foreign investment projects, ensures compliance with investment regulations, and facilitates the investment process.

Vietnam Competition and Consumer Authority of the Ministry of Industry and Trade (VCCA): The VCCA is responsible for enforcing competition laws in Vietnam, including reviewing M&A transactions for potential anti-competitive effects. It can investigate and take action against anti-competitive practices, including imposing fines and requiring divestitures.

State Securities Commission (SSC): The SSC is the primary regulator for M&A activities involving listed companies in Vietnam. It is responsi-

ble for approving and reviewing M&A transactions, ensuring compliance with relevant laws and regulations, and protecting the interests of investors.

Other relevant ministries and agencies: Depending on the specific industry or sector involved, other ministries and agencies may also be involved in regulating M&A activities. These may include the Ministry of Transport, the Ministry of Agriculture and Rural Development, and the State Bank of Vietnam, among others.

2.3 Restrictions on Foreign Investments

Prohibited sectors according to Article 6 of the 2020 Law on Investment stated, the following activities in Vietnam are banned (applies to both foreign and local companies). In particular, no company in Vietnam is permitted to perform:

- trading of narcotic substances;
- trading of hazardous chemicals and minerals;
- trading of specimens of wild flora and fauna;
- prostitution;
- human trafficking, trade in human tissues, corpses, human organs and human fetuses;
- human cloning;
- trading of fireworks; and
- provision of debt collection services.

Foreign investors are also subject to investment restrictions under specialised laws, and international conventions.

For instance, in the context of the WTO Commitments of which Vietnam is a signatory to the treaties therein, licensed activities can be broken down into four different categories for foreign investors seeking to enter Vietnam:

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- Committed – foreign investors can own 100% of an enterprise according to the WTO Commitments.
- Restricted – ownership limits exist for foreign investment and other specific restrictions may apply.
- Unspecified – the sector is not mentioned in the WTO Commitments detailing whether it is committed for foreign investors or uncommitted for foreign investors, therefore it will require ministerial approval and potentially additional licensing procedures and conditions.
- Uncommitted – the sector is mentioned in the WTO Commitments as uncommitted for foreign investors, requiring Ministerial Approval and potentially additional licensing procedures and conditions.

2.4 Antitrust Regulations

In Vietnam, business combinations are primarily governed by the 2018 Law on Competition and its guiding sub-law documents, namely Decree No. 35/2020/ND-CP. In M&A, these regulations aim to control M&A transactions that might cause significant anti-competitive effects on the Vietnam market throughout the merger control regulation, detailed briefly below.

- Mandatory filing – transactions exceeding certain thresholds (based on turnover, market share, or asset value) require mandatory filing with the Vietnam Competition and Consumer Authority of the Ministry of Industry and Trade (VCCA) for review.
- Review criteria – the VCCA assesses whether the transaction is likely to significantly restrict competition in any relevant market in Vietnam. This includes factors such as:
 - (a) market structure, share, and concentration;
 - (b) entry barriers and potential for competi-

- tion;
 - (c) competitive advantages; and
 - (d) efficiency gains and potential consumer benefits.
- Outcomes – the VCCA may (in case of an official assessment was carried out):
 - (a) approve the combinations without conditions;
 - (b) approve with conditions to mitigate competition concerns, such as divesting assets or imposing behavioural restrictions; and
 - (c) prohibit the combinations if it is deemed to be significantly harmful to competition.

2.5 Labour Law Regulations

Key labour issues:

- Employment contracts – acquirers should review the employment contracts of the target company's employees to ensure compliance with labour laws and to identify any potential liabilities.
- Transfer of employees – in the event of a merger or acquisition, the employees of the target company will be transferred to the acquirer. Acquirers should ensure that the transfer process is conducted in accordance with labour laws and that the employees' rights are protected.
- Social insurance and benefits – acquirers should ensure that the target company is in compliance with social insurance regulations and that employees are receiving the required benefits.
- Trade unions – acquirers should be aware of the role of trade unions in Vietnam and should engage with them in a constructive manner.
- Collective bargaining agreements – acquirers should be aware of any collective bargaining agreements that are in place at the target

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company and should ensure that they are respected.

Penalties for non-compliance:

- Violations of labour laws can result in fines, administrative penalties, and even criminal liability for the employer.
- Failure to comply with social insurance regulations can result in fines and additional social insurance contributions.
- In addition to the above, acquirers should also be aware of the following recent developments in labour law in Vietnam:
 - (a) The 2019 Labour Code introduced a number of new provisions, including the right to strike and the right to collective bargaining.
 - (b) The government has been gradually increasing the minimum wage in Vietnam.
 - (c) The government has been promoting the development of trade unions in Vietnam.

These developments reflect the government's commitment to protecting the rights of workers and improving labour relations in Vietnam.

2.6 National Security Review

Until now, apart from the specific provisions concerning conditional or restricted investment sectors explicitly listed in Appendix IV of the 2020 Law on Investment and Vietnam's commitments under the World Trade Organization (WTO) agreement on trade and services, there has yet to be any publicly available documentation providing an overarching concept, evaluation criteria, or a review process regarding the assessment of the impact on national defence and security when scrutinising investment projects or evaluating and approving capital contributions, equity acquisitions, or project transfers.

However, the ensuring of security and national defence within the investment sphere is delineated by various regulations:

- Sectors of investment and business operations subject to conditions as stipulated in Article 7 and Appendix IV of the 2020 Law on Investment, Articles 11 and 12 of Decree No. 31/2021/ND-CP.
- Investment regulations pertaining to capital contribution, share purchase, and contribution purchase as per Article 24 and Article 26 of the 2020 Law on Investment.
- Provisions concerning the approval of investment principles for foreign investment projects conducted in areas that could potentially impact national security and defence per Articles 29, 32, and 36 of the 2020 Law on Investment.
- Regulations empowering competent state agencies to suspend investment activities if the investment project poses a risk of detriment to national security and defence according to Article 47 of the 2020 Law on Investment.

