

# Healthcare M&A 2019

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# Healthcare M&A

## 2019

**Contributing editors****Warren Taylor, Philippa Chatterton and Charlotte Beston****CMS**

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Lexology Getting The Deal Through is delighted to publish the first edition of *Healthcare M&A*, which is available in print and online at [www.lexology.com/gtdt](http://www.lexology.com/gtdt).

Lexology Getting The Deal Through provides international expert analysis in key areas of law, practice and regulation for corporate counsel, cross-border legal practitioners, and company directors and officers.

Throughout this edition, and following the unique Lexology Getting The Deal Through format, the same key questions are answered by leading practitioners in each of the jurisdictions featured.

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Every effort has been made to cover all matters of concern to readers. However, specific legal advice should always be sought from experienced local advisers.

Lexology Getting The Deal Through gratefully acknowledges the efforts of all the contributors to this volume, who were chosen for their recognised expertise. We also extend special thanks to Warren Taylor, Philippa Chatterton and Charlotte Beston of CMS, the contributing editors, for their assistance in devising and editing this volume.



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## TRANSACTIONAL ISSUES

### Structures

- 1 | What is the typical structure of a healthcare-related business combination in your jurisdiction?

Share purchase or capital purchase is typically selected for a healthcare-related business combination owing to its simplicity in procedure as compared to other structures, such as asset deals, mergers and consolidation. Asset deals are complicated by the fact that there are no clear guidelines for the purchase and sale of healthcare-related assets, whereas share deals enable the buyer to determine the level of investment in a more flexible and individualised way. Furthermore, a business combination carried out through a share deal ensures the investor can continue day-to-day business without significant changes. It is common for a target company to be structured as either a limited liability company or a joint stock company. Both are similar in terms of issues and procedures from a deal perspective.

### Timeline

- 2 | How long do healthcare business combinations usually take, and what factors tend to be most significant in determining the timing to completion?

It will take between two and six months and in some cases up to a year for completion of a healthcare-related business combination. It is difficult to be more precise as it depends on the schedule of issuance or amendment of any required licences and certificates by the authority recording the investment, as well as on the process of rectifying the outstanding issues of the target company identified during the due diligence. Share deals are typically faster and carry fewer execution risks compared with asset deals, although, even in the case of share deals, these will take time given that there are still regulatory approvals and filings required (for example, acquisition approvals and licence amendments). Land-related issues can also significantly delay the process.

### Representations and warranties

- 3 | What are the typical representations and warranties made by a seller in healthcare business combinations? What areas would be covered in more detail compared with a more general business combination?

Representations and warranties made by sellers in healthcare business combinations are not notably different from those in a business combination in other industries. In respect of healthcare entities that depend on the use of certain intellectual property rights or information technology, the seller must represent and warrant that it (or the target company in the case of a share deal) has all rights to use, develop, modify and maintain those intellectual property rights and information

technology. Moreover, lawful conduct of a healthcare business is closely supervised by the authorities and representations and warranties must cover regulatory compliance before closing.

As certain healthcare-related business areas are restricted to foreign investors (for example, certain areas of pharmaceutical sector – see question 4), the seller should represent and warrant that the target company is not engaged in those areas. Furthermore, the conduct of healthcare-related businesses often requires numerous compulsory licences (treatment, clinic operation, treatment techniques, radiation or X-ray). Therefore, the representations during the investment process are more detailed on the compulsory licences and permits than for business combinations in most other industries.

### Due diligence

- 4 | Describe the legal due diligence required in healthcare business combinations. What specialists are typically involved? What searches would typically be carried out?

The due diligence process carried out with regard to healthcare-related businesses differs from other due diligence processes as typical healthcare related checks are carried out. Those checks include an explicit check on the business lines of the healthcare target entity as there could be restrictions for foreign investors for certain business lines such as the pharmaceutical sector. For example, certain foreign invested clinics may have pharmacies within their premises. A careful due diligence must be carried out to ensure that both are not – or are not deemed to be – related.

