NISHIMURA & ASAHI

西村あさひ法律事務所

Vietnam：Newsletter on ‘M&A Approval Under the New Law on Investment 2020 and Decree 31/2021/ND-CP’

Asia Newsletter

October 5, 2021

Author:
E-mail Taro Hirosawa
E-mail Ha Hoang Loc

The new Law on Investment No. 61/2020/QH14 (“**LOI 2020**”) and Decree 31/2021/ND-CP (“**Decree 31**”) introduce substantial changes to the framework of M&A approval. The changes are lauded to provide clearer guidance for foreign investors, especially in terms of business sectors that are open to foreign investment. Still, coming with these changes are new issues that require close attention and careful handling by stakeholders. This newsletter gives a brief of the circumstances where M&A approval is legally required and certain potential issues awaiting prospective investors in each circumstance.

1. STATUTORY CIRCUMSTANCES WHERE M&A APPROVAL IS REQUIRED

Under LOI 2020, M&A approval is required if the contemplated transaction falls into any of the following circumstances:

Circumstance (i) It causes an increase in the foreign ownership level in a target company conducting business within the list of sectors conditional on foreign investment as prescribed in Decree 31 (“**Negative List**”);

Circumstance (ii) It causes foreign investor(s) or foreign invested enterprise(s), as prescribed in Article 23.1 of LOI 2020, to hold more than 50% of a target company’s charter capital (i.e. increasing the foreign ownership ratio from 50% or below 50% to more than 50%, or from more than 50% to a higher ratio);

Circumstance (iii) It is to invest in a target company having land use right certificate(s) for land on an island or a coastal or border commune, ward or town or in any another area which affects national defence and security (“**Security Areas**”).

2. NOTABLE POTENTIAL ISSUES ARISING FROM EACH CIRCUMSTANCE

(1) Circumstance (i)

- The introduction of a Negative List aims to green light foreign investment in any business sector not enumerated therein. This is a significant improvement from the Law on Investment No. 67/2014/QH13 (“**LOI 2014**”) that technically hindered foreign investment, unless it was expressly permitted in certain international treaties or local laws. However, the Negative List is not as exhaustive as intended. There remain businesses beyond the Negative List that are deemed as conditional on or prohibited from foreign

investment.[1] That means, even if none of the target company's businesses are on the Negative List, foreign investors need to review such businesses in detail to ensure that they are not otherwise restricted under any specialized law.

- Neither LOI 2020 nor Decree 31 clarifies whether M&A approval is required if the nationalities of the concerned foreign investors change, yet the foreign investment level in a target company does not increase. In practice, we have experienced some provincial departments of planning and investment ("DPI") taking a strict interpretation that M&A approval is required in such cases. Thus, it is worth consulting the local authority in charge as the practice may vary from one locale to another.

(2) Circumstance (ii)

- While the circumstance requiring M&A approval is similar to LOI 2014, the foreign ownership threshold is lowered, from "at least 51%" in LOI 2014 to "more than 50%" in LOI 2020. As a result, more organisations are expected to apply for M&A approval under this circumstance. Therefore, relevant investors should assess the burden to conduct the M&A approval of the new M&A approval regime on their business and contemplated transactions.

(3) Circumstance (iii)

- There is an absence of legal instruments identifying Security Areas, which makes it difficult for local investment registration authorities, target companies, and foreign investors to determine whether a piece of land is located in one of the Security Areas. Therefore, the competent authorities are highly cautious when dealing with this situation and likely to advise foreign investors and target companies to submit applications for M&A Approval for review and written confirmation as long as the target companies hold the appropriate land use rights. There will be no exemptions for requirement of M&A approval, even if the target companies have received confirmation that the relevant land is located outside of the Security Areas for other purposes in the past.

(4) Other General Issues

- There is ambiguity concerning the parties responsible for applying for the M&A approval; LOI 2020 imposes the obligation on foreign investors while Decree 31 obliges target companies where a foreign investor acquires equity interests to do so. While the intention of the lawmakers is unclear, it can be seen as fueling further difference in the interpretations and requirements in this licensing procedure among local authorities. Thus, consultations with the concerned authorities would be necessary to ensure that the application dossier for M&A approval are properly prepared and submitted to confirm interpretation by local authorities whether foreign investors or the target company shall sign a power of attorney.

- To apply for M&A approval under LOI 2020, applicants are required to state the estimated transactional value, and submit an in-principle agreement between the prospective foreign investor with the seller or the target company. This new requirement seems to be a setback in comparison with LOI 2014 under which the relevant parties could apply for M&A approval even before they could determine a transactional value enter into any draft share purchase agreement or share subscription agreement.

---

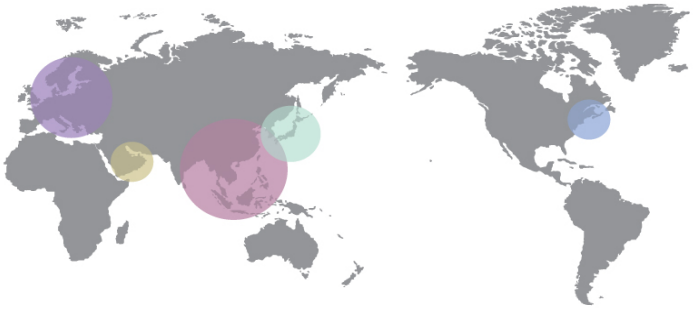
[1] An example is that foreign invested companies are not qualified to provide cyber information testing and evaluation services in Vietnam.

