



# **Top 10 Considerations for Mergers and Acquisitions in the Renewable Energy Sector in Vietnam**

March 2024



## INTRODUCTION

Foreign investment by way of mergers and acquisitions (M&A) in the renewable energy (RE) sector often presents its own set of unique issues and considerations that should be understood and considered before, during, and after the M&A transaction process. Below, we set out the key considerations and issues in Vietnam for a successful M&A transaction in the RE sector:



# 1 Does the legal and regulatory framework allow for such investment?

In Vietnam, the Law on Investment (**LOI**), the Law on Enterprise (**LOE**), the Law on Electricity (**EL**), and Vietnam's Power Development Plan (currently in its eighth version, which was enacted in May 2023) (**PDP8**), are the primary legislation that permit and regulate foreign investment in RE by way of an M&A transaction.

Under the LOI, RE generation is a business line with no foreign ownership restrictions, and as such, foreign investors may own up to 100% of the equity in RE power projects in Vietnam. The EL provides some additional requirements regarding the regulatory and technical approvals for the implementation and operation of a RE project, as do supporting regulations to the EL, and the PDP also regulates the type, location, and volume of such investment. However, in general, there are no restrictions on foreign investment in the RE sector.



In March 2022, Vietnam also opened the RE sector to foreign investment in transmission grid development, but this is still a nascent sector and awaits further implementing legislation to fully comprehend the scope and requirements for such transmission investments (e.g., whether such investment must be in tandem with an electricity generation project or can be a stand-alone investment project).

## 2 Are there any investment incentives for RE projects?

Under Vietnamese investment laws, there are different corporate income tax (CIT) incentives applicable to RE projects. For example, investors in RE projects are eligible to receive preferential CIT rates, whereby the CIT is set at the reduced rate of 10% for the first 15 years (the standard CIT rate is 20%). Alternatively, investors could opt to be exempted from CIT for four years commencing from when the project starts generating taxable income, followed by a 50% CIT reduction for nine years commencing from the end of the CIT exemption period. Depending on the RE project's location, the project may also be exempted from the payment of land rental fees for a period from three to fifteen years. Note, however, that if a project site is rent-free, the project owner will not be entitled to use the land use rights as collateral with lenders (i.e., the land use rights cannot be mortgaged).



### 3 Is it better to acquire the project company or the project sets?

In our experience, an acquisition of the shares of a project company (Share Acquisition) is often preferred by foreign investors over an acquisition of the assets of a project company (Asset Acquisition) due to the following reasons:

- (i) The project company must obtain prior consent from the regulator, Vietnam Electricity (EVN), pursuant to the standard form power purchase agreement (PPA) (for wind and solar projects) in order to transfer the project company's rights and obligations under the PPA to a foreign investor as the result of the project transfer (as would be the case in an Asset Acquisition). Without the EVN's prior consent, the PPA will be terminated due to the project transfer. Additionally, the timing for EVN to provide its consent is not set out in the standard form PPA, and, as such, this process may take time to complete.

- (ii) Because a project transfer (i.e., Asset Acquisition) will result in the change of the investor implementing the RE project from the project company to the foreign investor, the incoming foreign investor will need to register or notify the relevant authorities, as applicable, on the amendments to the issued approvals/permits of the project, notably, the investment policy decision, electricity operation licenses, land use right certificates/land lease agreements, and technical agreements with EVN. This process is often cumbersome and may take significant time to complete, which can negatively impact the timeline for completion.

- (iii) An Asset Acquisition structure will not result in a transfer of the licenses, approvals, and permits issued to the RE project – which are often the most valuable component of the RE project from a foreign investor's perspective.

- (iv) The project company is typically established for the sole purpose of developing, constructing, and operating the RE project, and, as such, the history of the project company's establishment is typically uncomplicated by having additional business operations.

In the case of a Share Acquisition, the key regulatory processes that must be completed prior to the completion of the share transfer by a foreign investor are: (i) the M&A approval (if required); and (ii) the merger filing clearance (if the notification threshold under Vietnamese competition law is triggered). The statutorily prescribed timeline for obtaining the M&A approval and

merger filing clearance is clearly stated under the law. Further, under a Share Acquisition structure, no amendment to the issued licenses, approvals, and permits of the RE project is required unless there are also changes to the information of the project company recorded in the relevant issued permits (e.g., name or address of the project company) and such changes require an amendment to the issued permits with the relevant authorities.