3. Recent Legal Developments

3.1 Significant Court Decisions or Legal Developments

The most significant legal development in Vietnam in the past three years related to M&A is the adoption of the 2020 Law on Investment (effective since 1 January 2021) (LOI), most notably the provisions relating to "national security" for inward investments.

Under Article 26.2.c of the LOI, foreign investors have to go through registration proceedings for the contribution of capital, purchase of shares or stakes of an economic organisation prior to the

change of members or shareholders – should the said economic organisation have any land title ownership in any of the following areas:

- an island;
- a commune at the international border or coastal area; and
- other places that have an affect on national defence and security.

Additionally, Article 24.2.b of the LOI also dictates that foreign investments made through contribution of capital, purchase of shares or stakes of economic organisations must not pose a threat to national defence and security.

While the requirement set out in Article 26.2.c is relatively clear on what needs to be done, the obligation provisioned in Article 24.2.b has no specific instructions or proceedings on how the foreign investors or the local authorities can ensure that the investments do not pose a threat to national defence and security, thus the only logical and practical way for the investors and the local authority to do is to rely on the individual opinions of the Ministry of Foreign Affairs, Ministry of National Defence, and the Ministry of Public Security, or perhaps their Department-level counterparts – all of which can be very time-consuming, possibly causing great damage to parties in the M&A deals, negatively affecting the attraction of foreign investments. In the worst case scenario, under Article 47.3 of the LOI, the Prime Minister has the power to suspend an investment project should the project pose or potentially pose a threat to national security and defence by proposal of the Ministry of Planning and Investment.

3.2 Significant Changes to Takeover Law

While there have not been any significant changes to takeover law in the past 12 months, nor is

there any takeover legislation under review in a way that could result in significant changes in the coming 12 months, there are signs of the government actively working on legal mechanisms and solutions in order to improve the M&A environment, especially during this period over which many businesses may require a takeover, and M&A in general, in order to survive.

4. Stakebuilding

4.1 Principal Stakebuilding Strategies

In Vietnam, it is not common to build a stake in the target prior to launching an offer. However, as shareholders with a certain percentage specified under the by-laws (charter) may have the right to summon the Board of Directors (BOD), appoint directors, or summon the shareholders of the company targeted for acquisition, the acquirers may build a minimum stake which gives them the above-mentioned rights to help them find it easier to launch an offer.

Building a stake in a private company will depend on the agreement with the existing shareholders. For a listed company, the acquirer may build a stake by reaching a negotiated agreement with the controlling shareholders or they can increase its ownership by engaging in block trading on the secondary market through the stock exchange's trading system.

4.2 Material Shareholding Disclosure Threshold

Material Shareholding Disclosure Thresholds

According to Article 118.1 (points e, g, i) of the 2019 Law on Securities (LOS), the material shareholding disclosure thresholds are as follows:

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- (i) Major shareholders, and groups of related persons holding at least 5% of voting shares of a listed company.
- (ii) Investors, and groups of related persons holding at least 5% of fund certificates of a closed-end fund.
- (iii) Groups of related foreign investors holding at least 5% of voting shares of one issuer or at least 5% of fund certificates of a closed-end fund.
- (iv) Founding shareholders during the transfer restriction period of a listed company or listed securities investment company.

Filing Obligations

Groups (i), (ii) and (iii)

Under Article 127 of the LOS, the filing obligations of groups (i), (ii), and (iii) are as follows:

- (a) Organisations, individuals, groups of related persons, groups of related foreign investors shall disclose information when they become or are no longer major shareholders of a listed company or listed securities investment company.
- (b) Organisations, individuals, groups of related persons, groups of related foreign investors that are major shareholders shall disclose information every time their holdings vary by more than 1% of voting shares of the listed company or listed securities investment company.
- (c) Investors, groups of related persons, groups of related foreign investors shall disclose information when the amount of closed-end fund certificates they are holding reaches or falls below 5%.
- (d) Investors, groups of related persons, groups of related foreign investors holding at least 5% of fund certificates of a closed-end fund shall disclose information every time

their holdings of closed-end fund certificates vary by 1%.

Filing obligations in points (a) and (b) do not apply in the following cases:

- changes in the holding of voting shares when the listed company repurchases its own shares or issues additional shares;
- swap transactions in exchange-traded funds (ETF); and
- other cases prescribed by law.

Group (iv)

Under Article 32 of Circular 96/2020/TT-BTC of the Ministry of Finance, group (iv) has the filing obligation when conducting securities transactions as follows:

- At least three working days before the transaction date, founding shareholders that hold shares restricted from transfer as prescribed by the Law on Enterprises shall submit reports on their transactions, made according to the form in Appendix XI enclosed within the Circular, to the State Securities Commission (SSC), the Stock Exchange (SE) (if shares are listed/registered), the Vietnam Securities Depository and Clearing Corporation (VSDCC), listed companies and securities investment fund management companies. If shares are transferred to persons other than founding shareholders, the transferor must submit the resolution of the General Meeting of Shareholder (GMS) on ratification of such transfer.
- Within five working days from the transaction completion date (if the transaction is completed before the registered deadline) or from the end of the estimated transaction time limit, founding shareholders shall submit reports on trading results, made according to the form in

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Appendix XII enclosed within the Circular, and explanations about failure to conduct transaction or to trade in entire trading volume as registered (if any) to the SSC, the SE (if shares are listed/registered), the VSDCC, listed companies and securities investment fund management companies.

4.3 Hurdles to Stakebuilding

If the reporting thresholds are regulated by specific laws, a company cannot set different reporting thresholds for filing or disclosure of such thresholds. Otherwise, the target company is free to set higher or lower reporting thresholds by its by-laws (ie, charter).

