

Law and Practice

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1. Transaction Activity

1.1 M&A Transactions and Deals

Small Volume, Large Potential

Vietnam is still a relatively nascent market for private equity (PE). Deal sizes are often small (although getting bigger) and transaction structuring and procedures are complex and time-consuming.

As in many other jurisdictions, 2022 has been a very challenging year for PE investors in Vietnam. The global impact of COVID-19 has been severe, and while Vietnam has managed the pandemic commendably, the vaccination roll-out remains, at the time of writing, in its early stages. The authorities are also being compelled to strictly control a more widespread pandemic resurgence, resorting to travel restrictions (both domestic and international), quarantine, social distancing, stay-at-home orders, and curfews.

Consequently, PE funds have faced harsh operating conditions so far this year, especially those with existing portfolio investments in exposed sectors (eg, real estate, hospitality, retail, and related supply chains, etc), and have, in many cases, been forced to make difficult funding decisions, as local portfolio companies' cash flows have become exhausted.

Of course, unlike many other jurisdictions, Vietnam's national balance sheet did not afford the government the luxury of stepping in with comprehensive fiscal measures to protect employment in these sectors, which has meant that PE investors have been forced to either write off investments or find new capital – not an easy task for limited partners (LP) stung by the global COVID-19 crisis, and looking to reduce emerging market liability exposure. The same capital-raising constraints have vexed leveraged buy-

out funds this year, which entered deals at lofty valuations (at low-to-mid teen forward EBITDA multiples) with highly geared equity investments.

Consequently, for those portfolio companies that survived 2021, it is likely that EBITDA margins and exit multiples will be reduced, exit horizons extended, internal rates of return (IRR) suppressed, and carried interests squeezed.

Despite these challenges, it has not all been doom and gloom, and perhaps unsurprisingly, some PE investors have used the difficult business conditions to invest at more attractive valuations in the hope of a steep post-COVID-19 recovery. In addition to opportunistic PE, the trend continues for regional PE to seek exposure to certain industry sectors in Vietnam, including but not limited to, real estate, logistics, health-care, education, manufacturing, supply chain and infrastructure.

There has also been a notable uptick in venture capital activity, especially with investments into the digital economy (e-commerce, fintech, etc). Vietnam has a tech-savvy and highly entrepreneurial population which has a need for alternative access to financing. In fact, technology start-ups attracted the most attention in the local PE market in 2022.

Favourable Laws and Policies

The Vietnamese government remains committed to increasing the ease of doing business for foreign investors in Vietnam and it is taking progressive steps to enhance administrative transparency and to reduce procedural hurdles. Privatisation of government-owned enterprises and stricter corporate governance requirements for locally incorporated entities have also contributed to the number of investable targets.

Added Value for Local Businesses

PE brings significant value to local Vietnamese businesses; PE money not only provides Vietnamese targets with much-needed growth capital to consolidate and expand their business operations, but it also provides healthy controls and constraints to focus the use of the investment capital for optimal growth and value creation. This added layer of operational supervision and corporate governance lends institutional legitimacy to businesses, which eventually enhances their future exitability to trade buyers or buyout funds. Cash flow and financing often pose inhibiting obstacles to young entrepreneurs, who do not have much equity of their own to bring into their businesses.

PE investors should be aware that much of the sophistication, financial engineering and exit-driven structuring implicit in PE may be lost on local business owners. Care should be taken to ensure that the owners and management teams truly understand the nature of the investment.

Opportunity through Crisis

All things considered, during 2021 and early 2022, Vietnam weathered the COVID-19 storm relatively well, and as such, it attracted significant PE investment during the pandemic. Recently, however, events have taken a turn for the worse, and the impact of the pandemic has become more severe; it remains to be seen how the effects of this resurgence will unfold. For now, it is hoped that the government will handle the vaccination roll-out with the same centrally planned efficiency as it did the initial containment of the disease.

1.2 Market Activity

Buyouts and Venture Capital on the Rise

Generally, PE-funded growth equity and buyouts are the most common types of transactions in

Vietnam, although venture capital (VC) activity, albeit with smaller deal sizes, has been on the increase.

Most PE investing is done by making direct investments into private companies; however, many individual investors prefer the liquidity of Vietnam's listed equities exchanges.

While mergers do play a role in Vietnamese M&A, they are uncommon among foreign direct investors.

2. Private Equity Developments

2.1 Impact on Funds and Transactions

New Law on Investment

The year 2022 has seen some changes in investment restrictions resulting from the new Law on Investment which came into force at the beginning of the year. As is customary in Vietnamese legislation, implementing regulations have already specified the implications of the new investment law during the previous year.

Free trade agreements with neighbouring countries have had a direct effect on regulatory thresholds for foreign investment into certain local industries and have enabled investors to acquire majority shares in previously restricted or conditional business lines. As there are not many PE companies – either local or international – holding stakes in Vietnamese companies and actively engaged in Vietnamese transactions, some industries see a lingering undersupply of capital.

Remarkable Synergies between Local Entrepreneurs and Foreign Capital

New laws and multinational treaties have also opened up new business sectors to foreign

investment, which is expected to increase foreign investment interest. As the Vietnamese market diversifies, it is also becoming more accessible and receptive to foreign (venture) capital. Vietnamese companies have a tangible need for guidance and cash to expand their market share and grow revenues. Local targets are available at competitive prices, even when taking into consideration higher deal volatility and transaction costs. Lower deal volumes make liabilities and returns more attractive. Working together with a foreign investor and partner can therefore produce remarkable success stories, as can be seen in some prominent examples.

