

Restructuring across borders
Vietnam

CORPORATE RESTRUCTURING AND INSOLVENCY PROCEDURES | MARCH 2024





Contents



Introduction

On 19 June 2014, the National Assembly of Vietnam adopted Bankruptcy Law no. 51/2014/QH13 (the **Bankruptcy Law**), which became effective on 1 January 2015, governing the bankruptcy regime applicable to all enterprises and cooperative organisations established under the law of Vietnam. The Bankruptcy Law does not regulate any matters of personal bankruptcy. This factsheet does not discuss regulations applicable to regulated companies operating in regulated sectors. Regulated companies such as banks may be subject to different and/or additional procedures administered by the State Bank of Vietnam and other requirements as regulated by specialised regulations.

The above restructuring and insolvency options under bankruptcy proceedings are only available to the distressed company upon a decision for commencement of bankruptcy proceedings by a competent court accepting a legitimate petition for bankruptcy (a **Commencement Decision**). Without a Commencement Decision, a corporate borrower must duly perform its contractual payment obligations.

Secured creditors may elect to enforce their security in respect of overdue debts separately from and before the

commencement of bankruptcy proceedings, as security over a securing party's assets may be enforced without the commencement of bankruptcy proceedings against the securing party.

Where a company has sufficient cash for settlement of all outstanding debts but decides to terminate its operation, such company shall apply for dissolution procedures under the Law on Enterprises no. 59/2020/QH14 effective on 1 January 2021, rather than the bankruptcy proceedings under the Bankruptcy Law.

Where a corporate borrower in Vietnam experiences financial difficulties, the principal restructuring and insolvency options available under the Bankruptcy Law are:

- creditors' acknowledgement of solvency and termination of bankruptcy proceedings;
- rehabilitation of business; or
- bankruptcy.



Enforcement of security out of bankruptcy proceedings

When a corporate borrower faces financial difficulties, a secured lender can enforce security in accordance with contractual terms upon an event of default. This step can be implemented before the commencement of bankruptcy proceedings. If security over a securing party's assets is enforced when bankruptcy proceedings have already been commenced against the securing party, the enforcement of the security may be adversely affected.

Vietnamese law allows parties to contractually agree on the enforcement of security in accordance with the applicable legal framework¹. The parties can agree on enforcement by way of handover of the security asset or by selling it via auction or private sale². The law recognises that enforcement of security in compliance with the relevant security agreement shall not require any authorisation or consent of the securing party³. Where the enforcement of security by way of handover of the security assets to the secured party in replacement of the performance of the secured obligations is agreed, the secured party is allowed to take over the ownership over the secured assets⁴ with necessary ownership registration procedures to be made to effect the change. It is noted further that it is quite challenging to take possession of the collateral in practice

and the court proceeding should be initiated in the event the securing party is not cooperative for handing over the collateral to the secured party for the enforcement purpose.

With respect to foreign lenders, the enforcement of security is further subject to satisfaction of certain requirements by law due to the nature of an offshore loan. The requirements include, among other things: (i) due registration of an offshore loan having term longer than 12 months with the State Bank of Vietnam; (ii) compliance with the limitation of foreign ownership in the event of conversion of the debt into shares; and (iii) compliance with rules on conversion of local currency to foreign currency for remittance of enforcement proceeds out of Vietnam.

The enforcement can be made consensually between the parties or with the assistance of the court⁵.

¹Article 49.1 of Decree 21/2021/ND-CP

²Article 52.1 and 52.2 of Decree 21/2021/ND-CP

³Article 49.2 of Decree 21/2021/ND-CP

⁴Article 59.1 of Decree 21/2021/ND-CP

⁵Article 52.6 of Decree 21/2021/ND-CP



Restructuring under contractual arrangements out of bankruptcy proceedings

Vietnamese law does not provide any special scheme that regulates how creditors and the distressed company should deal with the settlement of overdue debts prior to the Commencement Decision. Accordingly, the parties must comply with the signed contractual terms to settle any obligations and conflicts. Prior to the Commencement Decision, it is possible for the parties to mutually set forth a restructuring plan under an agreement either before or after the corporate borrower encounters the financial difficulties. Restructurings can be effected on a simple contractual basis and conducted out of court in this way.