## 4 What is the preferred investment structure to effect the M&A transaction?

The preferred investment structure for implementing the M&A transaction will depend largely on the current stage of the targeted RE project. In particular:

(i) At the pre-approved stage or development stage:

If the foreign investor contemplates acquiring a RE project at the pre-approved stage or the development stage, it is common that a foreign investor will enter

into a joint venture (JV) with a local partner to rely on the local partner's knowledge and experience about the local market and connections with the Vietnamese authorities in order to obtain permits and approvals and to achieve land clearance for the RE project. Additionally, a local partner with energy industry expertise and familiarity with certain specific technical requirements under local guidelines may be useful in developing the RE project.

(ii) Operational stage:

If the foreign investor contemplates acquiring a RE project at the operational stage (i.e., the project has reached the commercial operation date (COD)), the foreign investor may prefer to conduct the M&A through an offshore SPV or an onshore foreign-invested enterprise (FIE) in Vietnam (if applicable). This structure provides a foreign investor with the exclusive right to control and decide all matters related to the RE project. However, in rare cases, the foreign investor may still wish to maintain the JV structure for a specified, post-completion transition period in order to maintain the local partners' support in the project's operation and management to ensure the continued smooth operation of the RE project.

An offshore SPV is typically preferred if the foreign investor's investment in Vietnam is limited to a few separate transactions and RE projects and thus would not require establishing a commercial presence and maintaining an operations team in Vietnam. Otherwise, a foreign investor might find it more beneficial to establish an onshore FIE to directly manage a larger portfolio of RE projects in Vietnam for smooth operational purposes.



## 5 To remove or keep a local partner in the Project after completion of the M&A transaction?

This decision depends primarily on the stage in which the M&A transaction occurs. If the M&A occurs at the preliminary licensing stage, the foreign investor may wish to keep the local partner in the JV arrangement after the M&A completion to ensure success in obtaining the required permits and licenses for the RE project, which consequently reduces the development costs and legal risks. Otherwise, if the RE project has already reached the COD, then depending on the foreign investor's project development experience within Vietnam, the foreign investor may consider diluting or eliminating the shareholding of the local partner in the project.

In our experience, there are certain cases where a foreign investor might, despite having removed the local partner from the management of the project company, still require the local partner's assistance post-



completion to ensure that the RE project's operation remains smooth and to allow time for the foreign investor to accumulate sufficient experience to operate the RE project. The M&A transaction documents should be carefully drafted to incorporate such an arrangement.



## 6 When to time the M&A transaction (at the pre-approval stage, at the approved stage (but not yet having achieved COD), or at the operating stage)?

By law, a foreign investor can commence the M&A transaction at any stage of a RE project. However, in our experience, certain local authorities may impose restrictions on the transfer of equity or project assets before the COD milestone has been achieved, which would normally be included in the Investment Policy Decision issued to the project company during the pre-approval stage. High-level due diligence should be conducted to spot whether any of these restrictions apply.

Foreign investors should avoid commencing the M&A at the pre-approval/project preparation stage because the preliminary licensing procedures to obtain statutorily required permits and investment approvals can be cumbersome, and the possibility of the sellers obtaining all the permits and approvals required for the target RE project remains uncertain. Therefore, project companies that have already obtained key investment approvals (such as inclusion of their RE project in the local power development plan, environmental and construction permits, land use right certificates, or a PPA) would be more attractive targets to a foreign investor as they would bypass the complex preliminary licensing procedure stage.



## 7 Whether to acquire a project on a debt-free basis or with existing debt and then re-finance?

The M&A of an RE project on a debt-free basis or with existing debt (which can then be re-financed) are both acceptable under the law.

As RE projects typically require intensive capital investment, the target RE project is often financed with a significant portion of debt from lenders. Consequently, M&A transactions in the RE sector for projects with existing debt are common in practice.

It is likely that encumbrances and other restrictions relevant to an M&A transaction will be included under the financing documents for a debt-funded RE project, notably, change of control or project/equity transfer restriction provisions. Furthermore, upon the change of the investor in the RE project, the lenders will typically require the foreign investor to make certain additional commitments, notably, the requirement to re-pledge the foreign investor's shares in the project company in favor of the lender in a Share Acquisition structure.

## 8 What are the key permits and approvals to consider in an M&A transaction?

As with all investments in Vietnam, there will be certain permits and authorisations that will be legally required. For an M&A in the RE sector, we set out below the main permits and authorisations required for both the project itself as well as for the acquisition of the project company.

- (i) Key permits, authorisations, and material contracts for an RE project:
  - (i) Approval for the inclusion of the project into the PDP and the approval for the inclusion of the project's interconnection grid plan;
  - (ii) Investment Policy Decision, investment registration certificate (IRC), and enterprise registration certificate (ERC);
  - (iii) PPA;

- (iv) Grid connection/interconnection agreement;
  - (v) Land use right certificates;
  - (vi) Construction permit or an exemption from the construction permit;
  - (vii) Acceptance of the project's fire-prevention and firefighting system;
  - (viii) Approval for acceptance of construction works;
  - (ix) COD certificate; and
  - (x) Electricity business operation license.
- (ii) M&A transaction authorisations (if required):
    - (i) M&A approval; and
    - (ii) merger filing clearance.