3. Regulatory Framework

3.1 Primary Regulators and Regulatory Issues

Remaining Restrictions on Foreign Investment

Given the broad gamut of practice areas and industry sectors touched by PE investments, investors must be aware of all applicable laws. The mantra for PE is “start with the end in mind”, which means structuring carefully to avoid a fettered exit. A typical structuring pitfall is the failure to comprehend the nuances of local legislation governing tax, foreign capital controls, State Bank of Vietnam (SBV) loan registrations, etc.

Market access

The starting point for PE investors is market access, that is, whether an investment is prohibited, permitted subject to certain conditions, or unrestricted.

The prohibited and conditional sectors are contained in a list known as the “negative list”, in which foreign investors are either completely or conditionally restricted from participating.

This “negative list” of commercial activities also contains further guidance on such restrictions, which may come in the shape of investment conditions or a complete ban of certain business lines. Business sectors not appearing on this list are open to foreign investment, and foreign investors will be treated equally in matters relating to market entry, licensing and tax.

Licensing process

Although the Vietnamese regulatory environment has seen significant improvements over the last decade, as regulators have developed faster and more predictable licensing procedures, the process of closing a transaction in Vietnam is often arduous and protracted. In offering more certainty and reducing the time required to make the necessary filings, the legislator has already stepped in to start a transition. Most investments, however, still include complex processes to register an investment with the competent authorities (Ministry and Department(s) of Planning and Investment, or MPI and DPI), in parallel with the usual transactional steps between parties, such as term sheets, due diligence, disclosure, etc. The licensing process adds additional time, cost and uncertainty to these PE transactions, meaning that the transaction fees (as a percentage of deal size) can be higher than in other jurisdictions.

The duration of such local approvals can significantly impact the workflow of M&A deals and be a strong deterrent to the disbursement of foreign venture capital into the country. Additionally, exit strategies still pose an inhibiting factor to Vietnamese investments, as many investments do not guarantee short-term profitability and the repatriation of funds and gains may create regulatory difficulties.

Corruption

Vietnam has started doubling down on its fight against corruption and is imposing sanctions on any violations of the strong anti-corruption laws. In order to avoid competitive advantages or personal favours through illicit business practices like corruption, Vietnam is expanding the scope and reach of its regulatory arsenal.

ESG Objectives

ESG standards are also playing an increasingly important role in the Vietnamese legal and compliance landscape. A new environmental protection law that came into force at the beginning of 2022 introduced a new system of environmental licences and gives affected enterprises a 24-month time window to comply with the new rules and obtain all the necessary environmental licences to operate their business. To serve its ESG objectives, Vietnam has introduced new rules for the management of foreign direct investment. The Law on Investment (dated 17 June 2020) proposes a new mechanism that disallows the extension of investment projects that make use of obsolete or outdated technologies that may also pose a danger to the environment.

Green bonds have become an increasingly popular tool among Vietnamese issuers over the past years. As of 2020, Vietnamese companies had issued four green debt issues with an aggregate value of nearly USD284 million. Most of the proceeds from green bond issues (ie, roughly 57%) are used for renewable energy development. Sustainable energy sources form one of the cornerstones of Vietnam's ESG interests, alongside waste treatment and sustainable improvements in the agricultural sector.

Vietnamese public and listed companies are required to disclose annual ESG reports that comprise their efforts in reducing greenhouse

gas emissions, energy consumption and water consumption, and ensure compliance with the law on environmental protection. An assessment report related to the environmental and social responsibilities of the relevant company, prepared by the board of directors, and the corporate objectives of the relevant company with regard to the corporate environment, society and community sustainability are required. Vietnam's State Securities Commission (SSC), as well as non-government organisations, have managed to introduce some guidance and incentives to raise awareness and enhance Vietnam's ESG practice.

At the United Nations Climate Conference in 2021 (COP26), Vietnam pledged to phase out coal and stop building thermal power plants. Vietnam has committed to not develop new thermal power plants after 2030, to stop adding new thermal capacity and to shut down remaining old plants by 2045. These continuous improvements in ESG legislation, policies and corporate governance have been attracting new legions of foreign investment into Vietnamese companies.

Merger Control and Economic Concentration

The Ministry of Industry and Trade (MoIT) is the governing authority for merger control questions. Recent legislation amalgamated the Competition Investigation Agency of Vietnam, the Competition Authority of Vietnam, and the Vietnamese Competition Council into the National Competition Committee (NCC). The new NCC will now be solely responsible for monitoring and investigating breaches of competition law and enforcing any related regulatory sanctions.

Vietnam's Law on Competition (LoC), effective from 1 July 2019, focuses on competition restraining agreements, market dominance, economic concentration, and unfair practices. Its

scope now includes acquirers of equity by way of equity subscription or purchase (“PE buyers”) of local and foreign origin, in case their actions have – or may potentially have – a restrictive impact on competition in the domestic market. The threshold for this impact is broadly drawn at any kind of influence that is bound to exclude, reduce or hinder competition in the market.

When contemplating investment, PE investors will need to consider these new rules on economic concentration which are unfortunately, in many respects, less concise than the previous rules. In particular, concrete thresholds for economic concentration have been removed under the new LoC and redefined more vaguely, making it more difficult to predict the outcome of licensing applications. Moreover, investors are obliged to report to the NCC any economic concentrations, which are subject to thresholds based on similarly vague assumptions:

- the companies’ totals assets and turnover in the domestic market;
- the single transaction value; and
- the companies’ combined market share.

The relevant statutory instruments have enabled the NCC to grant considerable discretion to the competent authorities in determining these factors.