Key milestones of bankruptcy proceedings



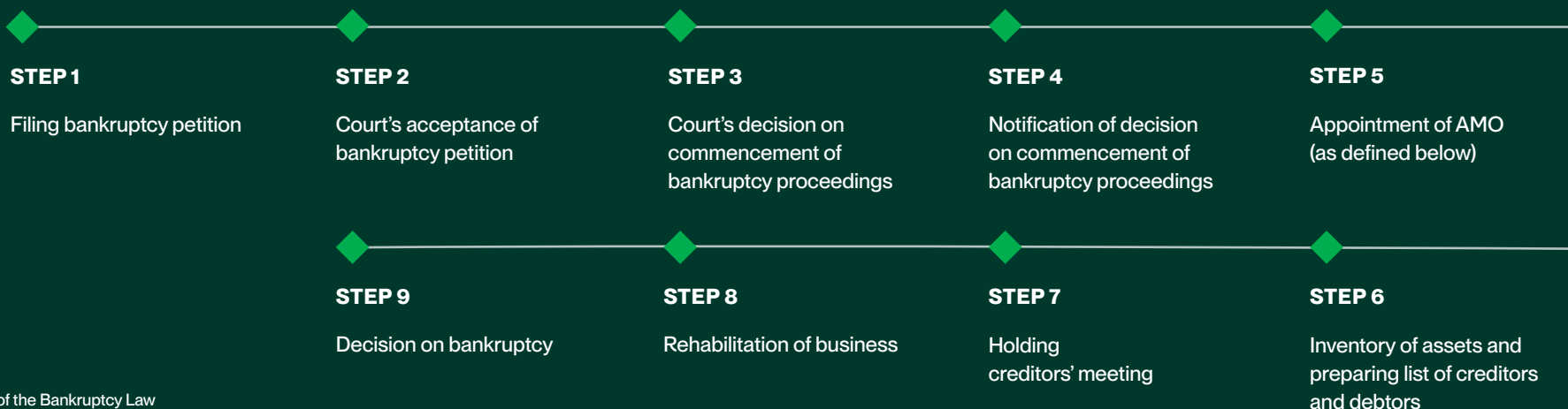
PRIOR TO COMMENCEMENT DECISION

ROUTE TO BANKRUPTCY

The Bankruptcy Law is engaged once a bankruptcy petition is filed with a competent court by an eligible party. The petition can be filed if the distressed company is by definition 'insolvent', i.e. when the company fails to pay an overdue debt within three (3) months from its due date. Although the distressed company can voluntarily liquidate and dissolve outside of insolvency proceedings with a decision of its owners, members or shareholders, bankruptcy filing is only allowed after it is insolvent. In practice, the relevant court may require certain supporting documents for evidencing that the debt has become overdue for more than 3 months which may include a debt acknowledgement from the distressed company or from a court's judgment or arbitral award.

A bankruptcy petition can be initiated by parties that are allowed to do so by law, such as the distressed company, unsecured creditors or an employee. However, the legal representative of a company, the owner of a single member limited liability company, the chairman of the members' council of a two or more member limited liability company, or the chairman of the board of director of a joint stock company is **obliged** to make a bankruptcy filing if such person becomes aware that the company has become 'insolvent'⁶. Failure to comply would subject these personnels to a monetary fine ranging from 1-3 million VND, which is a relatively small amount.

Bankruptcy proceedings can be a lengthy process with multiple stages. The key milestones can be summarised as set out below.



⁶Article 5 & 6 of the Bankruptcy Law

Bankruptcy filing process



Within 3 working days upon receipt of the bankruptcy petition, the court shall appoint a judge for the bankruptcy settlement, after which the appointed judge will handle the petition and notify the insolvent entity of its acceptance or dismissal within another 3 working days (step 1 to step 2).⁷ Within 3 working days upon the court's receipt of the bankruptcy petition, the insolvent company and creditors may nevertheless submit a written request to the court for permission to negotiate withdrawing of the request within a period of no longer than 20 days from the receipt of the request.⁸ If the parties reach an agreement on withdrawal, the case shall be dismissed.

If the case is accepted by the court, a moratorium shall be in place within 5 working days. This includes:⁹

- Enforcement of a court or arbitral judgement, award or decision against assets of the company, except for enforcement of any judgement, award of decision obliging the insolvent company to compensate for life, health or honour or to pay wages to employees;
- Civil, business, commercial or labour legal proceedings (but not criminal or administrative proceedings) to which the insolvent company is a party; and
- Enforcement of security over assets of the insolvent company by secured creditors, except for assets that are exposed to a risk of being destroyed or a considerable decrease in value.

