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Bach Van Mung
General Director
Vietnam Competition Authority
21 Ngo Quyen Street, Hoan Kiem District
08404 Hanoi, Vietnam

Dear General Director Mung:

Re: Proposed Competition Law Reforms in Vietnam

We write on behalf of the Merger Streamlining Group ("MSG" or the "Group"), whose membership consists of multinational firms with a common interest in promoting the efficient and effective review of international merger transactions.[1] The cornerstone of the Group's activity has been to work with competition agencies and governments to help implement international best practices in merger control. In particular, the Group focuses on the *Recommended Practices for Merger Notification Procedures* of the International Competition Network ("ICN"),[2] of which, as you know, the Vietnam Competition Authority ("VCA") is a member.

The Group was founded in 2001. Its work to date has included two major surveys on implementation of the *Recommended Practices*, as well as more than 50 submissions to the European Commission, the U.S. Antitrust Modernization Commission, and competition agencies and governments in more than twenty other jurisdictions (*e.g.*, the United Kingdom, Russia, Brazil, India, China, Japan, Korea, Spain, Italy, Philippines and Portugal) to promote reforms consistent with the *Recommended Practices*.

The Group writes in connection with the current public consultation[3] on potential changes to the Vietnamese competition law, including a proposal for the adoption of a

[1] The current members of the Group include Accenture, BHP Billiton, Bosch, Chevron, Cisco, Danaher, General Electric, Novartis, Oracle, Procter & Gamble, Siemens, and United Technologies.

[2] International Competition Network, *Recommended Practices for Merger Notification Procedures*, available online at <http://www.internationalcompetitionnetwork.org/ uploads/library/doc588.pdf> ("*Recommended Practices*").

[3] *See* the materials available online at <http://www.vca.gov.vn/NewsDetail.aspx?ID=3562&CateID=274>.

mandatory merger notification regime in Vietnam. We hope that this submission will prove useful to the VCA and the Vietnam Competition Administration Department of the Ministry of Industry and Trade ("MOT"), which we understand is coordinating the public consultation. This submission draws upon the MSG members' very substantial experience with multinational merger transactions.

We have reviewed an English-language translation of the proposed Competition Law (the "Proposed Law"), which we understand was prepared by the VCA and/or the MOT. Our particular interest is in providing commentary on the merger control-related portions of the Proposed Law, and in particular Chapter V and Article 25, which we understand to contain the pre-merger notification requirements and relevant notification thresholds. Based on the translation we have seen, Article 25(1) states that proposed transaction must be pre-notified to the VCA where:

a. "One of the parties to the transaction has a market share of 20% or more on the relevant market;

b. The transaction value of the economic concentration is from 300 billion VND or above; or

c. One of the parties to the transaction has revenue of 1000 billion VND or above in the fiscal year preceding the year of implementing the economic concentration."

While the Group appreciates the VCA's and the MOT's desire to modernize certain aspects of Vietnamese merger control law, we believe that the proposed Article 25 notification thresholds are inconsistent with the ICN *Recommended Practices* and will create significant burdens and uncertainty for the business community, while at the same time requiring the VCA to expend its valuable resources reviewing a large volume of transactions that are unlikely to raise any competition concerns in Vietnam. These concerns, and suggestions for addressing them, are discussed in greater detail below.

I. Lack Of Material Local Nexus In Articles 25(1)(b), 25(1)(c)

Neither Article 25(1)(b) or 25(1)(c) create any local nexus between a transaction and Vietnam. The very first principle articulated by the *Recommended Practices* is that "*jurisdiction should be asserted only over those transactions that have an appropriate nexus with the jurisdiction concerned*."[4] *Recommended Practice* I-C and its Commentary elaborate that the determination the appropriate level of local nexus between a transaction and the jurisdiction requiring pre-notification "*should be based on activity within that jurisdiction, as measured by reference to the activities of at least two parties to the transaction in the local territory and/or by reference to the activities of the acquired business in the local territory.*"

[4] *Recommended Practice* I-A (emphasis added).

Applying these principles to the Proposed Law, it is clear that neither Article 25(1)(b) nor 25(1)(c) contain any criteria demonstrating a material local nexus to Vietnam:

- Article 25(1)(b) appears to be based solely on the value of a proposed transaction exceeding 300 billion VND (*i.e.*, approximately US$13 million). Apart from transactions involving the acquisition of target companies with revenues generated solely within Vietnam, all transactions with a deal value exceeding this very low threshold are seemingly subject to mandatory pre-notification in Vietnam regardless of any local nexus to Vietnam. For example, a transaction in which a U.S. company purchases another U.S. company for an acquisition price exceeding US$13 million would require notification under the current language of Article 25(1)(b).

  Assuming the VCA and/or the MOT's intention was for Article 25(1)(b) to apply only to transactions in which the target's assets or revenues in Vietnam carried a value in excess of 300 billion VND, the Group would strongly recommend that the Proposed Law be revised to make this intention clear.

