

VIETNAM



Law and Practice

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ACSV Legal is a vibrant and dynamic, Vietnam-based law firm located in HCMC with unparalleled domestic expertise. It is one of the premier corporate and M&A practices in Vietnam with extensive experience in private equity transactions and a strong commercial focus. It has advised on (re-)structuring businesses in light of investments in or outside Vietnam. Its clients are businesses within Southeast Asia which are experiencing significant growth, as well as leading international and local corporations that need advice on a broad array of multi-jurisdictional

transactions. **ACSV Legal** has advised clients on matters in a wide range of sectors and industries such as healthcare, beauty and fitness, pharmaceutical, food and beverage, IT and technology, hospitality and leisure, education, retail, manufacturing and distribution, apparel and fashion, fintech and payment services. It has a team of over 30 experienced lawyers who are qualified in Vietnam, the UK and in civil and common law jurisdictions. The languages spoken at **ACSV Legal** include Vietnamese, English, German, Italian, Dutch and French.

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1. Transaction Activity

1.1 Private Equity Transactions and M&A Deals in General

Vietnam is still thriving as an attractive market for private equity (PE). Deal sizes are getting bigger, with complex transaction structures becoming more prevalent.

As many other jurisdictions, Vietnam is rebounding from the effects of COVID-19. But the stagnating global economy and rising inflation resulting from the Russia-Ukraine conflict are taking their toll on Vietnam's recovery from COVID-19. As evidence, the National Assembly of Vietnam projects only a 6.5% growth rate for Vietnam in 2023.

Consequently, PE funds have faced harsh operating conditions so far this year, and have, in many cases, been forced to make difficult funding decisions due to difficulties in obtaining financing. Despite these challenges, it has not all been doom and gloom, and perhaps unsurprisingly, the PE market is thriving.

There has also been a notable uptick in venture capital (VC) 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 2023.

With the finalisation and issuance of Vietnam's new Power Development Plan 8 (PDP8) for the period 2021-30, with a vision to 2050, it is expected that Vietnam will attract greater interest for PE transactions in the green energy sector, once the regulations to implement PDP8 are rolled out.

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 the first half of 2023, Vietnam saw impressive recovery from COVID-19, and as such, it attracted significant PE investment.

1.2 Market Activity and Impact of Macroeconomic Factors

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

Rising interest rates and other current macroeconomic factors have had an effect on PE investors' ability to raise financing for transactions and forced investors to be more selective in finding and valuating potential targets. However, the increased financing costs are still manageable.

PE transactions in certain manufacturing industries with supply chain problems resulting from global geopolitical issues are taking a hit due to increased risk to investors.

2. Private Equity Developments

2.1 Impact of Legal Developments on Funds and Transactions

The year 2022 has seen a new Law on Investment (LOI) which came into force at the beginning of the year. In keeping with customary practice within the Vietnamese legislative framework, the implementing regulations have duly delineated the ramifications of the novel investment law. A prominent feature of LOI is the incorporation of investment policies pertaining to national defence and security. As stipulated, any business investment shall be subject to suspension, cessation or discontinuation if such endeavor

our poses a risk to Vietnam's national defence or security. Moreover, a novel pre-approval requirement will be applicable to M&A transactions involving domestic entities endowed with land use rights situated upon islands, border or coastal regions or other areas that impact national defence and security. During the first half of the year 2023, the legal framework and guidelines under LOI remained unchanged and free from adverse alterations.

Free trade agreements (FTAs) established with neighbouring countries have exerted a direct influence on the regulatory thresholds governing foreign investment within specific local industries, thereby affording investors the opportunity to obtain majority stakes in previously restricted or conditionally permitted business sectors. By harnessing the benefits of these FTAs, investors operating in Vietnam gain access to a broader market, achieve cost reduction and enhance their competitive standing. The dearth of PE entities, whether of domestic or international origin, holding interests in Vietnamese enterprises and actively engaging in transactions within the Vietnamese market has contributed to a scarcity of capital within certain industries. M&A activities cooled down in Vietnam in the last months of 2022.

Remarkable Synergies Between Local Entrepreneurs and Foreign Capital

New legislative enactments and international agreements have additionally expanded the scope of business sectors open to foreign investment, thus foreseeably augmenting their allure for foreign investment. With the diversification of the Vietnamese market, it is concurrently becoming more accessible and accommodating to foreign (venture) capital. Vietnamese enterprises demonstrate a concrete need for both guidance and financial resources to amplify their

market share and bolster revenue growth. Local targets are attainable at competitive valuations, even when factoring in heightened deal volatility and transaction expenses. Lower deal volumes enhance the appeal for investors. Collaborative ventures with foreign investors and partners, as evidenced by noteworthy examples, have the potential to yield remarkable success stories.