If the court thereafter decides to not issue a decision for commencement of insolvency proceedings, the above will be lifted. If the court decides to issue a decision for commencement of insolvency proceedings, the enforcement of a court judgement or arbitral award will be suspended. This suspension will be lifted if the court decides to terminate the insolvency proceeding because the company is no longer 'insolvent' or the recovery plan terminates.

Meanwhile, after the court's acceptance and the distressed company has paid bankruptcy fee, the judge shall decide whether bankruptcy proceedings commence within 30 days thereafter (step 3).

⁷ Article 31& 32 of the Bankruptcy Law

⁸ Article 37 of the Bankruptcy Law

⁹ Article 41 of the Bankruptcy Law

Post commencement decision

APPOINTMENT OF AMO

After the Commencement Decision, the court will appoint an asset management officer or an asset management liquidation company (an **AMO**) (step 5). However, it is also possible for the person filing the petition to propose an AMO to the court, and the judge can appoint this person if he/she has sufficient qualifications and there is no conflict of interest.

Lawyers, auditors, or persons with a bachelor degree in law, economics, accounting, finance, banking with more than 5 years of working experience in that field are eligible to attain practicing certificate as an AMO. To practice, the person must have full civil act capacity, and ethical qualities, sense of responsibility, integrity and objectivity.¹⁰ A list of qualified AMO is publicly available in certain provinces and cities.

The AMO handles inventory of assets and preparing list of creditors and debtors (step 6), and supervise execution of the rehabilitation plan alongside the creditors committee (refer to 2.5 Rehabilitation of Business). The AMO must report to the court, though they have the right to suggest the sale of assets and are authorised to do so upon the court's approval.

¹⁰ Article 12 of the Bankruptcy Law



Limitations on business operation

PROHIBITED ACTS

The distressed company shall carry out its business operation under the supervision of the judge and the AMO. The distressed company is however prohibited from carrying out the following activities:¹¹

- concealing, disposing of or donating any assets;
- paying any unsecured debts except for unsecured debts arising after the commencement of bankruptcy proceedings and paying wages to employees of the distressed company;
- abandoning any right to claim a debt; and
- converting unsecured debts into debts secured or partly secured by the assets of the insolvent company.

During the bankruptcy proceedings, the distressed company can be entitled to certain special treatments offered to it, as set out below.

SUSPENSION OR TERMINATION OF PERFORMANCE OF EFFECTIVE CONTRACTS

Within five (5) business days after the court accepts the bankruptcy petition, the distressed company has the right to request the court to issue a decision to

temporarily suspend the performance of certain contracts where the performance of such contracts has or may have an adverse effect to the distressed company, except for settlement of secured loans¹².

If the court decides not to commence the bankruptcy proceedings, such temporary suspensions shall be lifted. If the court does decide to commence the bankruptcy proceedings, within five (5) business days from the date of Commencement Decision, the court must review the temporarily suspended contracts to decide whether to: (i) continue the performance of such contracts if such continuation does not adversely affect the distressed company; or (ii) terminate such contracts.

The suspension or termination of contractual performance is a statutory relief measure to allow the distressed company to halt its performance of any obligation causing adverse effects. If the counterparty suffers any losses due to the suspension or termination of contractual performance by the distressed company, such party can become an unsecured creditor, whose interest shall be settled in accordance with the bankruptcy proceedings¹³.

CLAWBACK

An AMO is responsible for reviewing the distressed company's transactions conducted within the six (6) months (or 18 months, where entered into with "related persons") preceding the Commencement Decision to request the court to invalidate them if the transaction relates to¹⁴:

- the transfer of assets not at market price;
- conversion of an unsecured debt into a debt secured or partly secured by the assets of the distressed company;
- payment or setoff which benefits a creditor in respect of a debt that has not yet become due or with a sum that is larger than a debt which has become due;
- donation of the assets;
- a matter that is outside the purpose of the business operation of the distressed company; or
- other transactions for the purpose of disposing of the assets of the distressed company.

¹¹ Article 48 of the Bankruptcy Law

¹² Article 61.1 of the Bankruptcy Law

¹³ Article 62.2 of the Bankruptcy Law

¹⁴ Article 59 of the Bankruptcy Law

Limitations on business operation (cont.)