4. Due Diligence

4.1 General Information

Better Safe than Sorry

PE investors pursuing deals in Vietnam should undertake a thorough legal due diligence (as well as financial, tax and operational due diligence) on the target. A prudent investor should also be aware that comprehensive contractual protec-

tion in the form of representations, warranties and indemnities do not negate the need for due diligence. While dispute resolution via arbitration or court proceedings is possible, satisfying a claim of this nature will be tortuous.

While due diligence procedures have been relatively standardised in recent years, acquirers of Vietnamese equity should focus on all aspects of regulatory compliance, including but not limited to, market access, corporate governance, tax, human resources, and accounting. The ramifications of non-compliance can be very severe – at best costly, at worst criminal. In addition to this, investors should also make use of all information in the public domain and carry out searches of the publicly maintained registers, such as the national register for secured transactions.

Pre-deal Approval Required

In advance of any merger, acquisition or joint venture which crosses the above thresholds, PE buyers must inform the NCC of their transactional intentions. The NCC’s approval will have to be obtained before starting the implementation phase of the transaction and can constitute a temporary roadblock to envisaged PE investments. The timeline for this procedure is proposed to be 30 days. For more complex issues, the NCC may extend its review for some additional months, subject to its discretion.

In a wider sense, target-based due diligence in Vietnam will also include pre-emptive engagement with the counterparties of the transaction, as well as the governing authorities, to resolve any preliminary issues that might arise. Working closely with the competent agencies provides helpful guidance on specific requirements and will bring further certainty where local codified law remains unhelpfully vague.

Structure Is Key

In some cases, restructuring a company to suit the needs of an international investor may require flexibility and creativity on the implementation side. Vietnamese laws do not allow many statutory options to streamline company management or introduce international corporate standards. Corporate governance is, however, particularly important for those investors who wish to have a close grip on the company's operations and maximise the effect of foreign expertise, experience and entrepreneurship in the Vietnamese target.

4.2 Vendor Due Diligence

The practice of vendor due diligence tends to be a question of deal size in Vietnam. For smaller deals, typically growth capital, buy-side due diligence is the standard. However, for larger transactions usually in the form of trade sales, majority deals or buyouts, and where a sell-side financial adviser has been appointed to run a competitive process, it is very common to have a vendor due diligence report. Without this, it can be difficult for the sell-side advisers to maintain deal momentum.

5. Structure of Transactions

5.1 Structure of the Acquisition

Private Companies Trending

PE investors generally acquire capital contribution (share capital) in limited liability companies or shares in joint stock companies by way of a capital contribution assignment agreement or share purchase agreement (SPA). Since the SPA must be submitted to the competent authorities as part of the licensing process, in practice, the parties will often supplement this document with more detailed terms.

Vietnamese PE transactions may take the form of either primary or secondary sales. Many PE buyers also choose to obtain a minority position first, while securing an option to acquire more shares at a later stage, subject to pre-agreed valuations.

5.2 Structure of the Buyer

Direct Investment

PE investors are a sophisticated investor class often preferring more complex and financially engineered investment structures, such as convertible loans or preference shares, to straight equity. Other investors seek to structure their shareholdings via interposed regional or offshore special purpose vehicles (SPVs) to optimise tax and benefit from flexible legal systems. In addition to this, the bigger buyout funds will utilise IRR-enhancing multi-layered offshore structures to allow for various levels of debt and inter-creditor subordination.

5.3 Funding Structure of Private Equity Transactions

Equity or Debt?

The most common deals are minority investments usually sub-USD20 million, which are growth capital-driven deals funded by unleveraged equity, mainly because (i) onshore acquisition finance is unavailable; and (ii) smaller offshore PE funds are seldom in a position to leverage their balance sheets or cross-collateralise their existing portfolios to raise cheaper offshore debt. Larger buyout funds (for deals usually in excess of USD100 million) tend to leverage their equity through multiple layers of structurally subordinated debt.

Minimum Share Quotas

In some cases, a foreign PE investor may be compelled to co-invest with a local company because the investment sector is restricted.

Normally PE investors will attempt to secure the largest stake possible, and will sometimes attempt to use loopholes in the investment law to structure around any restrictions.

5.4 Multiple Investors

Given the relatively small size of PE deals in Vietnam, it is not common for multiple PE investors to invest in the same deal. In some cases, where local or regional funds identify a deal that is too big for them, the fund may invite their limited partners to invest directly into the deal, which may appeal to a limited partner from the same industry sector.

6. Terms of Acquisition Documentation

6.1 Types of Consideration Mechanisms

Consideration structures vary from deal to deal in Vietnam and locked-box, completion accounts and fixed-price structures are all common.

Earn-outs and deferred consideration are also common features of PE transactions. Generally, earn-outs are preferred, as PE buyers tend to link the valuation to future target performance.

6.2 Locked-Box Consideration Structures

In Vietnamese PE transactions, whether interest will be charged on leakage will mainly depend on the deal, but it is generally possible.

6.3 Dispute Resolution for Consideration Structures

Both locked-box and completion accounts consideration structures are commonly supported by appropriate dispute resolution mechanisms. Such clauses are usually included in the docu-

mentation of PE transactions with Vietnamese targets.

