CHAPTER 4

ACQUISITIONS OF ASSETS IN VIETNAM

1. Asset Market in Vietnam

According to PwC Vietnam,asset and wealth management (AWM) industry in Vietnam in 2020 is set to continue its strong growth in the future, following a 20% expansion rate in 2019.

The Vietnamese government has streamlined asset acquisition process to encourage investment in new sectors of the economy. And for foreign investors that see establishing a business in Vietnam as too cumbersome, the acquisition route (M&A) provides a unique solution to many obstacles. M&A deals hit US$9.9 billion in 2018, according to the Vietnam Association of Foreign Invested Enterprises. While significant, it did not outpace M&A deals in 2017. Still, M&A deals are expected to pick up in 2019, particularly in the retail sector.

However, to successfully carry out M&As within Vietnam, it is important to recognize the legal foundation for M&As, and understand the procedures and restrictions associated with acquisitions.

2. Land Acquisition

In Vietnam, entities either domestic or foreign are not entitled to own land, in other words, could not hold indefeasible title according to the Constitution and the Land Law. An entity may acquire land use rights based on some methods of which the State would grant the right. Foreign investors do not belong to a group of subjects who are granted land use right by the State but a local company owned partially or wholly by the foreign investors does. The company could acquire land use rights with four methods, namely (i) allocation of land by the State, (ii) land leased from the State and land sub-leased form developers, and (iii) land transfer.

Allocation of land is solely applied to enterprises that have investment purposes being construction of residential housing for sale or lease. In case an enterprise acquires land use right via the method of land leased from the State, the enterprise could choose to pay land rental annually or in a lump sum upon commencement of the lease. Accordingly, the land use right may vary upon the methods of payment the enterprise had chosen. Land users paying rental annually may not mortgage or contribute their land use rights.

An enterprise may also acquire land use rights via the method of land sub-leased from developers. Once construction of the infrastructure is completed, the developer can sub-lease the land to

sub-lessees, including to foreign-invested enterprises and domestic enterprises.

The last method is receiving transferred land. An enterprise can acquire land use right from the person holding the right. The entities receiving the land use right may possess all the rights over the land equally to the person transferring.

3. Offshore Transactions

Under the Competition Law 2018, any transaction *"causing the effect or being capable of causing the effect of significantly restricting competition in the market of Vietnam"* is prohibited. As such, an offshore transaction will be caught by merger control requirement if it has actual or potential anti-competitive impact on a relevant market of Vietnam. In particular, an offshore transaction may be subject to notification requirement under Vietnamese laws where a party to the transaction or its affiliates have assets, sale revenue or purchase costs in Vietnam and the transaction triggers any of the applicable notifying thresholds discussed here (except for size of transaction test).

There is no clear exception for a foreign-to-foreign transaction which has no impact on Vietnam market under Decree 35/2020/ND-CP dated March 24, 2020 detailing the Law on Competition. In other words, under Decree 35/2020/ND-CP, a foreign-to- foreign transaction with insufficient nexus with Vietnam commerce may be reported to the National Competition Committee if (i) both buyer and seller are non- Vietnamese company, (ii) either party has assets in Vietnam, but (iii) the target has no assets or revenue in Vietnam.

4. Share Acquisition in Unlisted Companies

Foreign investors can invest in Vietnam by purchasing stakes in a limited company or purchasing shares in a joint-stock company. This is considered one of the simple investment forms for foreign investors to access the Vietnam market. Depending on the amount of equity that foreign investors intend to buy, they may have to carry out registration procedures to purchase stakes or shares. Under Article 26.2 of the Law on Investment 2020, foreign investors must carry out the procedures for registration to purchase stakes or shares:

a) the purchase of shares or stakes increases the ownership ratio by foreign investors in a business entity conducting business in the business lines allowed in the market with conditions applied to foreign investors;

b) the purchase of shares or stakes results in a foreign investor or business entity specified in Article 23.1 (a), (b), (c) of the Law on Investment 2020 holding over 50% of the charter capital of the economic organization in the following cases: The charter capital ownership ratio by the foreign investor is increased from less than or equal to 50% to over 50%; the charter capital ownership by the foreign investor is increased while such foreign investor is holding over 50% of the charter capital of the business entity; and

c) foreign investors purchase shares or stakes of a business entity have a certificate of rights to use land on an island or in a border or coastal commune; in a coastal commune; in another area that affects national defense and security .

If foreign investors do not fall into the above cases, they do not need to register to purchase stakes or shares. At that time, foreign investors are required to sign a contract to receive the transfer of shares or stakes and carry out procedures for changing shareholders with competent authorities.

5. Share Acquisition in Listed Companies

It is commonplace that securities are evidence of the owner's legal ownership with the assets or equity of a company or an organization. Vietnam's securities market is one of the popular financial investment channels and attracts a large number of local and foreign investors. As of June 2020, through the securities market, the Government and businesses have mobilized over VND2.4 million billion.

Buying shares in a listed company in Vietnam is relatively complicated. In Vietnam, the purchase of a listed company is mainly through the purchase of that company's securities. Article 4 of Law on Securities No. 54/2019/QH14 defines "*a listed organization or registered organization is an organization whose securities are listed or registered on the securities trading system*". Listing means the admission of eligible securities to trading on a system for trading of listed securities. In general, when buying and selling securities of the listed company, the parties will have to comply with Law on Enterprises, Law on Investment, Competition Law, and Law on Securities. In case the trading of securities by the listed company leads to an economic concentration in accordance with the provisions of the Competition Law, the enterprise is obliged to notify the National Competition Commission.

Recently, Decree 155/2020/ND-CP dated 31st December 2020 of the Government guiding Law on Securities provides for updated regulations on foreign ownership limitation. More concretely, foreign ownership limit of 50% for a public company engaging in business lines restricted to foreign investors which shall be regulated in another decree guiding the Law on Investment 2020 (for non-restricted lines, there is no limit promulgated in Decree 155/2020/ND-CP). However, shareholders of a public company may set out a lower foreign ownership limit in its charter. Limit on foreign ownership on bonds is not imposed in Decree 155/2020/ND-CP.