Upon the declaration of a null and void transaction, the parties to such transaction shall return what it has received to the other party. If it is impossible to return in kind, the parties shall return the equivalent monetary value instead¹⁵. It is not clear whether, in the event that the distressed company is unable to return what it received either in cash or in kind to the relevant counterparty, such party is still obliged to return what such party received to the distressed company. It is likely that the relevant counterparty shall perform its part independently and thus, it will become an unsecured creditor of the bankruptcy proceedings where the distressed company is unable to return what it received from the null and void transaction.

SET-OFF AND NETTING

The distressed company is allowed to offset its contractual obligations under contracts concluded before the Commencement Decision provided that such set-off is agreed by the AMO, who is then required to report that to the court¹⁶.

There are however specific provisions relating to bankruptcy which could limit the operation of a netting or a set-off in certain limited circumstances. A netting or a set-off in the event of insolvency could be regarded as “settlement of reciprocal obligations” in which the counterparty has

to carry greater obligations and becomes an unsecured creditor of the bankruptcy proceedings¹⁷.

Following the court’s decision on bankruptcy declaration, an account bank of the distressed company cannot settle the distressed company’s debts with the available monies therein without an approval in writing of the court or the civil judgement enforcement authority¹⁸.

LIABILITY FOR GUARANTEES PROVIDED BY THE DISTRESSED COMPANY AS A GUARANTOR

If an obligation guaranteed by the distressed company is not due yet, unless the guaranteed party is also insolvent, by law the guaranteed party shall replace the guarantee with new security unless the secured party and the guaranteed party agree otherwise¹⁹. If both the distressed company as a guarantor and the guaranteed party are insolvent, the distressed company must comply with its guarantee obligation²⁰.

Vietnamese law does not contemplate the rights of subrogation for the guarantor although the parties could contractually agree for the assignment of the lender’s claim to the guarantor following the guarantor’s performance of the guaranteed obligation.

If the guaranteed obligation is due, the distressed company as a guarantor shall perform its obligation to the extent of its financial capacity and the guaranteed party shall pay the remaining liabilities²¹.

Practically, as the guarantor is insolvent, the secured party would become a creditor. The settlement of any overdue debt by the distressed company as a guarantor will be in line with the bankruptcy proceedings.



15 Article 131.2 of the Civil Code
16 Article 63.2 of the Bankruptcy Law
17 Article 63.3 of the Bankruptcy Law

18 Article 73 of the Bankruptcy Law
19 Article 55.2(b) of the Bankruptcy Law

20 Article 55.3 of the Bankruptcy Law
21 Article 55.2(a) of the Bankruptcy Law

Limitations on business operation (cont.)

FORECLOSURE OF SECURED ASSETS

The enforcement of security granted by the distressed company must be suspended within five (5) business days from the date the relevant court accepts the bankruptcy petition²². Following the issuance of the Commencement Decision, the court may, at its own discretion, allow the enforcement of security to be resumed provided that (i) the secured assets will not be used for the rehabilitation purpose or (ii) in the event the secured assets are used for the rehabilitation purpose, the enforcement shall be specified in the rehabilitation plan which shall be approved by the secured creditors.

Vietnamese law is silent on how long the suspension will last and it seems that the competent court will determine this issue on a case by case basis. However, the enforcement of security may be permitted by the court if there is a risk that the secured assets will be destroyed or the value of the secured assets will be materially reduced²³. We note that at all times after the commencement of the bankruptcy procedures, secured creditors will remain secured and be ranked in priority in payment to any unsecured creditors.

²² Article 41 of the Bankruptcy Law
²³ Article 53 of the Bankruptcy Law



Personal liability

Officers and directors will not generally be liable for obligations of the company. However, officers can be held personally liable for compensation if they are in breach of Vietnamese law during the bankruptcy proceeding.

Creditors' meeting

The meeting of creditors is an important step of the bankruptcy proceedings (step 7). Attendants of the meeting of creditors include (i) the person who filed the bankruptcy petition, (ii) the legal representative of the distressed company, (iii) creditors identified in the list of creditors; (iv) the representative of the employees, and (v) guarantors who implemented any guarantee obligations in favour of the distressed company but are yet to collect the guaranteed amount from the distressed company²⁴.