6.4 Conditionality in Acquisition Documentation

In common with other jurisdictions, in Vietnam, equity purchase or subscription agreements are subject to conditions. Aside from the usual conditions precedent (eg, the PE buyer being satisfied with the due diligence, the disclosure letter being agreeable, the PE buyer securing the requisite acquisition financing or the seller procuring the repayment of shareholder loans and release of other security, etc), Vietnamese transaction documents will often allocate the regulatory transactional risk via conditions precedent or subsequent to, or post-closing, undertakings. As more particularly described in **3.1 Primary Regulators and Regulatory Issues**, the mechanics of closing will be the subject of negotiation, and they are often built into both the SPA or share subscription agreement (SSA) and the escrow agreement. In some cases, parties agree, sub-optimally, to settle the purchase price by way of staged milestone payments linked to the completion of certain licensing steps. Typical conditions subsequent to or post-closing undertakings would be the rectification of minor areas of regulatory non-compliance flagged during the legal, financial or tax due diligence.

Material adverse change (MAC) clauses are built into most SPAs between signing and closing, which is advantageous for the investor since the period between signing and closing can be lengthy, given the protracted licensing periods required to update the investor's ownership.

6.5 "Hell or High Water" Undertakings

"Hell or high water" undertakings are not common in Vietnam and PE buyers resist these very strongly.

6.6 Break Fees

Break fees are not the norm, but they are agreed for some transactions. Reverse break fees are even less common.

Despite a limited body of precedent on this matter, Vietnamese courts have been known to reject the enforcement of break fees in transaction documents. Investors wishing to introduce break fees should draft them carefully so that they are constructed as fair and reasonable, and not punitive.

6.7 Termination Rights in Acquisition Documentation

Vietnamese PE buyers and sellers are generally highly focused on deal certainty, and termination rights are typically heavily resisted. As is common practice in other jurisdictions, SPAs normally contain a long-stop date by which the closing conditions must be fulfilled. If a deal does not close by an agreed long-stop date, the agreement will terminate, unless otherwise agreed between the parties to extend such long-stop date. However, a long-stop date needs to be very carefully worded, as in reality, once an application dossier has been submitted to the competent authorities to effect the registration of the change of ownership, it would be difficult to unwind, if the long-stop date was to expire during the long-stop time window.

Rights afforded to PE buyers for breach of pre-closing undertakings or representations/warranties would generally be heavily resisted by sellers, and if accepted, linked to some clearly defined material thresholds.

6.8 Allocation of Risk

All deals are different, and risk allocation is ultimately determined by negotiation. A highly sought-after company in an attractive sector

with growing EBITDA margins, being sold in a competitive process, will simply not give the same contractual protections as offered by a company in trouble. In most jurisdictions, risk allocation is mostly based on certain indemnities granted to each of the parties by their respective counterpart(s). This is always subject to party negotiations and therefore very deal-specific. Generally, indemnities will include any damages arising to one of the parties due to the untruthfulness of representations and warranties, certain other target or buyer characteristics, and other industry-specific aspects.

Foreign Capital Transfer Tax

One critical issue that trade buyers and PE buy-out funds should be aware of is the post-closing allocation of foreign capital transfer tax. In particular, this means that the gains on the disposal of companies holding Vietnamese shares may be subject to local tax. To date, many growth PE funds have still not properly structured for this eventuality, leaving themselves, the target (including its directors and officers), the incumbent shareholders and PE buyers exposed. This is an extremely serious issue, as the penalties for non-payment of these liabilities may be criminal.

6.9 Warranty Protection

The sellers' warranties are contractual statements regarding the company's assets, typically contained within the SPA or the SSA, which are used as tools for allocating risk between the PE buyer and the seller and adjusting the price retrospectively. Generally, representations (reps) and warranties are given by sellers, and these days most PE buyers will require reps and warranties to be given by the seller on an indemnity basis; this is a US standard which has crept into mainstream M&A, although it should be resisted wherever possible. As a general rule, indemnity protection should be reserved for specific and

identifiable issues. A well-advised management team will not give any warranties. Shareholders partnering with PE investors should be aware that most PE funds will take a reduction on valuation if it means a reduction of post-closing liability, as the PE investor needs to return funds to LPs and in doing so, stop the IRR clock. This may not be aligned with incumbent shareholders who do not need to return funds to LPs and who may have a more intimate knowledge of the company. These shareholders are usually less concerned about the indemnity risk. For this reason, many outgoing PE firms prefer to pay warranty and indemnity (W&I) insurance premiums, to allow them to return funds to LPs and to crystallise carried interests.

6.10 Other Protections in Acquisition Documentation

Escrow Arrangements

Closing of equity purchases in Vietnam is problematic, since there is no clean and clearly defined closing mechanism. In most common-law jurisdictions, closing can occur on the same day. Purchasers are able to make same-day payments (especially when accompanied by an MT103 swift message) and share transfers can be effected by duly executing a stock transfer and updating the relevant statutory registers. In Vietnam, however, settlement cannot occur contemporaneously which in turn, creates a settlement risk. In particular, investors are reluctant to fund acquisitions until licences have been updated with the PE buyers as the new shareholders. On the other hand, however, sellers are reluctant to submit application dossiers to the competent authorities to effect the change of ownership until they have received the purchase consideration. This issue has been largely resolved using escrow arrangements with local banks, but this, too, comes with a panoply of issues.

Warranty and indemnity insurance is common in PE transactions in Vietnam.

State Bank Registration of Loans

In a restrictive foreign exchange (FX) environment, in which the SBV controls and monitors all offshore loans and transactions, lengthy registration and approval procedures can slow down transactions. However, with an increasing number of such transactions, the procedures become more predictable and do not pose major obstacles to PE deals into the country. Foreign loans do, however, require detailed planning and feasibility checks, as well as a good relationship with the respective credit institutions. Doing business in Vietnam has a reputation for being restrictive and local partners may take cover behind onerous enforcement procedures. For these reasons, foreign banks may be reluctant to lend to their usual partners during inbound PE deals.