Due diligence must also focus on the strict compliance of the target company with applicable regulation. In particular, it should emphasise the existence of valid treatment licences (ie, operation licence in respect of medical treatment entity) if the target company is a hospital since such licence is essential for the carrying out of hospital services.

Regarding due diligence on the major assets, these are commonly land use rights buildings and equipment (inter alia, healthcare-related equipment).

While carrying out the due diligence on employment law issues, it should be clarified whether all employees requiring any medical licence have been granted with the corresponding licence. Generally, only employees with direct patient contact are required by Vietnamese law to hold a medical licence. Foreign employees are also required to hold work permits.

Specific healthcare-related contracts are commonly medical and technical equipment rent-to-own lease agreements and other related activities and contracts regarding the set-up of pharmacies within the premises of the clinics. If there are pharmacies within the premises (see our comment on restrictions for foreign investment in this business line above), then we would also need to ensure that strategic supply agreements are in place to ensure that strategic supply of pharmaceuticals will continue to be available post combination. There may also be

related real estate issues for pharmacies located within the premises of the clinics since foreign investors are not allowed to establish pharmacies. Issues relating to the sub-lease of premises for the pharmacy business will come into play and it must be clear that the clinic also has a real estate licence to sub-lease land. Such licences are typically difficult to obtain in conjunction with healthcare licences.

Concerning insurance, medical malpractice insurances are compulsory and therefore due diligence should also focus on that specific issue.

### Risk exposure

#### 5 | If due diligence is not correctly undertaken, what specific healthcare risks might buyers inherit?

A strong focus should be paid to contracts that could violate Vietnamese law as they could lead to a termination of licences with the consequence that the healthcare target entity can no longer operate its business. That applies in particular to contracts on pharmacy distribution businesses as foreign investors are not entitled to conduct this business. Furthermore, since 2018, criminal liability is now applicable to companies in Vietnam relating to specific healthcare-related crimes such as manufacturing or trading counterfeit medicines for treatment or prevention of diseases or polluting the environment. These crimes could lead to a temporary or permanent suspension of business activities or a monetary fine. Only in certain cases of investment will criminal liability not transfer (merger, consolidation). Apart from that, criminal responsibility remains. Thus, investors need to undertake comprehensive due diligence to avoid risking their acquired company losing the right to operate.

Furthermore, it should be ensured that the target company does fulfil all regulatory healthcare related obligations such as ensuring the proper collection of medical waste since a violation could lead to an administrative penalty (ie, from 20 million to 30 million dong). In addition, in the case of a material breach of environment regulation, the healthcare entity may be subject to criminal liability. Depending on the breach, the healthcare entity may be subject to a fine up to 20 billion dong and may be permanently suspended from operation or banned from operation in some business lines or sectors for a period from one to three years.

### Specific diligence issues

#### 6 | How do buyers typically approach specific material diligence issues in healthcare business combinations?

The material diligence issues determined during the due diligence are usually agreed by the parties to be conditions subsequent. On certain material diligence issues the parties try to agree on indemnification provisions to reduce the investor's risks when this is possible.

### Conditions before completion

#### 7 | What types of pre-closing conditions are most common in healthcare business combinations?

Specific healthcare related pre-closing conditions mainly focus on the existence of all required licences and insurances since these licences and insurances are compulsory to conduct a healthcare related business. Customarily, the seller provides evidence that the medical malpractice insurance is valid, the medical malpractice insurance companies have been notified of a potential change of name of the target company, if any, and that the new or amended insurance policies have been issued by the insurance companies.

### Pre-closing covenants

#### 8 | What sector-specific covenants are usually included to cover the period between agreement and completion in healthcare business combinations?

There are no sector-specific covenants unique to healthcare business combinations. The seller is usually required to disclose business information relating to special healthcare-related factors including the number of patients, the pricing by practice and specialty amongst other things.