A foreign ownership limit (FOL) is a major hurdle for stakebuilding for a foreign company/individual to acquire a Vietnam company.

The FOL is provided under the WTO Commitments or Vietnamese regulations for specific businesses, which governs the list of business lines accessible to foreign investors, the percentage that a foreign company/individual can acquire a Vietnamese company.

4.4 Dealings in Derivatives

In Vietnam, as of August 2017, derivatives were officially allowed to operate and were introduced for trading in the form of futures contracts. The two most common futures contract products currently are the VN30 index futures contract and the government bond futures contract.

4.5 Filing/Reporting Obligations

The obligation to report and disclose information on derivative securities by the Securities Depository Centre is stipulated in Article 27 of Circular No 58/2021/TT-BTC guiding the implementation of Decree No 158/2020/ND-CP on derivative

securities and the derivative securities market issued by the Ministry of Finance. Accordingly:

1. Periodically, the relevant entities must report to the SSC as follows:

- derivative trading organisations shall provide the SSC with physical or electronic reports on their derivative trading;
- commercial banks and foreign bank branches that are special trading members shall provide the SSC with physical or electronic reports on their derivative transactions;
- settlement banks shall provide the SSC with physical or electronic reports on their cash settlement for derivative transactions, and their fulfilment of requirements for a settlement bank; and
- clearing members that are commercial banks or foreign bank branches shall provide the SSC with physical or electronic reports on their fulfilment of requirements for provision of clearing and settlement services.

2. Derivative trading organisations, clearing and settlement service providers, trading members, special trading members, market makers, and clearing members are required to submit physical or electronic reports to the SSC within 24 hours from the occurrence of any of the following events:

- a clearing member is replaced;
- the trading system (for receiving and placing trading orders) malfunctions;
- the clearing member that is a commercial bank or foreign bank branch no longer meets one of the requirements for the provision of clearing and settlement services;
- the charter capital or the owner's equity of the clearing member is reduced by more than 10% compared to those specified in

their audited annual financial statements or reviewed half-year financial statements or financial statements of the latest quarter; and

- the clearing member's debt-to-equity ratio is greater than 5.

3. Settlement banks are required to submit physical or electronic reports to the SSC and the Vietnam Securities Depository and Clearing Corporation (VSDCC) immediately when their cash settlement for derivative transactions is interrupted.

4. Settlement banks are required to submit physical or electronic reports to the SSC within 24 hours from the time they fail to meet one of the eligibility requirements for settlement banks.

5. The Vietnam Stock Exchange and Hanoi Stock Exchange are required to submit physical reports to the SSC within 24 hours from the occurrence of any of the following events:

- the derivative trading system malfunctions or there is any sign of abnormality in derivative transactions;
- they decide to suspend derivative trading or market-making activities or cancel membership of a trading member, a special trading member or a market maker; and
- they provide information for competent authorities according to regulations on the provision of confidential information.

6. The VSDCC shall submit reports to the SSC within 24 hours from the occurrence of any of the following events:

- a clearing member is incapable of settling derivative transactions;

- clearing and settlement activities of a clearing member are suspended or membership of a clearing member is cancelled; and
- the VSDCC provides information for competent authorities according to regulations on provision of confidential information.

4.6 Transparency

See 4.2 Material Shareholding Disclosure Threshold.

In Vietnam, for listed companies, shareholders with beneficial ownership of more than 5% of the outstanding shares or who want to acquire a particular number of the target company's voting stocks are required to disclose the purpose of their acquisition and their intention regarding control of the company.

5. Negotiation Phase

5.1 Requirement to Disclose a Deal

For listed companies, the bidder is required to disclose the offer to the SSC, the target company/the target investment fund management company (Article 86 of Decree No 155/2020/ND-CP). After receiving the proposed transaction, the target company that is a listed company must disclose the transaction.

5.2 Market Practice on Timing

The timing of disclosure for listed companies is normally in line with the legal requirements. For private companies, the deal is often disclosed after closing or after signing definite agreements.

5.3 Scope of Due Diligence

The scope of due diligence normally includes legal status, financial status, licenses and approvals of business activities, ownership of assets, employments, tax, operation, liabilities,

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and materials agreements. The due diligence process is crucial as:

- it helps the buyer minimise potential risks that may arise during the transaction process;
- legal assessment enables the buyer to gain a competitive advantage, maximising the deal's value by positioning itself strategically in the transaction; and
- it facilitates negotiating for a lower price.

During COVID-19, there have been no significant changes to the scope and process of due diligence, other than the transition to remote access for facilities and virtual meetings instead of on-site visits or in-person interviews because of the pandemic.

5.4 Standstills or Exclusivity

Exclusivity provisions are quite common in M&A deals in Vietnam due to their capability to protect the bidders from other potential buyers and for the seller to promptly reach an agreement and expedite the due diligence process. On the other hand, standstills are not common in Vietnam. For example, among other reasons, in cases of foreign investments, standstills may not be necessary if the bidder is already restricted by the law in the amount of shares it can acquire.

5.5 Definitive Agreements

In accordance with the provisions of the law, it is common practice to document the terms and conditions of a tender offer into a definitive agreement.

According to Article 82.1 of Decree 155/2020/ND-CP, the rules for tender offer dictate that:

- the tender offer shall ensure fairness among shareholders of the target company and investors of the investment fund; and

- the tender offer parties shall be provided with adequate information to decide their purchase of shares/closed-end fund certificates.

Pursuant to Article 85 of Decree 155/2020/ND-CP, a tender offer being paid in money has to fill the Tender Offer Registration Form (Form 23), and the Information Disclosure Sheet (Form 24); in case of a tender offer being paid with shares, the bidder must fill out Application for Issuance of Shares for Tender Offer by a Listed Company (Form 12) as instructed in Article 54 of said Decree.