6.11 Commonly Litigated Provisions

Litigation in connection with PE transactions is not common in Vietnam, but it does happen. The forum for dispute resolution and the choice of law are critical to the success of a claim.

When weighing up the relative merits of transparency versus enforceability, many PE investors have concluded that while foreign law and jurisdiction may provide a higher degree of legal certainty and procedural transparency, the Vietnamese courts or arbitration provide the most practical route to enforcement.

7. Takeovers

7.1 Public-to-Private

Public-to-private transactions are uncommon in Vietnam. It is important to note the distinction

between a public company and a listed company, as they are not synonymous – a public company need not be listed, but a listed company must be a public company.

Joint Stock Company

According to enterprise law, the only form of publicly traded company known to Vietnamese law is the joint stock company (JSC). A JSC is a commercial enterprise with assigned charter capital that is divided into equal portions (shares). There can be no less than three shareholders, whereas the maximum number of shareholders in a JSC is not limited by law. A JSC can – with limitations in specific business lines on the investment law’s negative list – be solely owned by foreign shareholders. Ownership can also be split between local and foreign investors, to represent a cross-border partnership. A Vietnamese JSC may issue shares and publicly list them on the Vietnamese stock exchange, subject to eligibility and fulfilling the conditions for an initial public offering (IPO).

Public Company

A public company under Vietnamese law qualifies as such if it has a contributed charter capital of at least VND30 billion (roughly USD1.3 million) and at least 10% of the voting shares are being held by at least 100 non-major shareholders, or if it has successfully carried out the registration of an IPO with the competent authority. There are restrictions on the capital of local companies held by foreign investors in certain sensitive sectors, which are enumerated in Vietnamese investment law. In addition, the law does not give any specific guidance on the acquisition of assets or merger transactions to which a foreign investor is a party.

Land-Use Rights

More specific restrictions that need to be considered from the perspective of Vietnamese law are all transactions that relate to the acquisition of a company that holds Vietnamese real estate (ie, land-use rights). In this regard, to align the PE deal with the mandatory stipulations of Vietnamese civil law, foreign ownership rights will be restricted according to real estate laws.

7.2 Material Shareholding Thresholds

Under the Vietnamese Law on Securities (LoS), a shareholder that directly or indirectly owns 5% or more of the voting shares of an issuing organisation is a major shareholder. Larger transactions concentrating more than 10% of share ownership in the hands of a single investor must undergo registration with the Vietnamese State Securities Commission (SSC).

7.3 Mandatory Offer Thresholds

Vietnamese enterprise law contains mandatory offer thresholds for tender offers, upon which minority shareholders will be made an offer to sell in three cases:

- purchase of a company’s circulating shares that results in a purchaser, with no shareholding, or less than a 25% shareholding, acquiring a 25% shareholding;
- purchase of a company’s circulating shares that results in a purchaser (and persons affiliated to the purchaser) with a 25% or more shareholding, acquiring a further 10% or more of the circulating shares of the company; and
- purchase of a company’s circulating shares that results in a purchaser (and persons affiliated to the purchaser) with a 25% or more shareholding, acquiring a further 5% up to 10% of the currently circulating shares of the company within less than one year from the date of completion of the previous offer.

In any of the above cases, after obtaining the SCC's input on the conditions of the offer, the initiator of the tender (the bidder) must publicly announce its offer in three consecutive editions of an electronic newspaper, or a written newspaper. With regard to listed companies, an announcement of the tender offer must also be made on the relevant stock exchange no later than a week after obtaining the SSC's opinion on the offer. The latter is a prerequisite for carrying out any tender offer.

7.4 Consideration

Most Vietnamese PE deals rely on cash as a consideration for the purchase of shares. However, shares may also be traded in consideration of land-use rights, intellectual property rights, technology, technical know-how, gold, and other commercialised assets, according to Vietnamese law.

7.5 Conditions in Takeovers

While there is no clearly defined legal restriction on the offer conditions for a PE-backed takeover offer under Vietnamese law, offers will regularly contain conditions that ascertain the equal rights and access of all target shareholders, define the shareholders' rights to sell their shares, and contain regulations, which are mandatory under Vietnamese law. Regulatory approval and MAC clauses also play an important role in this context.

7.6 Acquiring Less Than 100%

Vietnamese enterprise law does not define any squeeze-out rights of majority shareholders, which would enable them to take control of all the shares in the company against the minority shareholders' will. However, contrary to the absence of such squeeze-out rights, the PE buyer does have a statutory duty to purchase the remaining shares in the target under certain

conditions: If a bidder acquires more than 80% of the target's total shares, they will be obliged to buy all the remaining shares (of the same type) from other shareholders. This is subject to the request of these shareholders and must be executed at the same price as the bid within 30 days of the offer.

7.7 Irrevocable Commitments

Irrevocable commitments, by which a PE buyer may gain a higher degree of certainty about the outcome of a takeover or the voting behaviour of other major shareholders, are not typical in the Vietnamese PE market.

7.8 Hostile Takeover Offers

Another example of the Vietnamese legal system's immaturity in dealing with PE deals or M&A transactions more generally, is that hostile takeovers are not defined under Vietnamese law. This also means that local law does not prohibit such offers. However, as outlined in **3.1 Primary Regulators and Regulatory Issues**, foreign ownership is restricted in some sectors in Vietnam. Correspondingly, hostile takeovers cannot take place in these specific industries, in which maximum foreign ownership regulations preclude such takeovers.

