BUSINESS FREEDOM IN THE LAW OF ENTERPRISE RE-ORGANIZATION*

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Abtract: The article compares the provisions of the law on the reorganization of enterprise rights through the development process from Vietnam's renewal to present. It was found that the reorganize enterprise freedom in particular and the business freedom in general was recognized and became universal in the law of enterprise reorganization in Vietnam. In addition, in comparision with the laws of China, the United States, Singapore and international treaties, the article points out the similarities and differences of the freedom of reorganization of the business entity. As a result of the comparative perspective, the author raises inadequacy and recommends for improvement of the law on reorganization of enterprises to ensure the business freedom in Vietnam.

Keywords: Bussiness freedom, reorganization of enterprise, merger, consolidation, separation, acquisitions, division

Business freedom is the capacity of individuals or enterprises to act, to select and to decide at their discretion on issues related to business operations.[1] Enterprise reorganization is one of the most likely activities of the enterprise's course of business. Accordingly, recognition of freedom of enterprise reorganization will contribute to busines freedom as a whole. Therefore, by this article, the author affirms freedom of enterprise reorganization in particular, business freedom in general are clearly recognized in the law of enterprise reorganization. In addition, the comparision of Vietnamese laws governing enterprise reorganization in history, between Vietnamese law and foreign laws, international law demonstrates that business freedom is increasingly popular in Vietnamese business law. As a results, the author makes some suggestions and recommendations to ensure at higher level business freedom and to improve Vietnamese law of enterprise reorganization.

1. Freedom to re-organize enterprises in Vietnamese business law from the period of "Doi Moi"

"In business, reorganization of enterprises is one of measures investors conduct to adapt to the movement or change of the market and of the business operations. The change of enterprises aim to create, to seek more favorable conditions for business"[2]. Therefore, a relatively advantagous legal framework

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[1] Mai Hong Quy (2010), *Journey of Human Rights: Classical and Modern Perspectives,* Tri Thuc, Hochiminh city, P.17

[2] Tran Tri Trung (2012), "Principles of establishing and operating the institution for reorganizing enterprises base on the Enterprise Law", *Journal of Science VNUHN, Legal Studies,* (28), P.64

for enterprise reorganization is a cornerstone for business entities having business freedom. The Vietnamese enterprise law in particular and the Vietnames business law in general must recognize and protect freedom of enterprise reorganization in order for business freedom to be a fundamental value and a universal right in Vietnam.

In the early 1990s, the law of enterprise in Vietnam did not have rules and regulations on enterprise reorganization. The Vietnames Enterprise Law 1999 made a considerable progress when it for the first time recognized various forms of enterprise reorganization: separation, division, merger, consolidation, and tranformation of enterprises .[3] The Enterprise Law 1999 provisions with regard to enterprise reorganization procedures and documentation were relatively simple. However, it still set up a legal framework for enterprises to reorganize, to seek opportunities in the rapidly changing business environment in Vietnam in the late twentieth and early twenty first century.

The Enterprise Law 2014 continuously recognizes the enterprise reorganization and adds new rules to correct the previous Enterprise law's shortcomings. From Articles 192 to 199, the Enterprise Law 2014 not only recognizes forms of enterprise reorganization as the previous law, but also provides in detail for reorganization forms, reorganization procedures, legal consequences, reorganization documentation and the procedure for registration of change. The Enterprise Law 2014 has improvement as follows: (i) *Easy implementation*: Clear and detailed rules and regulations on reorganization of enterprises in terms of forms, procedure, legal consequences and the registration of change; (ii) *Reform of administrative procedures and reduction of formalities that enterprises must implement*: When enterprises apply for enterprise reorganization, the business registration agencies must update the information on the national database of enterprise registration; (iii) *Shorten the time of registration for reorganized enterprises to have a quick process*: For cases of enterprise transformation, the business registration agencies issue the enterprise registration certificate within 3 working days after receiving a duly application; (iv) *Rules and regulations to avoid acts of competition restraint in the market:* For mergers or acquisitions, " if the successor company has 30% - 50% of the market share, the legal representative of former companies shall notify the competition authority before initiating the consolidation process, unless otherwise prescribed by the Competition Law. Consolidation is prohibited if the successor company has more than 50% of the market share after consolidation, unless otherwise prescribed by the Competition Law"[4] or " If a merging company has 30% - 50% of the market share, the legal representative of the company shall notify the competition authority before carrying out the merger process, unless otherwise prescribed by the Competion Law. Mergers are