If the combination results in the change to the name of the target company, a covenant on the transfer, assignment or novation of rights and obligations on all signed contracts should be made to ensure the effectiveness of those contracts after the combination.

Change of control provisions in either insurance or finance documents are not usual but if they are present, they should be negotiated prior to closing.

### W&I insurance

#### 9 | What specific provisions are commonly seen in warranty and indemnity insurance policies for healthcare business combinations compared with general business combinations?

We do not commonly see W&I insurance in healthcare deals in Vietnam.

### Specific documentation

#### 10 | Is there any sector-specific documentation typically used in healthcare business combinations? Does this differ depending on the structure of the transaction?

To legally operate a healthcare related business, the company must have been granted specific permissions and licences especially with regard to specific medical equipment. Depending on the structure of the investment, the target company may be required to amend or renew these licences or permits. If the transaction is carried out as a share deal, there is generally no need for a specific documentation as there is no relevant change in the operating business of the target company itself. In this case, only notification to the Business Registration Office about the change of shareholders is required by law. In case of a transfer of assets or a merger of companies, transferring of legal titles might be necessary and could lead to a compulsory amendment or renewal of the relevant permits and licences, transfer of real estate ownership titles, transfer of intellectual property rights, etc.

### Post-completion undertakings

#### 11 | Which post-completion undertakings are common in healthcare business combinations? Which undertakings are common?

There is nothing specific or unique to healthcare business combinations. The usual post-completion undertakings that apply generally will be applicable here including licences where there is a change in the name of the target. Regarding healthcare-related businesses, special focus should be paid to medical treatment operation permits and licences as they are compulsory for conducting healthcare-related business. These post-completion undertakings are commonly agreed to be conditions subsequent to protect the investor from potential risks of failure.

## REGULATION

### Laws and regulations

- 12 What are some of the primary laws and regulations governing or implicated in healthcare-related business combinations? Are healthcare assets subject to specific regulation that would be material in a typical transaction? Is law and regulation of healthcare national or subnational?

These are:

- Law No.105/2016/QH13 of the National Assembly dated 6 April 2016 on Pharmacy, which took effect on 1 January 2017 (the Law on Pharmacy);
- Law No. 40/2009/QH12 of the National Assembly dated 23 November 2009 on Medical Examination and Treatment, taking effect as from 1 January 2011 (the Law on Medical Examination and Treatment);
- Decree No. 54/2017/ND-CP of the Government dated 8 May 2017 Guiding the Implementation of Law on Pharmacy, taking effect on 1 July 2017 (Decree 54);
- Decree No. 87/2011/ND-CP of the Government dated 27 September 2011 Detailing and Guiding the Implementation of Some Articles of the Law on Medical Examination and Treatment, which took effect on 15 November 2011 (Decree 87);
- Decree No. 109/2016/ND-CP of the Government dated 1 July 2016 Regulating on Issuance of Practicing Certificates to Healthcare Practitioners and Operation Licences to Healthcare Facilities, which took effect on 1 July 2016 (Decree 109);
- Decree No. 155/2018/ND-CP of the Government dated 12 November 2018 Amending Some Articles of Decree 109, taking effect on 12 November 2018 (Decree 155);
- Decree No. 36/2016/ND-CP of the Government dated 15 May 2016 Regulating Medical Equipment Management, taking into effect as from 1 July 2016 (Decree 36), as amended by Decree No. 169/2018/ND-CP of the Government dated 31 December 2018;
- Decree No. 102/2011/ND-CP of the Government dated 14 November 2011 Regarding Liability Insurance in Medical Examination And Treatment, which took effect on 1 January 2012 (Decree 102); and
- Decision No. 866/QD-BYT of the Minister of Health dated 14 March 2017 Approving the Document 'The Standard of Leadership Abilities, Basic Management of the Director of A Hospital' (Decision 866);

Medical machines and equipment shall be subject to classification regime, depending on possible levels of risks related to the design and production of such medical equipment. Depending on the group of the medical machines and equipment, the registration of publication of applicable standards (applicable to Group A) or the registration of free-sale (applicable to Groups B, C and D) is required before any medical machine or equipment is to be sold on the Vietnamese market.