Notable Highlights on Data Protection

In 2023, the issuance of Decree 13 on the Protection of Personal Data (“Decree 13”) has significantly fortified the legal framework governing personal data protection in Vietnam. This regulatory instrument not only enunciates numerous specific rights regarding personal data, but also delineates the obligations and responsibilities of the Personal Data Controller, Personal Data Processor and Personal Data Controller-cum-Processor concerning the safeguarding of personal data. Decree 13 introduces and addresses several novel concepts and matters that are of utmost importance. Notably, this encompasses the classification of sensitive personal data and general personal data, as well as the intricacies associated with cross-border transfer of personal data. Given the pioneering nature of these provisions, they hold considerable significance and interest for prospective investors.

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 fet-

tered 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”. Foreign investors are either completely or conditionally restricted from participating in these sectors. 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 in these sectors. Business sectors not appearing on this list are open to foreign investment, and foreign investors will be treated equally to domestic investors 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. Nonetheless, the legislator has already taken some steps towards a transition to offer more certainty and to reduce the time required to make the necessary filings. Most investments, however, still require complex processes to register an investment with the competent authorities, ie, with the Ministry and Department(s) of Planning and Investment, in parallel with the usual transactional steps between the parties, such as term sheets, due diligence, disclosure, etc. The licensing process

adds additional time, costs and uncertainty to these PE transactions, meaning that the transaction fees (when calculated as a percentage of the 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 strict sanctions on any violations of anti-corruption laws. In order to prevent obtaining 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 and water consumption and ensure compliance with the law on environmental protection. A company's board of directors needs to prepare an assessment report related to the environmental and social responsibilities and the corporate objectives of the relevant company with regard to the corporate environment, society and community sustainability. 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.

At the United Nations Climate Change Conference in 2022 (COP27), Vietnam reiterated its strong climate commitments and sought ways to realise its commitments. It also raised new

initiatives, mechanisms and policies to conduct a firm energy transition.

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 joined the Competition Investigation Agency of Vietnam, the Competition Authority of Vietnam and the Vietnamese Competition Council into the National Competition Committee (NCC) or Vietnam Competition Commission (VCC). The new NCC/VCC 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 restrictive 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 defined broadly as 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

merger control procedures. Moreover, investors are obliged to report to the NCC any economic concentrations, which are subject to thresholds based on similarly vague assumptions:

- the companies' total 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 protection 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.

In auction sales, sell-side legal advisers typically just provide a legal brochure containing general legal facts and details pertaining to the target company and its assets.

5. Structure of Transactions

5.1 Structure of the Acquisition

In Vietnam, 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). 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.

Since these agreements must be submitted to the competent authorities as part of the licensing process, in practice, such agreements will be often supplemented by the parties with more detailed terms. An auction sale is not a form of investment in Vietnam, therefore, the nature of the acquisition in an auction sale is different.

5.2 Structure of the Buyer

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 internal rates of return (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.

Consortia comprising a private equity fund and a corporate investor are not common.

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.

It is not typical to charge (reverse) interest on any leakage that occurs during the locked-box period but it can nevertheless be agreed among the parties.

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), 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.

Typically, long-stop dates are about three to six months from signing or longer, depending on the specific transaction.

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.

6.9 Warranty and Indemnity 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 limited partners (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 and Disclosure in Tender Offers

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 SSC'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 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.

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) structures 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 the judiciary.

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. 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.

Non-compete and non-solicitation clauses are usually part of the employment contract.

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.

Management does not typically have anti-dilution protection. This is deal-specific.

9. Portfolio Company Oversight

9.1 Shareholder Control and Information Rights

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.

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 and Tag Rights

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

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

10.3 IPO

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 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

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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.

Trends and Developments

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ACSV Legal is a Vietnam-based law firm with unparalleled domestic expertise. It is one of the premier corporate and M&A practices in Vietnam with extensive experience in private equity transactions and a strong commercial focus. It has advised on (re-)structuring businesses in light of investments in or outside Vietnam. Its clients are businesses within Southeast Asia which are experiencing significant growth, as well as leading international and local corporations that need advice on multi-jurisdictional transactions. ACSV Legal has advised on mat-

ters in a range of sectors such as healthcare, beauty and fitness, pharmaceutical, food and beverage, IT and technology, hospitality and leisure, education, retail, manufacturing and distribution, apparel and fashion, fintech and payment services. It has a team of over 30 experienced lawyers who are qualified in Vietnam, the UK and in civil and common law jurisdictions. The languages spoken at ACSV Legal include Vietnamese, English, German, Italian, Dutch and French.