Consequently, it will take more time and effort for the relevant parties to prepare application dossiers for M&A approval and delay the submission to a later stage of the merger and transaction process.

- Previously, provincial DPIs were empowered to handle applications for M&A approval exclusively. From LOI 2020, depending on the headquarters of target companies, applications need to be submitted to either provincial DPIs or equivalent authorities in the industrial zones ("**IZ**") or export processing zones ("**EPZ**"). This new step is expected to alleviate the workload at provincial DPIs and reduce overlaps, enhance the consistency among investment registration procedures and make it more convenient for enterprises headquartered in IZs or EPZs to apply for M&A approval. However, for the time being, certain unexpected delays have occurred in some areas while the transition from provincial DPIs to IZ and EPZ authorities is taking place and the processing at IZs and EPZs has not been initiated. Therefore, regular consultations and follow-ups with the concerned authorities would be recommended to keep track of the application.

Public Relations Section, Nishimura & Asahi E-mail✉

Nishimura & Asahi has 18 offices throughout Japan and in the markets that matter, with Asia as the starting point.



New York

Nishimura & Asahi NY LLP
Tel +1-212-830-1600
E-mail info_ny@nishimura.com
Managing Partner/Chair (New York) Katsuyuki Yamaguchi
Vice Chair (New York) Megumi Shimizu
Partner Stephen D. Bohrer
NY LLP Partners Kaoru Tatsumi
Yusuke Urano

Tokyo

Otemon Tower, 1-1-2 Otemachi, Chiyoda-ku, Tokyo 100-8124 Japan
Tel +81-3-6250-6200 +81-3-6250-7210 (Nishimura & Asahi LPC Principal Office)

Dubai

Tel +971-4-386-3456
E-mail info_dubai@nishimura.com
Counsel Masao Morishita

Nagoya

Tel +81-52-533-2590
LPC Partner Hiroki Fujii

Osaka

Tel +81-6-6366-3013
LPC Partners Taisuke Igaki
Yuichiro Hirota
Hiromune Usuki
Masanori Ban

Fukuoka

Tel +81-92-717-7300
LPC Partners Tsuneyasu Ozaki
Kengo Takaki
Yasuko Maita
Yoshinobu Nakagawa

Frankfurt (main office)

Nishimura & Asahi Europe Rechtsanwaltsgesellschaft mbH
Tel +49-(0)69-870-077-620

Düsseldorf (branch office)

Nishimura & Asahi Europe Rechtsanwaltsgesellschaft mbH
Tel +49-(0)211-5403-9512

E-mail info_europe@eml.nishimura.com
Co-representatives Noriya Ishikawa
Dominik Kruse

Bangkok

Tel +66-2-126-9100
E-mail info_bangkok@nishimura.com
Co-representatives Chavalit Uttasart
Hideshi Obara
Jirapong Sriwat

Beijing

Tel +86-10-8588-8600
E-mail info_beijing@nishimura.com
Chief Representative Azusa Nakashima
Representative Masashi Shiga

Shanghai

Tel +86-21-5280-3700
E-mail info_shanghai@nishimura.com
Chief Representative Takashi Nomura
Representatives Seita Kinoshita
Satoshi Tojo

Hanoi

Tel +84-24-3946-0870
E-mail info_vietnam@nishimura.com
Representative Akira Hiramatsu

Ho Chi Minh City

Tel +84-28-3821-4432
E-mail info_vietnam@nishimura.com
Representative Kazuhide Ohya
Partners Vu Le Bang
Ha Hoang Loc

Jakarta*1

Walalangi & Partners
Tel +62-21-5080-8600
E-mail info@wplaws.com
Representative Luky Walalangi

Rosetini & Partners Law Firm
Tel +62-21-2933-3617
E-mail info_jakarta@nishimura.com
Partner Noriaki Machida

Singapore

Tel +65-6922-7670
E-mail info_singapore@nishimura.com
Co-representatives Masato Yamanaka
Shintaro Uno
Partners Masataka Sato
Yuji Senda
Ikang Dharyanto

Note: We are in formal law alliance with Bayfront Law LLC, a Singapore law practice, under name of Nishimura & Asahi-Bayfront Law Alliance.

Taipei

Nishimura & Asahi Taiwan
Tel +886-2-8729-7900
E-mail info_taipei@nishimura.com
Co-Representatives Ing-Chian Sun
Sheng-Chieh Chang

Yangon

Tel +95-1-8382632
E-mail info_yangon@nishimura.com
Representative Yusuke Yukawa
Vice Representative Isamu Imaizumi

Okada Law Firm (Hong Kong)*2

Tel +852-2336-8586
E-mail s.okada@nishimura.com
Representative Saori Okada

*1 Associate office *2 Affiliate office