  The Group would also urge the VCA and MOT to ensure that, consistent with the *Recommended Practices*, such a revised Article 25(1)(b) threshold be "*be limited to the sales and/or assets of the business(es) being acquired*" in Vietnam,[5] rather than the assets or revenues of the vendor's entire corporate family in Vietnam.

- Article 25(1)(c) appears to require that only one party to the transaction have revenues exceeding 1000 billion VND (*i.e.*, approximately US$44 million) to require pre-notification in Vietnam, and it is not clear that these revenues must be generated within Vietnam. Thus, for example, a transaction in which a U.K. company with total revenues exceeding1000 billion VND (but modest or no revenues in Vietnam) acquires a French company with no revenues in Vietnam would also require notification. As noted above, this is contrary to *Recommended Practice* I-C, which requires that there be significant local activities by each of at least two parties to the transaction "*since the likelihood of adverse effects from transactions in which only one party has the requisite nexus is sufficiently remote that the burdens associated with a notification requirement are normally not warranted*."[6]

  The Group therefore recommends that Article 25(1)(c) be revised to require that each of at least two parties to the transaction have revenues exceeding 1000 billion VND, generated from sales into, from or into Vietnam. In this respect, we note that *Recommended Practice* I-B advises that worldwide

[5] See *Recommended Practice* I.B, Comment 3 (emphasis added).

[6] Comment 2 to *Recommended Practice* I-C.

> revenues "*should not be sufficient to trigger a merger notification requirement in the absence of a local nexus (e.g., revenues or assets in the jurisdiction concerned) exceeding appropriate materiality thresholds.*"[7]

In addition to bringing the merger control provisions of the Proposed Law into greater conformity with the *Recommended Practices*, the Group believes that the adoption of these suggested changes will significantly improve the transparency and predictability of Vietnam's merger control regime, while also saving significant costs to both merging parties and the VCA. As the *Recommended Practices* have concluded, the use of merger notification thresholds that lack material local nexus "*imposes unnecessary transaction costs and commitment of competition agency resources without any corresponding enforcement benefit.*"[8]

II. Use Of Threshold Based On Market Share In Article 25(1)(a)

The Group also wishes to convey its concerns regarding the use of a 20% market share-based notification threshold in Article 25(1)(a). The *Recommended Practices* state that merger notification thresholds "*should be clear and understandable*", in order to "*permit parties to readily determine whether a transaction is notifiable.*"[9] Thresholds should employ "*clear, understandable, easily administrable, bright-line tests*", and the use of market shares is explicitly mentioned as a type of threshold to be avoided for its lack of "*objectively quantifiable criteria*".[10]

As the VCA will appreciate, the definition of relevant product and geographic markets — which is a necessary precursor the calculation of market shares — is often a challenging exercise, even for specialized competition law enforcers. Enforcers and private parties, and indeed even enforcers across different jurisdictions, frequently disagree on the precise scope of a relevant antitrust product market. For private companies, many of whom possess little or no familiarity with the principles of competition law, engaging in such an exercise *ex ante*, in order to determine whether a transaction might be pre-notifiable in Vietnam, will be burdensome and may lead to incorrect definitions of the relevant market.

Even where the relevant antitrust product and geographic markets can be correctly defined by the parties, the calculation of market shares may be difficult, owing to the lack of proprietary or third-party data concerning the total size of the relevant market.

It is presumably for these reasons that the *Recommended Practices* expressly state that market-share based thresholds "*are not appropriate for use in making the initial determination as to whether a transaction is notifiable.*"[11] The Group therefore recommends that

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[7] Comment 2 to *Recommended Practice* I-B.

[8] Comment 1 to *Recommended Practice* I-B (emphasis added).

[9] *Recommended Practice* II.A; Comment 1 to *Recommended Practice* II.A.

[10] Comment 1 to *Recommended Practice* II.B. Indeed, the Commentary states that "e*xamples of criteria that are not objectively quantifiable are market share and potential transaction-related effects"* (emphasis added).

[11] Comment 2 to *Recommended Practice* II.B (emphasis added).

the VCA and MOT eliminate Article 25(1)(a) of the Proposed Law, and instead focus the merger notification thresholds on "*bright-line tests*" such as the target having material assets in, or material local revenues generated in or from, Vietnam.

* * *

Thank you very much for considering the Group's views. We believe that the suggestions set out above would provide important clarity to the business and legal communities, while at the same time bringing Vietnam's merger control laws into greater conformity with the ICN's *Recommended Practices*, and also allowing the VCA to focus its resources on those transactions most likely to have significant domestic effects in Vietnam. We would welcome the opportunity to respond to any questions or discuss this submission with you or your colleagues further, at your convenience.

Yours very truly,

A. Neil Campbell

Casey W. Halladay

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