[3] See Article 105-109 Enterprise Law of Vietnam 2014
[4] Article 194(3) Enterprise Law of Vietnam 2014

prohibited if the merging company has more than 50% of the market share after merging, unless otherwise prescribed by the Competition Law "[5].

The above-mentioned provisions of the Enterprise Law 2014 show that enterprises are easy to be re-organized. In addition, the reform of administrative procedures and shortened registration time facilitate a convenient procedure for enterprise reorganization and minimize the opportunity cost. Rules and regulations on conditions for mergers and consolidation create a fair "playground" for all business entities. It should be affirmed that freedom of enterprise reorganization in particular and business freedom in general have become universal in the Vietnamese existing law of enteprise..

2. Freedom to reorganize enterprise in a comparative perspective

Countries around the world have provisions on enterprise reorganization. Accordingly, enterprises have the right to separate, divide, merge, consolidate, and transform their forms of business. However, similar to Vietnamese law, foreign laws often focus on mergers and acquisitions because concerned activities are likely to result in market concentration leading to monopoly and restricted competition.

Delaware law, a state law in the United States provides in detail procedures and legal consequences of mergers and consolidation between domestic companies[6] and between domestic companies and foreign companies[7]. Furthermore, the foregoing state law has rules for specific situations such as mergers of subsidiaries; mergers or consolidation between a publicly-held company and privately-held company; mergers or consolidation of publicly-held companies and partnerships, etc.[8] Since mergers and consolidation have a potential impact on the market structure and economic efficiency, the United States in 1976 enacted the Hart-Scott-Rodino Antitrust Law (HSR). This federal law requires the parties to notify and submit the application to the Federal Trade Commission (FTC) and the Department of Justice before completing the merger. This rule applies to all mergers in which either party has a turnover of more than $ 100 million and the other of more than $ 10 million, with a transfer value exceeding $ 15 million.[9] If the merger company is not examined by the FTC and the Ministry of Justice, it will cancel the transfer agreement and can be fined up to $ 10,000 per day.[10] Obviously, state laws as well as federal law recognize freedom of enterprise reorganization. However, to take into consideration interests of other entities, and to ensure the stability and development of the market, the law has special provisions on mergers and consolidation activities to avoid the case of market concentration and competition restraint.

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[5] Article 195(3) Enterprise Law of Vietnam 2014

[6] See 8 DE Code § 251 (2016)
[7] See 8 DE Code § 252 (2016)
[8] See 2016 Delaware Code, Title 8, Chapter 1, Subchapter IX
[9] See 15 U.S.C. § 18a (2015)
[10] See 15 U.S.C. § 18a(g)(1) (2015)