A meeting of creditors shall make a decision to request the court for (i) termination the bankruptcy procedures if the distressed company is considered still solvent, or (ii) rehabilitation of business of the distressed company, or (iii) declaration of the distressed company's bankruptcy²⁵.

At this stage, it is up to creditors to decide whether they believe the distressed company is solvent or not. Practically, the distressed company would be required to provide necessary information to convince creditors. If the meeting of creditors decides that the distressed company is not insolvent, creditors can issue a decision to request the court to terminate of bankruptcy proceedings. Once the court issues a decision on termination of bankruptcy proceedings, the distressed company shall resume its normal operation and the regulations under the Bankruptcy Law shall not apply to the distressed company any more. As a result, the distressed company must duly perform its contractual obligations.

The quorum of the meeting of creditors is creditors representing at least 51% of the total value of unsecured debts of the distressed company and the AMO²⁶. A decision of the meeting of creditors shall be passed when more than half of the unsecured creditors (by number) attend the meeting and creditors representing at least 65% of the total value of unsecured debts approve the decision²⁷.

²⁴ Article 77 of the Bankruptcy Law

²⁵ Article 83.1 of the Bankruptcy Law

²⁶ Article 79 of the Bankruptcy Law

²⁷ Articles 79 and 81.2 of the Bankruptcy Law



Rehabilitation of business

If the meeting of creditors requests the rehabilitation of business, the distressed company must establish a plan for rehabilitation of its business (the **Rehabilitation Plan**) and send such plan to the court, creditors and the AMO to seek their opinion²⁸ (step 8). The court, creditors and the AMO shall give responses to the distressed company and the distressed company then finalises the Rehabilitation Plan to resubmit to the AMO and creditors. The next meeting of creditors will consider whether the proposed Rehabilitation Plan is passed or not. If the creditors do not approve the Rehabilitation Plan, the court shall declare the distressed company bankrupt²⁹.

The Rehabilitation Plan may include measures of capital mobilisation, debt reduction, debt waiver, rescheduling payment of debts, change in production or products portfolio, renovation of production technology, reorganisation of management team, merger or demerger of production department, issuance of shares to creditors and others, sales or lease of property, or other measures allowed by law³⁰. In the case where the rehabilitation plan involves using secured assets/collaterals, there needs to be clear outline of duration of use, plan of use, and the approval of the secured creditor of the collateral in question.³¹

The ranking for repayment of debt is in the following order:³²

- Cost and expenses related to the bankruptcy proceeding;
- Unpaid wages, severance allowances, social insurance and health insurance and other employee benefits;
- Debts arising subsequent to the commencement of the insolvency procedure that are used for the purpose of business recovery of the company;
- Financial obligations to the state; unsecured debts payable to the creditors named in the list of creditors; and secured debts that remain unpaid because the value of secured assets being insufficient to repay them; and
- The remaining assets will be distributed to the owner or owners of the bankrupt company.

The quorum of the meeting of creditors is creditors representing at least 51% of the total value of unsecured debts of the distressed company and the AMO³³ and a decision of the meeting of creditors shall be passed when more than half of unsecured creditors (by number) attend and creditors representing at least 65% of the total value of unsecured debts approve the decision³⁴. The decision of the meeting of creditors shall be binding on all creditors³⁵.

The duration of the Rehabilitation Plan shall be decided by the meeting of creditors. If the meeting of creditors does not decide this matter, a 3-year period from the date of passing the Rehabilitation Plan shall be applied³⁶. During the Rehabilitation Plan, the AMO and creditors shall supervise the business activities of the distressed company. Every six months, the distressed company shall report on the implementation status to the AMO, which shall in turn report to the judge and creditors³⁷. Any changes to the Rehabilitation Plan during its implementation shall be approved by the creditors at the same approval threshold applied at the meeting of creditors³⁸.

If the distressed company fulfils the Rehabilitation Plan and it is no longer insolvent, the court shall terminate the implementation of rehabilitation proceedings.