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VIETNAM TRENDS AND DEVELOPMENTS

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Deal Activity and Deal Value

Even though 2022 started well, fewer private equity (PE) deals were closed overall compared to 2021. In 2023, the number of deals and deal value are not high yet, which is mainly due to market uncertainties. These uncertainties are caused by an inflationary environment, increased interest rates and global supply-chain disruption resulting from the conflict between Ukraine and Russia. The Vietnamese M&A market will likely continue to grow in 2023, with deal activity expected to increase by 10-15%.

By prioritising environmental, social and governance (ESG)-related projects, building investor confidence and continued efforts to equitise state-owned enterprises (SOEs), the Vietnamese government has strengthened the business environment and revitalised the M&A market. Furthermore, as SOEs in Vietnam are being restructured and private companies are looking to obtain cash, private equity firms have large investment prospects. Also, with the commitment of the Vietnamese government to reach its net-zero-carbon emission target by 2050, domestic businesses are likely to follow this focus on ESG. ESG is becoming increasingly important to M&A investors who are looking for companies that are committed to ESG principles. Investors are willing to pay a premium for these companies.

Other contributing factors supporting the growth of the PE and M&A market in Vietnam are the continued strong GDP growth (especially compared to other countries), a stable political and economic climate, a growing middle class and a young population.

Sectors and Investors

Technology and healthcare remain attractive sectors for PE investors. These sectors are

benefiting from Vietnam's recent rapid economic growth and the increased demand for healthcare products and services as well as digital services. In 2022, healthcare accounted for 35%, while technology accounted for 20% of the total PE deal value in Vietnam. For the technology sector, this is thanks to the government's incentives for digital transformation. Vietnam has also shown its potential to become the next tech start-up hub. The start-up ecosystem has evolved, and the number of tech start-ups is growing. The consumer goods and services sectors are also expected to see growth.

As mentioned before, Vietnam has a relatively young population which supports a high and fast digitisation rate. A strong technology talent pool coupled with a growing entrepreneurial mindset also plays an important role in transforming the Vietnamese tech industry. Digital payments will continue to develop as the government is pushing digital transformation, along with the growing young population and a larger number of tech-savvy consumers.

Another sector that might be attracting investment is renewable energy. Especially considering the recent power problems in the north of the country, it has become obvious that Vietnam needs to increase its renewable energy capacity, particularly solar and wind. Significant investment is required for this and renewables obtained an important focus in Vietnam's Power Development Plan 8.

Challenges

Challenges such as the lack of a developed legal framework for private equity and transparency in the market, and the high cost of doing business in Vietnam, have not been fully addressed yet. However, the government has amended various

relevant laws already and is in the process of amending other laws.

The long-lasting COVID-19 lockdowns in China have disrupted supply chains, which was a reason to look for alternate suppliers. Multinational corporations relocated their production to other countries and diversified supply chains accordingly. Vietnam became one of the obvious choices for this. For example, Apple and its suppliers, Foxconn and Goertek, Nintendo and Lego moved to Vietnam. However, due to reduced global demand, some of these companies are encountering some hiccups.

Nevertheless, investors from Thailand, Singapore, Japan and South Korea remain interested and continue to invest in Vietnam to increase their market share and diversify their operations. Not only foreign investors are active in PE. Due to the increasing wealth of investors and the availability of local capital in Vietnam, the number of domestic investors has increased as well. Local investors accounted for 30% of the total PE deal value in Vietnam in 2022. The participation of local investors is likely to continue to increase, as more Vietnamese investors gain experience in the market.

Some strategic investors want to form joint ventures or partnerships with Vietnamese companies in order to gain access to local expertise and networks. PE investors are also attracted to Vietnam's M&A market due to the country's excellent growth potential and favourable demographics, as well as their desire to gain access to high-growth sectors and diversify their portfolios.

As mentioned earlier, ESG investing, although still in its early stages, is a growing trend in Vietnam, and it is a growing trend that is gain-

ing momentum. Investors are becoming more concerned about the environmental and social impact of their investments. The Vietnamese government is also supportive of ESG investing and has implemented several policies to encourage renewable energy, sustainable agriculture and green infrastructure. However, some of the challenges are the lack of transparency and a clear regulatory framework. Furthermore, there is still a lack of understanding of ESG principles among businesses and investors. Finally, there seem to be insufficient resources and infrastructure. Nevertheless, the Vietnamese government and businesses are increasingly recognising the importance of ESG, and this is likely to lead to further growth in the sector in the coming years.

Free Trade Agreements

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 conditionally restricted business sectors. 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, corroboration of facts and 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 also 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. The consequences of non-compliance with Vietnamese investment restrictions, foreign exchange laws, antitrust procedures or licensing requirements can be severe and can include financial and even criminal consequences. The available national registers are, therefore, an essential source of information. However, they do not provide adequate proof of compliance 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 venture capital and professional investors running out of alternative investment locations with lower risk 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.