Similarly, in Chapter 9, Chinese company law also recognizes mergers and separation of company. Mergers can be made by: (i) A company will be consolidated into another company and the consolidating company shall be dissolved; (ii) Two or more companies are merged to form a new company and the former companies shall be dissolved.[11] This means that the Chinese company law uses the term "mergers" to describe two forms, namely merger and consolidation. Furthermore, the “merger” in the Chinese Company Law is also provided by the Antimonopoly Act 2007. If “mergers” result in restricting competition, and thus is heavily regulated, it is considered to dominate the market in following cases: (1) the relevant market share of a business operator accounts for 1/2 or above in the relevant market; (2) the joint relevant market share of two business operators accounts for 2/3 or above; or (3) the joint relevant market share of three business operators accounts for 3/4 or above.[12] Singaporean law governs mergers in three ways: (1) 2 or more undertakings, previously independent of one another, merge; (2) one or more persons or other undertakings acquire direct or indirect control of the whole or part of one or more other undertakings; or (3) the result of an acquisition by one undertaking (the first undertaking) of the assets (including goodwill), or a substantial part of the assets, of another undertaking (the second undertaking) is to place the first undertaking in a position to replace or substantially replace the second undertaking in the business or, as appropriate, the part concerned of the business in which that undertaking was engaged immediately before the acquisition.[13]. Under this approach, "mergers" under Singaporean law includes consolidation, mergers and acquisitions. Singapore does not have its own antitrust and market concentration laws, but the Competition Commission of Singapore (CCS) will rely on the market to assess and conclude whether any merger will restrain competition. The Competitive Committee of Singapore has assessed and concluded that competitive activities are impeded by: (1) A merged entity with a market share of 40% or more; or (2) A merged entity with a market share of between 20% to 40% and a post-merger CR3[14] ratio of 70% or more.[15] Singapore law respects freedom of incorporation and reorganization, but any arrangement results in significant reduction of competiton in the market shall not be allowed.

All above-mentioned jurisdictions consider consolidation and mergers as a measure of market concentration. Market concentration can lead to abuse of the monopoly position or abuse of the market dominance that restrain competition. As a result, national laws provide certain barriers to limit this right of enterprises. Restricting market concentration under the form of mergers and

[11] Article 172 Company Law of the People's Republic of China (Revised in Dec 28, 2013)
[12] Article 19 Anti-monopoly Law of People’s Republic of China 2007
[13] Section 54(2) Competition Act of Singapore 2004
[14] The CR3 is the concentration ratio measured by adding the market shares of the 3 biggest firms in the market
[15] Lee Jwee Nguan (Director of Competition Commission of Singapore), *Overview of the Competition Act 2004* at http://www.singaporelaw.sg/sglaw/laws-of-singapore/commercial-law/chapter-27

acquisitions is not a factor indicating restraint of business freedom. Rather, it is a counter-balance to business freedom.

To harmonize business freedom and avoid competition restraint, besides the provisions of the Enterprise Law on mergers and acquisitions, Vietnamese Competition Law and other laws prohibit market concentration leading to restriction of competition. Vietnam Competition Law defines market concentration as behaviors of an enterprise, including mergers, acquisitions, consolidation, join - venture and other acts.[16] Market concentration is prohibited if it potentially has a significant negative impact on the Vietnamese market.[17] In addition, groups of enterprises shall be considered to hold the dominant position on the market if they take concerted action to restrict competition and fall into one of the following cases: (1) Two enterprises having total market share of 50% or more on the relevant market; (2) Three enterprises having total market share of 65% or more on the relevant market; (3) Four enterprises having total market share of 75% or more on the relevant market.[18] Vietnamese law on limitation of the right to merger and consolidation therefore has many similarities with foreign laws.

Vietnamese law also has rules and regulations in line with international treaties to which Vietnam is a contracting party. Accordingly, foreign investors easily have capital contributions in Vietnamese enterprises through investment activities such as acquisition of enterprises, merger or consolidation of enterprises, joint ventures, as discussed as follows:

In the general commitment to join the World Trade Organization (WTO), Vietnam commits that: *"Foreign service suppliers are permitted to make capital contribution in the form of buying shares of Viet Nam's enterprises. In this case, the total equity held by foreign investors in each enterprise may not exceed 30% of the enterprise's chartered capital unless otherwise provided by Viet Nam's laws or authorized by Viet Nam's competent authority. One year after accession, the 30% foreign equity limitation for acquisition of Vietnamese enterprises shall be eliminated, except for capital contribution in the form of buying shares of joint-stock commercial banks, and except for the sectors not committed in this Schedule. For the other sectors and sub-sectors committed in this Schedule, the level of equity held by foreign investors in acquisition of Vietnamese enterprises shall be corresponding to the limitations on foreign capital participation set forth therein, if any, including the limitations in the form of transitional periods, where applicable"*[19]. To date, the limitation on the foreign investors' ratio of equity in Vietnamese enterprises have been removed, except for some specific sectors such as banking and securities. Therefore, it is easy for foreign investor