Due to recently lifted foreign equity caps on public companies, however, the domestic PE environment has seen an increase in takeover offers in the last five years, although these are still relatively uncommon.

8. Management Incentives

8.1 Equity Incentivisation and Ownership

Management equity is ubiquitous to PE and Vietnam is no exception; Vietnamese law allows for employee stock ownership plan (ESOP) struc-

tures to incentivise key management and align them with the PE investors' exit timeline. Moreover, PE investors also attempt to lock in key management so that they stay with the company after the previous owner's exit; this is done by requiring the management team to roll over a certain percentage of the proceeds from their ESOP shares into new ESOP shares.

Clearly, PE buyers are buying businesses at valuations arrived at by analysing business plans and financial models built by the target's key management and based on the belief that they are achievable. PE buyers and management are not aligned, because the higher the forecast, the higher the price (which includes the rollover price for the new ESOP shares), and the harder it will be for the management to hit the KPIs to participate in the new ESOP. In other words, if the key management are forced to roll over too much of their ESOP proceeds, they will be incentivised to push down the transaction.

8.2 Management Participation

The form of management participation depends on the deal, but in most cases, ESOPs are the preferred means of equity incentive and management shares are issued to key management.

8.3 Vesting/Leaver Provisions

Vesting schedules will be negotiated, but usually, PE investors attempt to link vesting to "good/bad leaver" provisions and exits.

8.4 Restrictions on Manager Shareholders

When companies want to restrict a manager's or employee's right to jump ship and work for competing enterprises, they may consider imposing a non-compete clause on such individuals. The permissibility and enforceability of such restricting provisions have not been definitely resolved

under Vietnamese law, either by the lawmaker or by jurisdiction.

In more developed jurisdictions, practitioners are faced with an intricate and well-balanced system of considerations that need to be thought through when crafting or interpreting the true meaning and enforceability of a non-compete or non-solicitation clause. This will depend on the level of compensation the individual receives in consideration of the restriction on their workforce. Another important aspect of such evaluation is the duration of the designated clause.

While non-compete and non-solicitation clauses do come up in Vietnamese drafting, there is currently no certainty about their enforceability or legality. Interpretation will therefore depend on the specific litigation of such clauses and will be subject to the reading of the Vietnamese labour courts, which generally tend to rule in favour of the employee and against the solicited competitive restriction.

8.5 Minority Protection for Manager Shareholders

Minority shareholders' interests are protected by (i) contractually agreed reserved matters (negotiated on a case-by-case basis, and usually contained in the shareholders' agreements); and (ii) statutory provisions relating to the protection of minority rights.

9. Portfolio Company Oversight

9.1 Shareholder Control

PE buyers in Vietnam will seek as much control as possible. This control will come in the form of reserved matters, information rights, corporate governance, board seats and management oversight.

9.2 Shareholder Liability

Generally, shareholders of a Vietnamese legal entity are not personally liable for the debts of a company, aside from their obligation to fully pay up their shares in the charter capital of the company. In other words, shareholders can be personally liable in cases where the target company's share capital has not been paid up.

9.3 Shareholder Compliance Policy

Corporate governance is a major issue for PE in Vietnam, and stringent corporate governance mechanisms should be put in place to ensure statutory compliance with both domestic and extraterritorial legislation, such as the UK Bribery Act and Foreign Corrupt Practices Act (FCPA). Criminal liability and devastating reputational damage can result from poor corporate governance.

10. Exits

10.1 Types of Exit

Depending on the life of the fund, which is typically ten years, PE funds will look to exit an investment after five years.

Trade sales and secondary buyouts remain the most popular exits. IPOs are uncommon exits in Vietnam.

Reinvestment rights will depend on the tenor and mandate of the fund.

10.2 Drag Rights

Drag rights are commonly built into Vietnamese shareholder documents and, in principle, they are permitted by Vietnamese law. The enforcement of such rights in practice could be challenging, however.

10.3 Tag Rights

As with drag rights, tag rights are also commonly built into Vietnamese shareholder documents and, in principle, they are permitted by Vietnamese law. The enforcement of such rights in practice could be challenging, however.

10.4 IPO

Exit through Sales, Not IPOs

Most exits in Vietnam are carried out through sales to trade buyers and share sales after local IPOs. The latter can take time as liquidity is not huge, so a plan for such sales, that will not disrupt the market, has to be drawn up. Typically, listed companies with strong corporate governance and attractive growth rates quickly reach the foreign ownership cap (usually 49%, removable under certain conditions), resulting in most transactions happening in large blocks at a premium to the PE price – and most disposals of listed shares by PE funds have occurred via these “off-market transactions”.

There has been no strong track record of successful listings of Vietnamese companies outside of Vietnam, although some have started setting up for such ventures. Much like an inbound investment is restricted to foreign investors, Vietnamese companies must obtain regulatory approval in the form of an Overseas Investment Registration Certificate (OIRC), to be eligible to step on to the global playing field. With such high thresholds in Vietnamese foreign ownership, the Vietnamese regulations and lack of prior exposure to international disclosure principles inhibit local companies' IPOs. The related costs also play a significant role in the scarcity of this exit strategy.

Throughout the divesting process, some regulatory procedures must be completed and respective approvals obtained. This is particularly true

for cases in which the issuance of new shares is required and in which non-cash consideration needs to be determined and accepted.

Neither lock-up periods, nor relationship agreements, are common practice in Vietnam.