All laws and regulations are national.

### Consents, notification and filings

- 13 What regulatory and third-party consents, notifications and filings are typically required for a healthcare business combination?

Depending on the way the investment into a healthcare-related business is carried out (share deal, asset deal, merger or amount of shares held by foreign investor for example), it may be necessary to amend or renew the permits and licences of the target company. Furthermore, it may be necessary to inform the relevant insurance or finance company about a possible change of control owing to the investment and request for an amendment or renewal of the insurance policies.

Similar to other more general businesses combinations, in case the acquirer is located in another jurisdiction, the acquisition of a healthcare business must be subject to approval of competent authority in charge of foreign investment, prior to acquisition.

Additionally, the new Law on Competition sets out a notification obligation prior to making any combination, which applies to healthcare business as well as businesses in other industries. In particular, as from 1 July 2019 (the date on which the new Law on Competition comes into effect), any combination that meets a certain threshold must be notified to the National Competition Committee prior to being carried out. The current regulations are, however, silent on the threshold and we are awaiting further guidance on this.

### Ownership restrictions

- 14 Are there any restrictions on the types of entities or individuals that can wholly or partly own healthcare businesses in your jurisdiction?

Although it is not clearly expressed under the laws, individuals are not entitled to own healthcare businesses. To clarify, only enterprises that have been issued with registration licences (enterprise registration certificate, investment registration certificate, investment licences, as applicable) are allowed to apply for operation certificates for healthcare businesses.

In addition, there is a requirement on minimum capital applicable to foreign investors. In particular, the WTO's Commitment of Vietnam permits foreign investors to invest in healthcare businesses, provided that they are able to meet the minimum following capital amount:

- minimum total investment capital for a hospital is US\$20 million;
- minimum total investment capital for a polyclinic unit is US\$2 million; and
- minimum total investment capital for a specialty unit is US\$200,000.

The above requirements on capital, however, do not apply to investors coming from Association of Southeast Asian Nations (ASEAN) countries (ie, being established in an ASEAN country) as per agreements under ASEAN Framework Agreement on Services.

In addition, foreign investors are not entitled to participate in or invest in the distribution and retail of pharmaceutical products and consequently foreign invested companies are not allowed to operate the same.

### Directors

- 15 Are there any restrictions on who can be director of healthcare businesses in your jurisdiction?

The concept of director of healthcare business does not exist under Vietnamese law (except for directors of hospitals). There is, however, under Vietnamese law a similar concept of 'person in charge of healthcare business', which may be used to describe the head of the healthcare business. In addition, the laws require that each healthcare business must appoint a person in charge of professional and technical operations.

The requirements for qualifications (professional degrees and practising certificate) and experience (years of practising) vary depending on the position (whether being a hospital director, person in charge of healthcare business or person in charge of professional and technical operations) and types of healthcare business. For example:

- in the case of specialty clinics, the person in charge of professional and technical operations must be a doctor with a practising certificate suitable for the practice scope of the clinic and must have worked as a healthcare practitioner in such speciality for at least 54 months;

- in the case of polyclinics, the person in charge of professional and technical operations must be a doctor with a practising certificate suitable for the practice scope of the clinic and must have provided medical examination and treatment for at least 36 months after being granted a practising certificate, or has directly participated in providing medical examination and treatment for at least 54 months.

### Operating outside the home jurisdiction

- 16 | What domestic regulatory issues might arise for a company based in your jurisdiction operating healthcare businesses in other jurisdictions?

The investment sector should be carefully taken into consideration. The Law on Investment does not allow investors to invest in the sectors of purchase or sale of humans, tissues or parts of the human body and activities relating to asexual reproduction. It means that Vietnamese investors are also not allowed to invest in those sectors in other jurisdictions.