In both cases, Forms 12, 23 and 24 all require the relevant and basic terms and conditions of the deal to be filled. As these forms are the basis for the tender offer to uphold the rules of tender offer provided, the terms and conditions of the definitive agreements must follow what was filled in these forms.

Thus, it can be said that it is mandatory by law to document the terms and conditions for a tender offer in a definitive agreement.

6. Structuring

6.1 Length of Process for Acquisition/Sale

The timeline for acquiring or selling a business can vary substantially depending on several factors, such as the target company's listed or private status, the size and type of assets/shares, the target company's listed or private status, the level of due diligence needed, and the time required to secure regulatory approvals.

The process of closing the deal was significantly affected by the government's restricted measures implemented during the COVID-19 pan-

demic, which delayed the process, especially the licensing procedures related to the deal.

6.2 Mandatory Offer Threshold

In Vietnam, there are mandatory offer thresholds in three different circumstances.

Pursuant to Article 35.1.(a) and Article 35.1.(b) of the LOS, it is mandatory for a tender offer to be made by any investor and its related persons (except investment funds and funds management companies) in the following cases:

- intention to purchase of circulating voting shares by said entities with no or less than 25% shareholding, which results in the direct or indirect ownership of 25% or more of the total voting shares of the company targeted for acquisition;
- intention to purchase of circulating voting shares by said entities with pre-existing 25% or more shareholding, which results in the direct or indirect ownership reaching or exceeding the 35%, 45%, 55%, 65%, and 75% thresholds of the total voting shares of the target company; and
- after a tender offer, if said entities have acquired 80% or more of the total voting shares of a listed company or outstanding fund certificates of a closed-end fund then it is mandatory to purchase the shares or fund being held by the remaining shareholders, unless all voting shares or outstanding fund have been bid for.

The exceptions to said circumstances are as follows, pursuant to Article 35.2 of the LOS:

- the purchase of shares or closed-end fund certificates results in the holdings specified above is due to an issuance plan approved by the General Meeting of Shareholders of the

listed company or the representative board of the closed-end fund;

- the acquisition of voting shares or outstanding closed-end fund certificates results in the holdings specified above as approved by the General Meeting of Shareholders of the listed company or the representative board of the closed-end fund;
- the transfer of shares between groups of companies, including business corporations, general companies, parent companies, and subsidiaries does not result in cross-ownership defined by the LOE;
- shares are acquired through auction of publicly offered securities or offering upon transfer of state capital or a state-owned enterprise's stakes in another enterprise;
- shares are acquired through division, acquisition or consolidation of enterprises;
- giveaway, inheritance of shares or closed-end fund certificates; and
- transfer of shares or closed-end fund certificates under an effective court judgment, court decision or arbitral decision.

6.3 Consideration

Cash is more commonly used than shares. In some cases, payment is provided partially in shares. Earn-out and price adjustment are the most commonly used tools to bridge the value gap in case of high valuation uncertainty.

6.4 Common Conditions for a Takeover Offer

Common conditions for a takeover offer are:

- the terms and conditions of the offer apply equally to all of the targeted acquisition's shareholders;
- the shareholders have full rights to sell their shares;

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- no material adverse change has occurred to the targeted acquisition's business; and
- regulatory approvals.

Offer conditions are not restricted as long as the conditions do not violate the applicable laws.

6.5 Minimum Acceptance Conditions

Bidders often set the minimum acceptance conditions for tender offers at a material shareholding threshold, to ensure their rights and solid standing in the target company. The exception to this is the foreign ownership limits for certain industries (such as those prescribed in Vietnam's Schedule of Specific Commitments in Services).

6.6 Requirement to Obtain Financing

No specific regulations govern private transactions. During leveraged transactions, sellers typically request commitment letters and evaluate the buyer's balance sheet. Prior to moving forward with a public takeover bid, the bidder must confirm that they possess the financial capability to meet their commitments to shareholders who agree to the offer. To receive a cash offer, bidders need to provide proof of sufficient funds by getting confirmation from a credit institution, typically a bank.

6.7 Types of Deal Security Measures

When acquiring a listed company, a bidder can consider various deal protections, such as:

- break-up fees against the bidder if they terminated the deal without justified reason;
- provisions that restrict the targeted company's board from seeking other offers;
- in cases such as when a board does not want to continue the deal, a provision that requires the targeted company's board to secure shareholders' approval concerning the transaction could be applied; and

- acquiring a bank's guarantee.

For private transactions, to manage the risk from the outset of the acquisition process, the bidders could make agreements directly with the shareholders to secure solid approval for the transaction.

For the changes in managing pandemic risk, see **10.3 "Broken-Deal" Disputes.**

6.8 Additional Governance Rights

For listed companies, more often than not, it is challenging to get extra governance rights beyond those relevant to ownership of shares. For such cases, a bidder should consider negotiating with other shareholders for extra influence.

A buyer with a minority stake in a privately owned company may have more discretion to seek further governance rights, depending on the company's ownership structure, such as veto rights over certain crucial decisions, information rights to get regular financial and operational reports, or to request further information, and drag-along rights to increase transferability and compel other shareholders to join in a sale.

6.9 Voting by Proxy

The right of shareholders to exercise proxy voting in a company, unless restricted by the company's by-laws, is unrestricted in Vietnam. To be authorised to vote by proxy, shareholders are required to present a duly registered power of attorney. The power of attorney can be revoked at any moment without prior notice.

6.10 Squeeze-Out Mechanisms

Under Article 35.1.(c) of the Law on Securities, bidders who have just gained 80% or more of the target's voting shares from a tender offer must buy out the remaining shares of the minor-

ity shareholders (whether the minorities conform to the successful tender offer or not).

6.11 Irrevocable Commitments

It is common practice to ask the principal shareholders of a target company to agree to tender their shares in a possible tender offer. This aims to ensure that the buyer can successfully complete the acquisition. Getting agreement or confirmation from the principal shareholders will help to ensure their dedication before making the announcement.