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Trends and Developments

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Full Steam Ahead

Vietnam is steadily developing into the region's hotspot for private equity (PE) deals across many growth industries, namely e-commerce, tech, manufacturing, retail and renewable energies. Making several global headlines this year, as large multinationals intensify their commitment to growing Vietnamese production capacities – heralding a tangible shift of business away from China into the neighbouring members states of ASEAN. A thriving market of close to 100 million Vietnamese consumers has led to an increasing number of local businesses and rising revenues in the domestic market. These developments enable Vietnamese businesses to cross the PE threshold and sell to offshore investors or domestic PE funds, which are diversifying their portfolios.

Growing investor confidence in this market is a result of the country's recent record of economic success. This is rooted in more than a decade of political stability, an achievement almost unparalleled in the region. For the past few years, Vietnam has seen an uptick of interest in M&A activity involving Vietnamese entities. In the first half of 2022, Vietnam therefore managed to retain pre-pandemic levels of approximately 25,000 deals.

Already in 2018, the domestic PE market hit USD3 billion and USD1.9 billion the following year (not accounting for investments in real estate and infrastructure). PE now accounts for almost 50% of the total Vietnamese deal value, which is roughly double where it stood only

five years ago. The amount of capital raised for investment reached a record USD2.3 trillion in the first six months of 2022. Of this, over a third was invested in technology, media and telecommunications.

Vietnam has managed to shake the woes of the COVID-19 pandemic and reopened for business (travel) in March 2022. Before the pandemic, a strong average annual GDP growth of around 7% had helped Vietnam close the gap on its competitors in the region to become one of South-East Asia's emerging powerhouse economies. This favourable trend remains almost unbroken by the dwindling COVID-19 pandemic. GDP growth is forecast to surge from an estimated 2.6 percent in 2021 to 7.5 percent at the end of 2022, while inflation is projected to average 3.8 percent over the year, according to World Bank figures published in August 2022. Similarly, the Asian Development Bank sets Vietnam's growth forecast at 6.5 percent for this year and 6.7 percent for 2023, which falls in line with Vietnam's achievements in the decade preceding the pandemic.

Despite global economic headwinds, Vietnam is set to further profit from economic unrest in Europe over the Russian aggression in Ukraine. Similarly, the ongoing volatility of China as the world's manufacturing and logistics hub is giving Vietnam an edge over its regional and global competition.

Digital Does Best

Vietnam's government has launched a digital revolution that encourages the establishment of digital start-ups and emphasises the importance of digitalisation in governance and society. Vietnam's digital economy had an estimated value of USD14 billion in 2020, posting a growth of 450% since 2015. Carried by innovative policies, Vietnam's digital economy is expected to grow further to USD57 billion by 2025. While new digital policies had already started to be put in place before, the country's digital transformation has only been accelerated by the pandemic. Like businesses everywhere, Vietnamese businesses were forced to reconsider their way of generating and investing revenues. The Vietnamese government is still the driving force behind this regulatory and structural transition that has introduced incentives-based measures to achieve an environment that promotes technological innovation.

Potential in Tech, Renewables and E-commerce

Fuelled by a fertile environment for fast-growing start-ups, low labour costs, and a young, tech-savvy, well-educated population, high returns await venture capital (VC) disbursed by funds and other institutional investors. In particular, a diverse landscape is developing around young companies with attractive products or business models, especially in the fields of tech and e-commerce. This trend is accelerating as Vietnamese entrepreneurs become more familiar with the benefits of working with professional investors.

Renewables are another significant future growth market. Global green energy trends – coupled with a desire for energy independence and improved power infrastructure – have helped to create new government policies. These macro-level developments are now being translated

into legal amendments that will, for the first time, allow foreign investment in formerly restricted industries. As a result, renewable energy has seen an unprecedented surge over the last two years, with local generation capacity multiplying over a relatively short timeframe.

Likewise, Vietnam is creating increasingly favourable conditions for investment into its overall infrastructure by promoting public-private partnerships (PPPs) and revising its laws to include foreign bidders in publicly-funded infrastructure projects.

Meanwhile, the exponential growth of e-commerce is a global phenomenon to which Vietnam is no exception. With around 100 million people and a fast-growing middle-class consumer market, the country is an attractive destination for retailers. The population's enthusiastic adoption of new technologies, along with the widespread affordability and availability of 4G network access, make Vietnam a Goldilocks economy for taking commercial activities online and a petri dish for innovative business models. The local legal framework governing e-commerce is trying to keep pace with this bonanza, with varying degrees of success.

Uncharted Territory

Vietnam offers the potential for high returns. However, the flip side of this opportunity is the lack of legal precedents involving inbound PE transactions. In particular, the experience-deficit of local regulators and authorities can pose obstacles that require careful examination, so that potential roadblocks can be cleared before implementation. Meanwhile, competitive timelines for inbound PE transactions can be compromised by local foreign exchange (FX) restrictions or the involvement of local partners unfamiliar with the enhanced due diligence (DD)

requirements in cross-border PE transactions. With the Vietnamese government generally favouring foreign capital influx, investors usually manage to remove these roadblocks in guided discussion with the competent public authorities and agencies. Even so, PE investors are conscious of the risks involved in emerging markets, which is why many of the current activities in Vietnamese PE are VC-driven.

The good news is that the regulations governing Vietnam's investment environment have improved over the last decade. However, closing a transaction can still be arduous and lengthy. Regulators are now making licensing procedures more transparent and predictable, although these changes often take time to trickle down to the implementation level of subsidiary government agencies. Furthermore, Vietnamese regulations have a reputation for being patchy and ambiguous. Laws made in haste to accommodate mushrooming domestic industries are then amended at leisure. Shortcomings like these in older laws are therefore only now slowly being rectified.