### Cross-border acquirers

- 17 | What domestic regulatory issues arise when the acquirers of healthcare businesses are based outside the jurisdiction?

The capital issue should be taken into consideration. Post-acquisition by a foreign investor, the target will become a foreign-owned business. The WTO's Commitment of Vietnam permits foreign investors to invest in healthcare businesses, provided that they are able to meet the minimum following capital amounts:

- minimum total investment capital for a hospital is US\$20 million;
- minimum total investment capital for a polyclinic unit is US\$2 million; and
- minimum total investment capital for a specialty unit is US\$200,000.

The above requirements on capital, however, do not apply to investors coming from ASEAN countries as per agreements under the ASEAN Framework Agreement on Services.

### Competition and merger control

- 18 | What specific competition or merger control issues may arise in healthcare business combinations?

There is no specific competition or merger control that may arise in healthcare business combinations only. Healthcare business combinations, as well as other more general business combinations, however, are subject to the requirement on notification of combination if they fall within the cases where the notifications are required by law. In particular, as from 1 July 2019 (the date on which the new Law on Competition came into effect), any combination that meets a certain threshold must be notified to the National Competition Committee prior to proceeding with such combination. The current regulations are, however, silent on the threshold.

### State and private healthcare combinations

- 19 | Are there any differences for healthcare business combinations if the transaction relates solely to businesses servicing private clients rather than state-funded clients?

No, there are not.

## FINANCING AND VALUATION

### Financing

- 20 | How do buyers typically finance healthcare-related business combinations?

Financing should be secured overseas. Lending in Vietnam is generally not allowed to finance any business combination.

### Security

- 21 | Describe the typical security structures in healthcare business combinations, including confirmation of any registration or notary fees in respect of the security documents.

Local loans to finance an acquisition are not allowed in Vietnam.

### Financial assistance

- 22 | Are there any financial assistance rules that arise in healthcare business combinations?

No further rules are relevant beyond what we have already highlighted.

### Price and consideration

- 23 | What pricing and consideration structures are typical in healthcare business combinations?

There is no typical pricing structure applicable to healthcare business combinations. Pricing structures vary according to how negotiations take place and whether the buyer is a financial buyer, whether there are market comparables, whether there was a valuation made in a previous round of financing, historical financial data, projected financial growth, and the experience and expertise of the management team. It often comprises cash and non-cash (including contingent) consideration and can include earn-outs and clawbacks as part of the contingent consideration.

### Enterprise value

- 24 | How are healthcare-related businesses typically valued?

Concerning the valuation on healthcare-related businesses, a specific focus should be laid on assets and factors that are healthcare specific and constitute the major value of the target company. Those specific factors are, inter alia, specific healthcare-related equipment as well as the licence for its use. Furthermore, the workforce of the healthcare related business is considered as a major asset as those businesses are particularly reliant on their workforce. Other important factors include the treatment plan as well as the quality of the services indicated by several factors such as percentage of procedures with complications, patient ratings and hospital acquired infection rate. Another relevant factor is the revenue per bed day and the bed per square foot. As is the case in numerous industries, investors usually value their target on the basis of financial metrics such as net assets, profits and EBITDA, which are stated in the latest financial reports.



**TAX****Typical issues in combinations**

- 25 | What are some of the typical tax issues in healthcare business combinations and to what extent do these typically drive structuring considerations? Are there certain considerations that stem from the tax status of a target?

The healthcare sector in Vietnam is subject to several tax incentives (such as import duties, CIT tax, VAT).

If the target company is entitled to a preferential CIT rate of 10 per cent, as it qualifies as an investment in social activities (which is assessed based on criteria of scale, staff, land, construction, medical equipment and instruments, etc), the combination could lead to a loss of this privilege as it might provoke a change in any of the applicable criteria. The tax authorities will then assess whether the target company still qualifies as an investment in social activities enjoying those incentives or not. In particular, a target company will be considered investing in social activities if it satisfies prescribed criteria, as follows.