[16] Article 22, Competition Law of Vietnam 2017 (Draft)
[17] Article 24, Competition Law of Vietnam 2017 (Draft)
[18] Article 18, Competition Law of Vietnam 2017 (Draft)
[19] See Schedule of Specific Commitments in Services (List of Article II MFN Exemptions), Vietnam as a member of WTO, WT/ACC/VNM/48/Add.2 27 October 2006

to conduct mergers, acquisitions, consolidation and joint venture because it is no longer subject to the limitation of the ratio of equity.

In the ASEAN commitment to build a favorable investment environment in the ASEAN region, member countries have signed a framework agreement on the ASEAN investment area (AIA). Article 4 of the Agreement states that: " *The AIA shall be an area where: there is a coordinated ASEAN investment co-operation programme that will generate increased investments from ASEAN and non-ASEAN sources; national treatment is extended to ASEAN investors by 2010, and to I all investors by 2020, subject to the exceptions provided for under this Agreement; all industries are opened for investment to ASEAN investors by 2010 and to all investors by 2020, subject to the exceptions provided for under this Agreement;…".* With this commitment, until now, Vietnam does not have any limit on the proportion of capital contributions and investment sectors for ASEAN foreign investors . Accordingly, investors from ASEAN countries will easily acquire, merge and consolidate with enterprises in any business lines or sectors in Vietnam (except for those in the exclusion list).

Bilateral agreements between Vietnam and the United States, Japan and other countries allow foreign investors to set up foreign-invested joint stock companies and loosen limitation of foreign investors's equity.[20] Furthermore, the parties undertake to apply the principle of national treatment and the most favored nation. [21] Therefore, investors in the same circumstances have the same opportunities to acquire, merge, and consolidate their business. At present, Vietnamese law respects the right to acquisition, consolidation and merger of enterprises of foreign investors, especially investors from countries Vietnam has an investment agreement.

Clearly, the Vietnamse law on mergers and acquisitions has many similarities with other jurisdictions and is compatible with bilateral, regional and global agreements. The limitation on the right to merges, acquitions and consolidation does not abolish business freedom , rather, it harmonizes interests of relevant parties, interests of enterprises with interests of the community. In other words, freedom of business has been universalized in the law of enterprise reorganization in particular and in business law in general.

3. Some recommendations and suggestions to universalize freedom of enterprise reorganization

Under the comparative approach to compare the Vietnamese jurisdiction with other jurisdictions, and with international agreement, the Vietnamse company law and investment law in particular, and business law in general recognize freedom of enterprise reorganization. It is one of the factors to promote business freedom. There are, however, some difficulties to implement these rights, particularly of mergers, acquisitions and consolidations.

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[20] Annex H, Vietnam-US Bilateral Trade Agreement

[21] See Article 2, Agreement on Freedom, Promotion and Protection of Investment in Vietnam - Japan 2003

Firstly, there is a lack of consistence between the Enterprise Law , the Law on Investment and the Competition Law on the form of mergers, consolidations and acquisitions. Under the Competition Law, activities of market concentration are comprised of mergers, consolidation and acquisitions. Accordingly, the three activities are independent and different. The Law on Investment recognizes the form of investment as capital contribution, purchase of share or capital contribution. Thus, through this investment activity, investors can take control and dominate all or one of the business sectors of an enterprise. This activity is considered as a business acquisition. However, the Enterprise Law 2014 does not provide for the right of acquisition.