In offering more certainty and shortening the timescale of necessary filings, the transition towards more transparency is in full swing. However, most investments still include complex registration processes with the competent authorities, alongside the usual transactional steps required for PE deals (from term sheet to closing). In addition, protracted DD exercises commonly tamper with transaction schedules or may not yield the desired level of evidence. If licensing procedures are involved, this burdens PE transactions with additional time, expense and uncertainty.

The length of time taken for these local approvals can significantly impact the workflow of

M&A deals and be a strong deterrent for the disbursement of foreign VC into the country. Additionally, exit strategies still inhibit Vietnamese investments. Many acquisitions do not guarantee short-term profitability, and the repatriation of funds and gains may create regulatory difficulties. Meanwhile, the transaction fees for Vietnamese targets can be higher than in other jurisdictions due to inflated timelines and other challenges.

Difficult Partnerships

Local entrepreneurs can significantly profit from the contributions of professional investors. However, working with inexperienced managers or local teams can be onerous. Therefore, investors should maintain a close grip on the target's affairs post-closing and regularly familiarise themselves with its operational issues.

Meanwhile, corporate governance and management standards in Vietnam remain low in many sectors. This can present both challenges and opportunities for PE buyers wishing to enter the market. For instance, former state-owned companies tend to retain bad habits from pre-equitisation times. Managers' acceptance of kickbacks or underhanded commissions on sourcing facilities or from sub-contractors is also not uncommon. Moreover, lingering remnants of nepotism tend to flout staffing choices to the detriment of business.

Private companies might be less prone to such practices. However, a pivotal drawback of many Vietnamese companies remains their chronic lack of investment in human capital and the internal development of management and staff to improve performance. With steep hierarchies inside most Vietnamese businesses, there is often a lack of ownership in lower-level management. Finally, as in many other emerging

markets, sustainability considerations are the exception rather than the rule.

For these reasons, successful PE buyers in Vietnam are not shy to intervene and proactively steer their target's operations or support management with day-to-day business. Luckily, the most popular sectors for PE investment in Vietnam – such as hi-tech, IT and e-commerce – are home to a young, open-minded community of entrepreneurs who are eager to rub shoulders with international experts and learn from market leaders in their industries.

New Laws Await the Test of Practice

A cascade of new laws, legal guidelines and subordinate implementing regulations has stirred up the PE community since 2020. As a major point of discussion, the new Law on Investment amends the 2014 law and reflects the next step of economic opening towards foreign business. Reducing foreign capital restrictions in some business lines and abolishing specific requirements for investment in others has further incentivised PE streams into local companies. However, the many uncertainties surrounding the new rules frequently render reliable predictions on timelines and feasibility impossible.

Free trade agreements (FTAs) with neighbouring countries have also impacted the regulatory thresholds for foreign investment in numerous local industries. Building ties with the global investment and trade community by ratifying multilateral treaties like the EU-Vietnam Free Trade Agreement (EVFTA) and the Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP) has been a core policy in recent years. These treaties have enabled investors to acquire majority shares in previously restricted or conditional business lines. However, some industries see a lingering undersupply

of capital because few local and international PE investors hold stakes in Vietnamese companies due to regulatory risks.

Despite the general trend of relaxing restrictions and simplifying procedures, investors and their advisers need to examine proposed deals carefully on a case-by-case basis. The foundations of profitable investment in Vietnam are local experience, meticulous planning, reliable research and corroboration of facts, as well as transactional flexibility.

Due Diligence is Key

The core of such investigations is the performance of a full legal due diligence (DD) for the target and any affected affiliates and controlled assets. Additionally, if other shareholders are involved, DD should include such structures and the entities and individuals behind them. PE investors pursuing deals in Vietnam should be aware of the resources required to perform a full legal DD that delves into the transaction target's financial, tax, and operational aspects. If investors cannot obtain a sufficient degree of certainty, they should protect themselves with sophisticated representations, warranties, and indemnities in the underlying deal documentation. While dispute resolution via arbitration or court proceedings is possible, successful enforcement is often limited. Therefore, in Vietnamese PE practice, accountability is typically introduced on a strategic level through close supervision and milestones. This helps to avoid defaulting legal enforcement tools and the risk of questionable business practices by the counterparty.

DD procedures have been increasingly standardised in a sequence of new laws. Vietnamese PE buyers are still advised to focus on all aspects of regulatory compliance, including but

not limited to market access, corporate governance, tax, human resources, and accounting. Non-compliance with Vietnamese investment restrictions, FX laws, antitrust procedures, or licensing requirements can be severe, including financial and even criminal consequences. Available national registers are, therefore, an essential source of information. However, they do not provide satisfying proof in many cases.

Prospects of Sophistication

If the trends described above continue, Vietnam is bound to become a hotspot for PE in the region over the next five to ten years. All indicators show that Vietnam is in a strong position to absorb growing volumes of foreign capital.

The pressure of VC and professional investors running out of alternative investment locations with lower liability levels will further increase this momentum.

Global investment streams were already shifting towards Asia pre-pandemic. Therefore, with this trend set to continue, Vietnam's future potential for PE buyers is clear. It will be interesting to see how the country's maturing market and legal framework affect the nature and volume of PE transactions in the coming years. Undoubtedly, Vietnam was already on PE buyers' radar before starting its transition from rags to riches. Now, with a new legal framework and promising FTAs in place, first-movers will reap the largest profits.

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VIETNAM TRENDS AND DEVELOPMENTS

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