Regarding the scale: general hospitals must have at least 31 beds and specialised hospital must have at least 21 beds. In respect of hospitals located in Ha Noi City, Ho Chi Minh City, Hai Phong City and Da Nang City, these numbers are 100 beds in case of general hospitals and 500 beds in case of specialised hospitals;

Regarding the staff: having to comply with the Circular No. 08/2007/TTLT-BYT-BNV dated 5 June 2007. For example, a general hospital having 500 beds must have a ratio of staffs to beds, which is 1:1.

Regarding the land: has to comply with Vietnam Construction Standard TCXDVN 365:2007. For example, a general hospital having 500 beds must have minimum area of 40,000 square metres.

It should then be considered whether the combinations will exclude the target company from enjoying tax incentives.

**Tax risks for healthcare businesses**

- 26 | What are the typical tax risks that are associated with healthcare businesses? What measures are normally taken to mitigate those typical tax risks in healthcare business combinations?

Tax risks are likely to happen when the combination leads to a change of scale and structure of the target company as a consequence of which the target company would not be entitled to tax incentives anymore. This might happen in respect of CIT incentives. A tax due-diligence should be properly carried out to ensure whether the target company is entitled to any tax incentive. A representation and warranty should also be made to ensure that the combination will not result in a change to the scale and structure of the target company that may result in exclusion from the tax incentives.

**PUBLIC RELATIONS AND GOVERNMENT POLICY****Public relations**

- 27 | How do the parties address the wider public relations issues in healthcare business combinations?

With regard to public relation issues of an investment in a healthcare-related business, the parties try to focus on the positive effects of a healthcare business combination. As Vietnam is in need of healthcare-related investments, positive effects are very well suited to be pointed out. Thus, the parties try to highlight that investments are done in order to improve the living standard on healthcare-related issues and add value to Vietnamese society. Investments with negative effect on public health are avoided. The investors try to point out that the patients'

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interests are at the centre of each investment decision. Investments in Vietnamese healthcare-related businesses are supposed to grant local people access to healthcare in remote areas and to improve the quality of healthcare. By improving human lives, it will strengthen Vietnam's most important asset: human resources.

**Policy**

- 28 | How do parties address the wider political issues in healthcare business combinations?

The Vietnamese government tries to transform its economy into a market economy as well as to address the needs of the Vietnamese middle class and its rising standard of living. Thus, policies have been encouraging (foreign) investors to engage in the healthcare sector. In order to do so, Vietnamese laws and regulations on healthcare related businesses are currently mostly investor-friendly. Nevertheless, parties usually agree that if there are changes to laws and regulations prior to completion of transaction that may cause a material adverse effect, the transaction will not be carried out.

**UPDATE AND TRENDS****Current trends and developments**

- 29 | What are the current trends, and what developments are expected in healthcare business combinations in your jurisdiction in the coming year?

Vietnam is one of 21 countries that are classified by IMS Health to the group of countries where the pharmacy market shows a rapid development (with the market scale of pharmacy and medical equipment exceeding US\$10 billion per year). Vietnam is offering numerous opportunities for enterprises engaged in the medical and pharmaceutical sectors. In recent years, the Vietnam market has recorded a remarkable wave in M&A activity from both offshore and onshore investors. Together with the action of encouragement by the government through promulgating a few new regulations, foreign investors are taking advantages of M&A activities by approaching the Vietnamese market without a need to spend too much time on requesting the issuance of investment licences and constructions of production lines. M&A activity in



the pharmaceutical sector is forecast to be active in the coming years, as the State Capital Investment Corporation plans to divest from many pharmaceutical enterprises by 2020.

In the policlinics sector, M&A activity is soft. Investors do not seem interested in policlinic businesses, which are often family owned, which prevents those businesses from developing into public companies.

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