28 Articles 87.1 of the Bankruptcy Law
29 Article 91.7 of the Bankruptcy Law
30 Article 88.2 of the Bankruptcy Law
31 Article 91.5 of the Bankruptcy Law

32 Article 54 of the Bankruptcy Law
33 Article 90.1 of the Bankruptcy Law
34 Article 91.5 of the Bankruptcy Law
35 Article 91.6 of the Bankruptcy Law

36 Article 89 of the Bankruptcy Law
37 Article 93 of the Bankruptcy Law
38 Article 94 of the Bankruptcy Law



Declaration of bankruptcy

If (i) the meeting of creditors fails to be convened³⁹, or (ii) the meeting of creditors decides to request that the court declare the distressed company bankrupt⁴⁰, or (iii) the distressed company fails to implement the Rehabilitation Plan, or (iv) the distressed company remains insolvent after the expiry of the term of the Rehabilitation Plan, the court shall issue a decision declaring the distressed company bankrupt (step 9)⁴¹.

After the court issues a decision on bankruptcy declaration, if the distressed company has no assets to be liquidated and distributed, the proceedings end. Otherwise, the assets of the distressed company shall be distributed in the following waterfall payment⁴²:

- costs of the bankruptcy;
- unpaid wages, severance allowances, social insurance and health insurance of the employees and other benefits in accordance with the executed labour contracts and collective labour agreement;

- debts arising subsequent to the commencement of the bankruptcy procedure which serve the purpose of business recovery of the distressed company; and
- financial obligations to the State (e.g., taxes and duties); unsecured debts payable to the creditors named in the list of creditors; secured debts which remain unpaid due to the value of the assets being insufficient to repay them.

Where the value of assets does not suffice to distribute to all parties listed above, the payment to the parties in the same priority ranking will be pro rata to their debt claims⁴³. If there is residual value of the assets of the distressed company after full payment of the above items, such value shall be returned to shareholders.



39 Article 80.3 of the Bankruptcy Law
40 Article 83.1(c) of the Bankruptcy Law
41 Article 96.2 of the Bankruptcy Law

42 Article 54.1 of the Bankruptcy Law
43 Article 54.3 of the Bankruptcy Law

Key contacts

If you require advice on any of the matters raised in this document, please contact any of our partners or your usual contact at A&O Shearman, or email rab@aoshearman.com.

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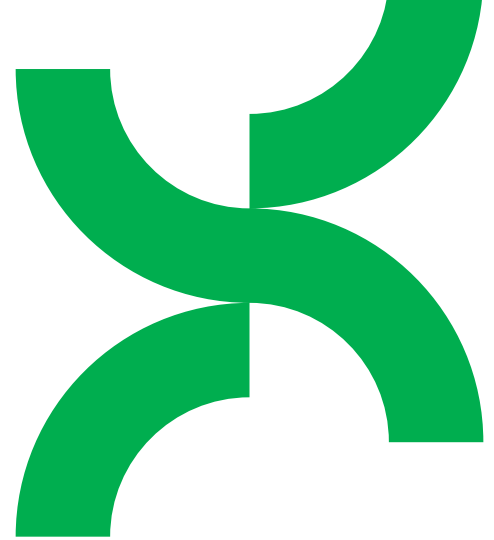
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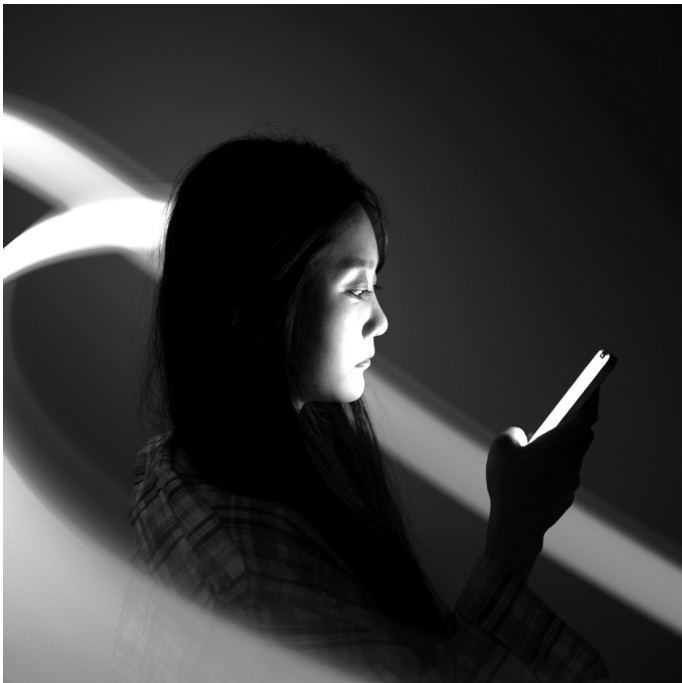
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