In the commitment agreement, a clause shall request the principal shareholder to decline offering shares if a rival bid at a higher price is made. Subject to the negotiation and agreement between the parties, a clause shall state a request to the principal shareholders to decline or not seek out a better rival bid, preventing them from opting out of the deal.

7. Disclosure

7.1 Making a Bid Public

There is no obligation to publish a bid, except for the specific cases subject to a tender offer applied for a listed company specified in Article 35.1 of the LOS (see **6.2 Mandatory Offer Threshold**).

The bidder must register for the proposed public tender offer with the SSC. The SSC has 15 working days to review the dossier, and if it is full and valid, the SSC will publish it on its website upon receipt. Within three working days from the receipt of the public tender offer registration dossier, the target company must disclose the information on its website.

7.2 Type of Disclosure Required

Many types of disclosure depend on the type of shares issuance governed by the LOS, and Decree No 155/2020/ND-CP.

Some Typical Disclosures

- issuance of new shares;
- tender offer;
- share acquisition worth 15% or more of the buyer's total asset value;
- share acquisition leads to the target becoming the buyer's subsidiary or affiliate;
- change of voting shares; and
- major shareholders.

7.3 Producing Financial Statements

It is required that the bidders provide audited financial statements from the two most recent years. Financial statements that are provided by bidders are expected to conform with the Vietnam accounting standard (VAS). The application of the IFRS is in the voluntary period from 2022 to 2025. From 2025, the IFRS is required to be applied in Vietnam.

7.4 Transaction Documents

The disclosure is only required to have the key information of the transaction; ie, full disclosure is not mandatory.

8. Duties of Directors

8.1 Principal Directors' Duties

Under the Law on Enterprises (LOE), the BOD of the target company owns the fiduciary duty to the company and its shareholders rather than the other stakeholders. Therefore, the BOD of the target company is required to act in the best interests of the company and shareholders, but is only required to treat each potential acquirer fairly, and refrain from unjustly impeding a take-

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over. The BOD is responsible for conducting research, evaluating the offer, engaging relevant experts for transaction support, and presenting proposals to the shareholders. During the transaction, the target company's BOD must seek shareholders' approval for any significant decisions.

8.2 Special or Ad Hoc Committees

It is not a common practice for BOD to establish special committees to evaluate potential company acquisitions. An independent committee is usually established when a scenario occurs in which the majority of competing directors, management, or a controlling shareholder are involved in a transaction. It's important to show the existence of a special or ad hoc committee made up of impartial and independent directors in certain situations, ensuring that the directors have fulfilled their fiduciary duty which involves reviewing and authorising the transaction.

8.3 Business Judgement Rule

The doctrine "business judgement rule" is not recognised under the court system of Vietnam. However, during the takeover situations, the BOD, as always, owns fiduciary duties to the company targeted for acquisition and shareholders which means they must act on an informed basis, in good faith and in the honest belief in the best interest of the company and shareholders.

8.4 Independent Outside Advice

In a business combination, it is common for the directors to refer to external experts in law, finance, assets evaluation, and taxes to ensure transparency, compliance, and smooth transactions.

8.5 Conflicts of Interest

Conflicts of interest of directors, managers, shareholders or their related persons are subject

to scrutiny in Vietnamese jurisdictions. They are obligated to disclose their related persons and related interests.

Any related party transaction is subject to the scrutiny of either the BOM or the GSM, depending on the transaction value. The related person is not allowed to vote for the approval on such transaction to ensure that the transaction is conducted fairly and impartially for all parties involved.

9. Defensive Measures

9.1 Hostile Tender Offers

Hostile tender offers to take over companies are not regulated in Vietnamese law, and rarely occur in practice. Usually, a listed company in Vietnam is controlled by a limited group of shareholders, who hold significant authority regarding M&A deals.

9.2 Directors' Use of Defensive Measures

In Vietnam, shareholder meetings are the major focus of both the law and practice pertaining to corporate governance. When it comes to responding to public takeover efforts, the authority and flexibility of BOD are very limited. Hence, it is not particularly customary for the BOD to use defensive measures in takeover situations.

9.3 Common Defensive Measures

Hostile takeovers remain relatively rare in Vietnam. Accordingly, it appears that Vietnam has not yet fully implemented advanced defensive measures against takeovers.

9.4 Directors' Duties

See 9.3 Common Defensive Measures.

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However, in general, directors have fiduciary duties to the company and shareholders, which necessitate acting honestly and in the best interests of the company and shareholders (see **8.1 Principal Directors' Duties**).

9.5 Directors' Ability to "Just Say No"

See **9.4 Directors' Duties**.

The practice of "just say no" is acceptable as long as it serves the best interest of the company and shareholders.

10. Litigation

10.1 Frequency of Litigation

In Vietnam, litigation in connection with M&A is fairly common and has tended to increase in recent years. Some common issues that lead to dispute settlement by litigation are:

- settlement of the target company's liabilities to third parties before, during, and after the M&A transaction;
- non-transparency or misrepresentation of the target company's, among other things, value, financial status, ongoing liabilities and/or disputes;
- price valuation; and
- payment obligation during the implementation of the M&A transaction.

10.2 Stage of Deal

Litigation is more likely brought from the performance stage onwards (after signing relevant agreements) of the M&A transaction. This pattern could be contributed by, among other things, the following reasons:

- the parties understand or interpret certain term(s) differently, to each one's advantage,

while performing the transaction concerning such term(s);

- certain relevant aspects of the M&A transaction are subject to change in reality (eg, condition precedent, representation, etc) which leads to the situation where a party does not want to continue the transaction; and
- decisions made by the authorities, which the parties cannot control, that adversely affect the transaction.