Existing provisions of the Enterprise Law governs some , but not all forms of acquisition: (i) *An enterprise acquires another enterprise as a whole*: The acquiring enterprise shall become the owner of the acquired enterprise, and shall be assigned all the rights and obligations of the acquired enterprise. If the acquired enterprise is dissolved and merged into the acquiring enterprise, it is a merger operation. If the acquired enterprise remains independent of the acquirer, it is a relationship between a parent and a subsidiary company. The Enterprise Law has rules providing for those kinds of acquisition. (ii) *An enterprise can acquire a part of another enterprise through two forms of transaction*: (1) An enterprise acquires shares or equity in another enterprise sufficiently to control a whole or a part of the business. Under this transaction, the acquired business becomes one of the shareholders of the acquired enterprise. Purchase of share or equity is regulated by the section of the Enterprise Law providing for share or equity transfer. (2) An enterprise purchases part of the assets, rights and obligations of another enterprise through the enterprise purchase and sale contract between the purchasing enterprise and the selling enterprise. For example, enterprise A has two franchised restaurants and wants to sell a chain of restaurants to B. B will purchase a chain of restaurants with agreed rights and obligations between A and B. At present, The Vietnamese Enterprise law does not govern this kind of acquisition, as a result, has a legal gap for acquisition activities.

In practice, mergers and acquisitions occurs increasingly in Vietnam. A number of large M&A transactions took place, for examples, the Central Group (Thailand) acquired BigC Vietnam, Vinaconex-Viettel Financial Joint Stock Co (VVF) officially merged into Saigon - Haiphong Commercial Joint Stock Bank SHB and a number of other big deals have been implemented. Clearly, M&A transactions have a substantial impact on the Vietnamese economy, but the lack of consistency among legislations leads to difficult M&A procedures. Therefore, in order to ensure the consistency between legislations governing enterprise acquisition, the Enterprise Law should regulate the acquisition of business. Acquisition is often associated with consolidation or merger of enterprises, so the Enterprise Law should recognize the form of enterprise regorganization, that is "many enterprises merging into one enterprise" , namely consolidation,

mergers and acquisitions. Then, the Enterprise Law should provide for the procedure of enterprise reorganization related to acquisitions.

Secondly, the procedures for acquisition, merger or consolidation are not consistent between the Enterprise Law of enterprises, the Law on Investment and the Competition Law. For example, when two or more enterprises carry out merger procedures, they may have to follow three completely different procedures. Specifically, enterprises must carry out the merger procedure under the Enterprise Law, the procedure for registration of equity under the Law on Investment and the procedure for notification of market concentration under the Competition Law. These requirements are time-consuming, costly and creat burden for enterprises. For enterprises easily carrying out reorganization activities while still being strictly administratively monitored by state agencies, the three above-mentioned laws should have a uniform procedure. There should be only one agency functioning as an authorative agency and being responsible for the application of enterprise reorganization. It will assign the application and documentation to relevant agencies for business registration, investment and competition administration. It demands a network for information exchange between agencies of business registration, investment, and competition administration . Under the policy of protecting human rights and universalizing business freedom in Vietnam, state agencies are expected to coordinate strongly. In addition, a simple and least time-consuming procedure demands a good technical infrastructure to access and exchange business data between state agencies. Thus, business freedom would be protected, the state administration would be facillitated efficiently, and enterprises and other stakeholders could obtain easily busines information.

4. Conclusion

Business freedom is a fundamental economic right of human beings, so this right "enters" into all business relationships between business entities. In the current trend of globalization, business freedom has become universal on a global scale. Freedom of enterprise reorganization is an aspect of business freedom. Therefore, freedom of enterprise reorganization universalized in Vietnames business law is an unavoidable tendency. To protect freedom of enterprise reorganization in particular and business freedom in general, Vietnamese law needs to a systematic reform and improvement of, from upgrading technical infrastructure to reforming administrative procedures. Furthermore, amendment and supplementation of the law on enterprise reorganization is necessary for Vietnamese law to be in line with foreign laws. With a good legal framework, an up-to-date technical infrastructure and simple administrative procedures, business entities would have a foundation supporting enterprise reorganization.

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