Mergers & Acquisitions Of Securities Companies: Inevitable Yet Still Lacking In Pecuniary Sanctions

What happened in the securities market during the last year, especially activities of Securities Companies, show that the M&A tendency in the financial area in particular has been becoming a potential activity in the subsequent years. According to Vietnam Competition Administration Department under the Ministry of Industry and Trade, the M&A activities will even grow at the rate of 30 – 40% per year. With approximately 100 Securities Companies coming into existence while the market only demands 20 – 30 companies of this type, this fact proves that the M&A requirement for Securities Companies is inevitable.

Nevertheless, the biggest obstacle that Securities Companies may face when conducting the M&A process in Vietnam is a lack of legal framework and manpower.

About the Legal Framework

The M&A of Securities Companies constitutes an inevitable tendency, however still lacks a clear legal framework. For the time being, the legal regulations in respect of the M&A in Vietnam are sometimes set out in the legal documents such as the Civil Code, the Enterprises Law, the Investment Law, the Competition Law, the Securities Law, etc. The M&A is regarded a financial and commercial transaction, thus requiring specific regulations and a market mechanism designed for the sale and purchase of enterprises, prices, transfer of legal entities, financial obligations and a multitude of issues directly related to this transaction but not specified yet, including audit, evaluation of price, consultancy, brokerage, confidentiality of information and so on.

It is known that the MPI is drafting a Decree on mergers and acquisitions of enterprises involving foreign elements in a favourable manner for capital transfer deals between domestic and foreign enterprises, in order to make up a specific legal framework for M&A deals, particularly reaching agreement on the regulation of the ownership ratio by the Foreign Investors in M&A deals which so far there has been no consistence between the Enterprises Law, the Investment Law, the Securities Law and other specialized laws.

About Manpower

The M&A market in general, and Securities Companies in particular, is a market which needs not only the participation and consultation of the specialists having deep experience in various areas such as law, finance, trademark, etc, but also a large number of professionals capable of making M&A deals successful. Unfortunately, Vietnam labor market reveals that the highly qualified manpower in this new area falls short of the current demand. Consequently, to develop this highly qualified manpower is a must in order to satisfy the requirements of M&A deals, particularly in transactions with foreign partners.

Things to be taken into account

Firstly, there are some differences between the M&A of Securities Companies and the M&A of enterprises in general. The Securities Law has not got any concept of M&A (demerger, consolidation, merger and conversion of enterprises as set fourth in the Competition Law and the Enterprises Law). The demerger, consolidation, merger and conversion of Securities Companies are conducted in accordance with the Competition Law and the Enterprises Law. Nevertheless, the fundamental difference between the M&A of Enterprises and the M&A of Securities Companies is that if Securities Companies wish to conduct the demerger, consolidation, merger, conversion, they are required to submit the application file thereof to the Securities Commission. And the demerger, consolidation, merger will be carried out only if approved by the Securities Commission. The main reason is that Securities Company is an intermediary financial organization in the Securities Trading Centre, thus its significant change will have broad impact on socio-economic activities.

Secondly, in the event of merging Securities Companies with each other, the newly merged company shall inherit the entire rights and obligations that the merging company has committed to the Securities Investors prior to such merger. As a result, if there is any conflict arising between the two merging Securities Companies in respect of commitments with the Investors, the parties concerned will agree with each other in principle. In case no agreement can be reached, they are required to comply with the commitments made previously or to act in a way which is beneficial to the Investors. For instance, A is a Securities Company opening the Investor's account at the bank while B, another Securities Company, is managing the Investor's account at its own company. In this case, the newly merged company will negotiate with the Investor so as to reach an agreement on the form of managing the Investor's account at the bank in accordance with Article 32, Regulations on the organization and operation of Securities Companies attached to Decision 32/2007/QĐ-BTC issued by the Finance Ministry on 24 April 2007: the Securities Company's clients are required to open their account at a commercial bank of the Securities Company's choice. The Securities Company shall report the list of commercial banks providing payment services to the Securities Commission within three (3) days after the payment service agreement is entered into between such Securities Company and the commercial bank. If the Securities Company offers various transaction fees, the Investor will be entitled to incur a more favourable transaction fee.

Thirdly, the Competition Law also prohibits the M&A cases in which the newly merged company holds a dominant position by a market share of more than fifty (50) per cent in the relevant market, except for cases otherwise stipulated by the Law on Competition.

However, economic concentration which is prohibited as stipulated above may be considered for exemption in the event that one or more of the parties participating in the economic concentration (including cases of Securities Companies) is or are at risk of being dissolved or bankrupt. According to this provision, the Securities Companies which are at risk of being dissolved or bankrupt will be entitled to exemption under prohibited cases though they have a market share of more than fifty (50) per cent in the relevant market.

When an enterprise has a market share of more than fifty (50) per cent in the relevant market, it means that such enterprise will be capable of acting in an independent manner, occupying the dominant position, even the monopoly position in such sector, thus

affecting the equal business environment. Therefore, this regulation is aimed at preventing the economic concentration by consolidating or merging with each other to form a company capable of dominating the market, then creating an unequal business environment. Nevertheless, we should be fully aware that the Competition Law shall not prohibit an enterprise to rise by itself to the dominant or monopoly position in the market (known as endogenous growth).

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