10.3 "Broken-Deal" Disputes

The heavy impact of the COVID-19 pandemic has caused the parties to M&A deals to carefully consider some terms when drafting the agreements, namely:

- the definition/scope, and interpretation of "force majeure" and MAC (material adverse changes) clause;
- adding/detailing the conduct of each party when the contract performance is put into a halt;
- more leisure for the contract amendment clause, giving the parties opportunities to appropriately adjust the contract terms when needed; and
- situations and conditions for the bidders to walk away from the deal.

11. Activism

11.1 Shareholder Activism

Shareholder activism is not common in Vietnam. There are two main reasons:

First, the Vietnamese stock market is in its early stages of growth and there is still a lack of established shareholder rights activities. Currently, the market is missing a comprehensive investor

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base with limited professional institutional investors, leading to a lack of guidance in this sector.

In addition, shareholders, especially small shareholders, are often unaware of their rights. Investors typically engage in small-scale and short-term investment activities, often speculating on price increases rather than implementing long-term and professional strategies. There is a lack of awareness and concern among many shareholders when their rights are infringed upon.

11.2 Aims of Activists

See 11.1 Shareholder Activism.

11.3 Interference With Completion

See 11.1 Shareholder Activism.

Trends & Developments

Contributed by:

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LE & TRAN

LE & TRAN was founded in 2011, and since then its formidable attorneys have worked hard and intelligently to garner widespread acclaim from both the local and international business community, thereby solidifying Le & Tran as a noteworthy presence in the legal realm. The firm's strength is based upon its top-tier lawyers with years of experience in handling a wide array of legal topics, including corporate counsel matters such as M&A deals, investment ad-

visory, business structures and compliance. In addition, the firm pursues a uniquely multidisciplinary and holistic approach to clients' issues, spotting underlying problems and recommending appropriate solutions for them. Le & Tran's lawyers are highly skilled at identifying clients' needs, then meticulously crafting the most sufficient strategy to encompass a satisfying outcome.

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Confidentiality, Labour Issues, and Inheritance of Rights and Obligations of Enterprises in Merger and Acquisition Transactions

Confidentiality in M&A transactions

When a company decides to conduct M&A transactions with its business, it must accept that some of its internal information must be disclosed to potential investors and their consultants during the transaction. In order to determine the business value and negotiate the contractual terms of the M&A transaction, the investor will need to collaborate with the consultants to conduct business due diligence, such as legal due diligence, financial due diligence, and tax assessment. At this stage, confidentiality is critical and is a requirement for a successful M&A transaction.

The significance of confidentiality in M&A transactions

If the enterprise, the investor, and the third parties (such as the personnel of the consultants performing the business due diligence) do not initially have a confidentiality agreement, these entities may not be obligated to keep the information of enterprises confidential, except for cases where they are required by law to keep the information confidential such as the obligation to keep client information confidential under the provisions of the law on lawyers. They may disclose information about the enterprise to other parties, particularly when the internal information (such as financial statements, and pricing information of important contracts) of the enterprise is made aware of to its competitors, and business partners. In addition, if the confidentiality agreement is not detailed enough to cover possible circumstances for internal information disclosed by the enterprise to investors and consultants, these entities may fail to fully fulfil the confidentiality obligations expected by the

enterprise, seriously affecting the enterprise's legitimate rights and interests.

Furthermore, if information about the company doing M&A is disclosed, it may have an impact on the company's business activities, employees feeling insecure about their jobs, partners concerned that the company's business will be disrupted due to M&A transactions, and the value of the company during the negotiation phase may decrease.

Risks of disclosing internal information of enterprises in the process of M&A transactions

When investors and their consultants conduct business due diligence, the enterprise must establish a "data room" to provide and store enterprise documents and information (legal, tax, investment, finance, etc) as required by investors and their consultants. If the data room grants the right to download and/or print documents, investors and their consultants can download documents, print, copy, and store them in their own data room to assist with their due diligence. Even if the confidentiality agreement has been signed, there is still a risk of information disclosure when the company's internal information is stored in multiple locations, such as forgetting documents in the printing area, administrative staff learning about M&A transactions when arranging meetings between enterprises, investors and consultants and preparing documents for the meeting. Especially in the case that the consultant has many employees who have access to the data room, it is difficult for the enterprise to control which personnel has the right to securely hold the internal information of the enterprise.

In the authors' experience, some enterprises may only allow investors and consultants the

right to “view” documents directly in the data room without granting the right to “download”, “print”, or specifically allowing only a group of people to have “view” permission, another group to have “download” permission, another group to have “print” permission, and so on. Some enterprises only allow investors and consultants to access paper documents directly at the enterprise and do not allow them to copy or bring paper documents out of the enterprise’s office without the enterprise’s permission. In addition, to best ensure the legal rights of the enterprise, each employee of the investor and the consultant must sign a separate confidentiality agreement with the enterprise if such personnel are required or designated to access the enterprise’s documents and internal information to serve the due diligence of investors.

In addition, not only do investors need consultants to conduct business due diligence, but the enterprises also need their own consulting teams. Investors and their consultants will generally require enterprises to provide as much detailed information and documents as possible in order to prepare a due diligence report. As a result, businesses must have a team of professional consultants to help them provide relevant information and documents for the business due diligence process of investors and consultants, or to provide information and documentation at the appropriate time during the due diligence and negotiation process.

Confidentiality agreement

In order to best protect the legitimate rights and interests of the enterprise, a confidentiality agreement must include many contents and elements. For example:

- What information should be kept confidential and what information should not be kept

confidential (for example, information that has been made public through legitimate communication channels)?

- Who receives the information (specifically, which personnel are assigned to participate in the transaction by the investors and their consultants)?
- What should be done when information must be disclosed to public authorities as required by law (with reasonable advance notice to the enterprise and prior consultation with the enterprise)?
- What are the consequences of breaching information confidentiality obligations (damages/fines for violations)?
- What is the information confidentiality period (usually, the confidentiality period can last between three and five years, depending on the parties’ agreement)?
- What actions should the parties take if they decide not to proceed with the M&A transaction after the due diligence process (for example, they can ask investors and consultants to confirm that all information and data provided by the enterprise have been deleted)?