## 9 What are the main issues that cause an M&A transaction to fail?

### (i) Land law compliance

Under Vietnamese land law, land users (i.e., holders of land use rights) are not permitted to use land plots for purposes other than those recorded in the land use right certificate. If the land is used for the wrong land use purposes, such land may be subject to recovery by the State (in the case of State-owned land) and, as a result, the RE project may be suspended, and EVN (as the power purchaser) has the right to cease purchasing power from the project company under the PPA. Generally, RE projects must be built on land with a land use purpose that permits the construction of energy infrastructure. However, current laws remain unclear in respect of the appropriate land use purposes of certain RE projects. We have observed various land issues





of all kinds in relation to M&A transactions in RE projects.

For example, the land use purposes for rooftop solar power projects where the photovoltaic panel system will be installed on greenhouses or other types of buildings used for agricultural cultivation purposes are yet to be clearly defined. In light of such uncertainty, the practice would depend on the views of each provincial authority where the RE project is located.

In another example, the land use term of the project land might be less than the PPA term, which presents the risk of the project land being recovered by the State prior to the expiry of the PPA term. Necessary steps are then required to extend the land use term to align with the PPA term, or special structures are often investigated to resolve this inconsistency.

(ii) Curtailment risks/grid unavailability

The standard form PPA for wind and solar projects provides EVN with a broad curtailment right whereby

EVN is not obliged to purchase or receive electricity in the following circumstances:

- (i) When the power plant of the seller is found not to operate in compliance with the power industry technical regulations and standards;
- (ii) When EVN installs equipment or repairs, replaces, inspects, or examines the grid system and such works are directly related to its connection to the power plant of the seller, in accordance with the regulations on the operation of the national grid and power industry technical regulations and standards;
- (iii) When EVN's grid system breaks down, or grid equipment directly connected to the grid system breaks down, or the grid operational regime breaches the regulations on the operation of the national grid and power industry technical regulations and standards; and



- (iv) When EVN's grid system needs support to recover after a breakdown, in accordance with the regulations on the operation of the national grid and power industry technical regulations and standards.

Recently, Vietnam has faced both grid overload issues in certain provinces and low electricity consumption demand, notably, in certain industrial zones, either of which results in the possible curtailment. As a matter of bankability, the fact that the standard form PPA provides EVN with a broad, non-negotiable curtailment right will adversely affect the bankability of the RE projects, especially when a foreign investor is looking for financing from international lenders.

(iii) Technical or environmental issues

The standard form PPA stipulates that EVN shall not be obliged to purchase or receive electrical output in the event that the seller (i.e., project company) does not operate or maintain its project in compliance with the power industry technical regulations and standards. Therefore, if it is the case, EVN may suspend the PPA until the Company's violation is ended.

(iv) Failure to secure the M&A Approval

Under the LOI, M&A Approval must be obtained before the completion of an M&A transaction in the following three cases:

- (i) if the foreign investor is acquiring ownership in a

target company that is engaged in a conditional business line (i.e., sector) for foreign investors (such as hydropower, offshore wind, or nuclear power);

- (ii) if the acquisition results in the foreign investor or foreign-invested economic organization owning more than 50% of the charter capital of the target company; or

- (iii) if the target company has a land use right certificate for land on an island, coastal, or border commune, ward, or



town, or in another area that affects national defense and security.

The M&A Approval is a key governmental approval before the completion of the M&A transaction. In our recent experience, the practice of obtaining the M&A Approval is largely dependent on the views of the relevant provincial Department of Planning and Investment office of the location of the target company's head office. Certain deal structuring steps are often exploited to ensure efficiency in this key procedure.

timely and accurate due diligence investigation:

- (i) the timely management and alignment of the parties' expectations throughout the due diligence process;
- (ii) the involvement of legal advisors who are experienced in the RE sector and M&A transactions in the RE sector;
- (iii) the data room should be well-organized (a virtual data room is preferred over a physical offsite location); and
- (iv) the effective communication between the buy-side, sell-side, and their representatives and other advisors (e.g., tax, technical, and financial).

## 10 What are the key factors that help to ensure a thorough and effective due diligence process?

While every M&A-related legal due diligence exercise will present its own set of unique issues, we have found, based on our experience, that the following key principles provide the most success in ensuring a



# Key Contacts



**Kevin Hawkins**

Partner

kevin.hawkins@dfdl.com



**Uyen Le**

Legal Adviser

uyen.le@dfdl.com