Common labour issues in M&A transactions

M&A transactions have a significant influence on the employees of target companies. These transactions often result in the potential investors, its target company, and/or related entities implementing employment-related restructuring, which may include changes in the employers hiring these employees, the employees’ remuneration and benefits, also internal labour regulations and agreements that bind them. Before implementing any employment-related restructuring, it is essential to take into account certain legal considerations.

This executive brief will walk the potential investors/buyers through the critical legal labour con-

siderations before focusing on the finer details of an M&A process.

Labour contracts

It is vital for the investors to understand the employment situation of the target companies, eg, the number of employees, employees' remuneration and benefits (especially for senior and management positions), employment terms, and the compliance of these employments with Vietnamese labour laws and internal labour regulations of the target company. As such, the investors need to examine the labour contract templates of the target company for each type of employment (definite and indefinite labour contracts), especially the labour contracts for senior and management positions.

When the investors officially become the owners/shareholders of the target company upon completion of the M&A deal, they may want to carry out labour restructuring activities which may result in welcoming and/or laying off some employees. In the latter case, the investors need to consult with the lawyers on legal methods to lawfully lay off the employees and get advice on the legal tactics to protect the rights and interests of the target company, such as know-how and business secrets that the employees might have obtained during their employment with the target company. Additionally, the investors in the company under consideration for acquisition should note the expired and not extended labour contracts – according to the laws on employment, if the definite labour contracts are not extended within 30 days from the expiry dates and the employees are still working for the company, these labour contracts will become indefinite labour contracts.

Moreover, the laws stipulate that definite labour contracts can be extended only once. There-

fore, it is important for the investors to know in detail all of the labour contracts and annexes signed by the employees of the company slated for acquisition. Issues related to the types and extensions of labour contracts will have a direct impact on the employment usage of the target company and the investors after completing the M&A transactions.

In addition to the labour contracts, the investors need to consider if the company targeted for takeover has signed any service contracts with individuals as these contracts may be treated as labour contracts under the new labour laws. In these cases, the target company may need to fully comply with the obligations of an employer, such as compulsory insurance, termination of the employment relationship under limited legal grounds, etc.

Internal labour regulations and agreements

In case of having ten or more employees, the target company is required to register with the Internal Labor Regulations (ILR). The ILR is a legal corridor that provides fundamental regulations to govern the relationship between the target company and its employees, such as working hours, rest breaks, and occupational safety and hygiene in the workplace. The ILR is also the ground for disciplining employees, especially in cases of dismissal. It is important that the investors check whether the ILR has been registered with the competent authorities and whether its contents are in line with the laws on employment or not.

If the company under consideration for acquisition has a collective labour agreement with its employees, the investors also need to examine whether the contents therein adhere to the laws and whether the target company has submitted this agreement to the competent authorities. In

addition to the benefits for employees specified in the employment agreements, the ILR, and the collective labour agreement, the investors also need to identify other benefits that the prospective acquisition offers to its employees, especially for senior positions (such as rewarding policies and tuition support for children) to give the investors a heads-up about its obligations after the completion of the M&A transaction.

Moreover, some companies often have an employee stock ownership plan and have employee stock options for their employees (eg, restricted stock unit agreements), so the investors should carefully make sure whether the target company has similar schemes to plan out after the M&A transaction's completion.

Foreign employees

The investors need to additionally know whether the target company employs any foreign worker and whether such a worker (if any) possesses an official work permit or a document certifying that such a foreign employee is not required to obtain a work permit and whether these documents are still valid. Failure to comply with these requirements may result in severe administrative consequences such as expulsion of foreign employees and administrative sanctions imposed on the target company. Moreover, in case of disputes with these foreign employees, the validity of the labour contracts may be challenged by the courts if these foreign employees do not have the necessary papers to legally work in Vietnam.

Regulatory compliance

The target company (as an employer) and its employees must follow compulsory insurance contribution obligations, including social insurance, health insurance, unemployment insurance, and insurance for labour accidents and occupational diseases, therefore the investors

need to verify whether the target company has fully settled these compulsory insurances. Currently, the Criminal Code has criminalised the act of evading social insurance, health insurance, and unemployment insurance. Consequently, investors need to inspect the target company's insurance payment carefully.

The final concern is regulatory compliance with the laws on employment, such as the obligation to report to the competent authorities on the employment of foreigners, occupational safety and hygiene activities, and technical inspection of occupational safety adherence. Specifically, if the target company uses dangerous equipment, it needs to ensure regulatory compliance with the conditions of occupational safety and hygiene, such as identification and assessment of hazardous and harmful factors at the workplace; and periodic inspection and maintenance of machines, equipment, factories, and warehouses. As such, the investors need to investigate if the target company is subject to such compliance regulations.

Inheritance of rights and obligations of enterprises after merger and consolidation

Corporate consolidation and mergers are two common forms of corporate reorganisation. These corporate reorganisations help the merging enterprise and the consolidating enterprise increase their competitive potential in the normal market. After the consolidation or merger, the enterprise will receive benefits such as increased market share, capital use and accessibility to capital resources, risk sharing, and the saving of operation and management costs.

This brief will provide basic information about the inheritance of the rights and obligations of the consolidating enterprise and merging enter-

prise from the consolidated enterprises and merged enterprise.

Transfer of rights and obligations to the consolidating enterprises and merging enterprise

According to the 2020 Law on Enterprises, corporate consolidation is where two or more enterprises (hereafter referred to as consolidated enterprises) may be consolidated into a new enterprise (hereafter referred to as a consolidating enterprise) and terminates the existence of consolidated enterprises. After the consolidating enterprise registers its business, the consolidated enterprises cease to exist; the consolidating enterprise inherits all the legitimate rights and interests, is responsible for the obligations, unpaid debts, labour contracts, and other property obligations of the consolidated enterprises. The consolidating enterprise prima facie inherits the full rights, obligations, and legitimate interests of the consolidated enterprises under the consolidation contract.

Meanwhile, a merger is where one or more enterprises (hereafter referred to as the merged enterprises) are merged into another enterprise (hereafter referred to as the merging enterprise) by transferring all legitimate assets, rights, obligations and interests to the merging enterprise, while at the same time ceasing to exist as the merged enterprises. Similar to the case of corporate consolidation, after the merging enterprise registers its business, the merged enterprise ceases to exist; the merging enterprise inherits the legitimate rights and interests, responsible for the obligations, unpaid debts, labour contracts, and other property obligations of the merged enterprise. The merging enterprise prima facie inherits the full rights, obligations, and legitimate interests of the merged enterprises under merger contracts.

After a merger or consolidation, in case the merging enterprise or consolidating enterprise may change its name to match the new market position and business strategy, according to Article 48.3 of Decree No 01/2021/ND-CP, the change of the enterprise name does not change its rights and obligations. Therefore, the rights and obligations of the merged or consolidated enterprise will remain unchanged even if the enterprise's name is changed.

Notes in the process of consolidation and merger

Legal due diligence

Since the consolidating enterprise and merging enterprise will inherit the full rights, obligations, and legitimate interests of the consolidated and merged enterprises, it is important to fully understand these enterprises' rights, obligations, and interests. Legal due diligence should be detailed and completed, including business contracts, labour contracts, assets, debts, intellectual property rights, existing or potential disputes, etc.

For the legal due diligence process to be effective, all records, documents, and information about the consolidated and merged enterprises must be provided fully and honestly. Access to these documents will also help the parties determine the value of the merger and consolidation transaction.

Consolidation and merger contracts

In order to protect the legitimate rights and interests of the consolidating enterprise and the merging enterprise as well as form a basis for resolving issues, avoiding disputes arising later, consolidation and merger contracts should be carefully drafted, for example, provisions on confidentiality, anti-competitive practices and their effects, representations and warranties, etc.

Notification on economic concentration

Based on the 2018 Law on Competition, forms of economic concentration include corporate consolidation and merger, in which enterprises implementing economic concentration cause or may cause anti-competitive effects on the Vietnamese market.

According to Decree No 35/2020/ND-CP providing in detail some articles of the Law on Competition, enterprises having the intention to participate in economic concentration must notify the National Competition Commission before implementing economic concentration if they fall under one of the following cases.

- Total assets in the Vietnamese market of an enterprise or a group of affiliated enterprises of which the enterprise is an affiliate must be worth VND3,000 billion or more in the fiscal year preceding the planned year of economic concentration.
- Total sales or purchase volume arising in the Vietnamese market of an enterprise or a group of affiliated enterprises of which the enterprise is an affiliate must be worth VND3,000 billion or more in the fiscal year preceding the planned year of economic concentration.
- Value of all economic concentration transactions must be worth at least VND1,000 billion.
- The joint market share of enterprises having the intention to participate in the economic concentration must account for at least 20% of the total share of the relevant market in the fiscal year preceding the planned year of economic concentration.

Therefore, the parties in the merger and consolidation transactions should carefully note whether the economic concentration transaction falls under the case of required notification or

prohibition under competition laws. The consequence of not notifying with regards to economic concentration is a fine of between 1% and 5% of the total revenue in the relevant market in the preceding fiscal year before the year of each enterprise participating in economic concentration not fulfilling its notification obligations. Where mergers or acquisitions are prohibited, the parties will be forced to split or separate the consolidating enterprise and the merging enterprise.

Trends and predictions

Vietnam is one of the fastest-growing economies in Southeast Asia, with a GDP growth rate of 5.05% in 2023 and a population of over 98 million people. The country has also attracted significant foreign investment, especially from Japan, South Korea, China, and the US.

However, the M&A market in Vietnam has been relatively underdeveloped compared to its regional peers, with only about 265 deals worth USD4.4 billion in 2023. The M&A market in Vietnam can be divided into five phases: emergence (1996–2004), boom (2005–2013), slowdown (2014–2019), recovery (2020–2021), and level off (2022–2023).

The M&A market in Vietnam experienced a significant increase in both the number and value of deals from 2005 to 2013, driven by market liberalisation, economic growth, and foreign investment. However, the market witnessed a sharp decline in both indicators from 2014 to 2019, due to the impact of the global financial crisis, political instability, and regulatory uncertainty. The market rebounded strongly in 2020 and 2021, thanks to the easing of border restrictions, the acceleration of vaccination programmes, and the improvement of business confidence. After peaking in 2021, the market leveled off in 2022

and 2023 as M&A participants adopted a more cautious approach to spending, partly due to global geopolitical concerns and the risk of high inflation impacting cross-border transactions.

As Vietnam's economic landscape continues to attract global attention, the M&A sector is burgeoning with opportunities and complexities. Navigating this dynamic terrain requires nuanced understanding and adept handling.

Businesses must carefully weigh the advantages of expanded market reach, economies of scale, and enhanced financial performance against potential downsides such as cultural clashes, regulatory hurdles, and financial risks. The key is in meticulous planning, due diligence, and strategic execution.

Successfully navigating M&A transactions requires a clear understanding of how these strategies differ and what they entail. Stakeholders need to weigh their objectives, the benefits, and the possible challenges to make well-informed decisions that enhance the likelihood of success.

To effectively navigate the complexities of mergers and acquisitions, it is highly advisable to seek the expertise of professional consultants. These strategies, while offering significant opportunities for growth and market expansion, come with intricate challenges that require specialised knowledge and experience. Therefore, seeking professional consultancy is not just recommended; it is a critical step in leveraging the full potential of mergers and acquisitions.

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