

Vietnam Competition Law Series

Restrictive Agreements in Vietnam – Towards Greater Clarity and Coverage in 2019





RESTRICTIVE AGREEMENTS IN VIETNAM TOWARDS GREATER CLARITY AND COVERAGE IN 2019

Vietnam's competition law is poised for big changes, as the new 2018 Law on Competition comes into force from 1 July 2019 onwards.

The latest changes bring greater clarity to regulating restrictive agreements by expressly specifying that extra-territorial practices and vertical agreements are caught. It will also lead to greater coverage of the types of restrictive agreements that are caught by dropping the 30 percent market share safe harbour threshold and expanding the list of per se prohibitions.

This latest issue in our Vietnam Competition Law series focuses on how restrictive agreements are regulated in Vietnam, and highlights the differences between the 2004 Law on Competition and the upcoming 2018 Law on Competition.



| Whom Does it Cover?

The 2004 and 2018 Law on Competition applies to any practices, whether involving Vietnamese or foreign individuals or enterprises, which have a competition restraining impact on Vietnam's market.



The 2004 Law on Competition applies to organisations and individuals conducting business (collectively known as ‘enterprises’), enterprises conducting business in State monopoly industries and sectors, and foreign enterprises operating in Vietnam. It also covers industry associations operating in Vietnam. There are no express provisions stating that the law applies to foreign entities that do not operate in Vietnam.

The 2018 Law on Competition expressly expands the provisions to have extra-territorial reach by covering all practices which have or may have a competition restraining impact on Vietnam’s market. It also expands the entities covered to expressly include public professional entities and professional associations operating in Vietnam, and related domestic and foreign agencies, organisations and individuals.

2004
Law on Competition

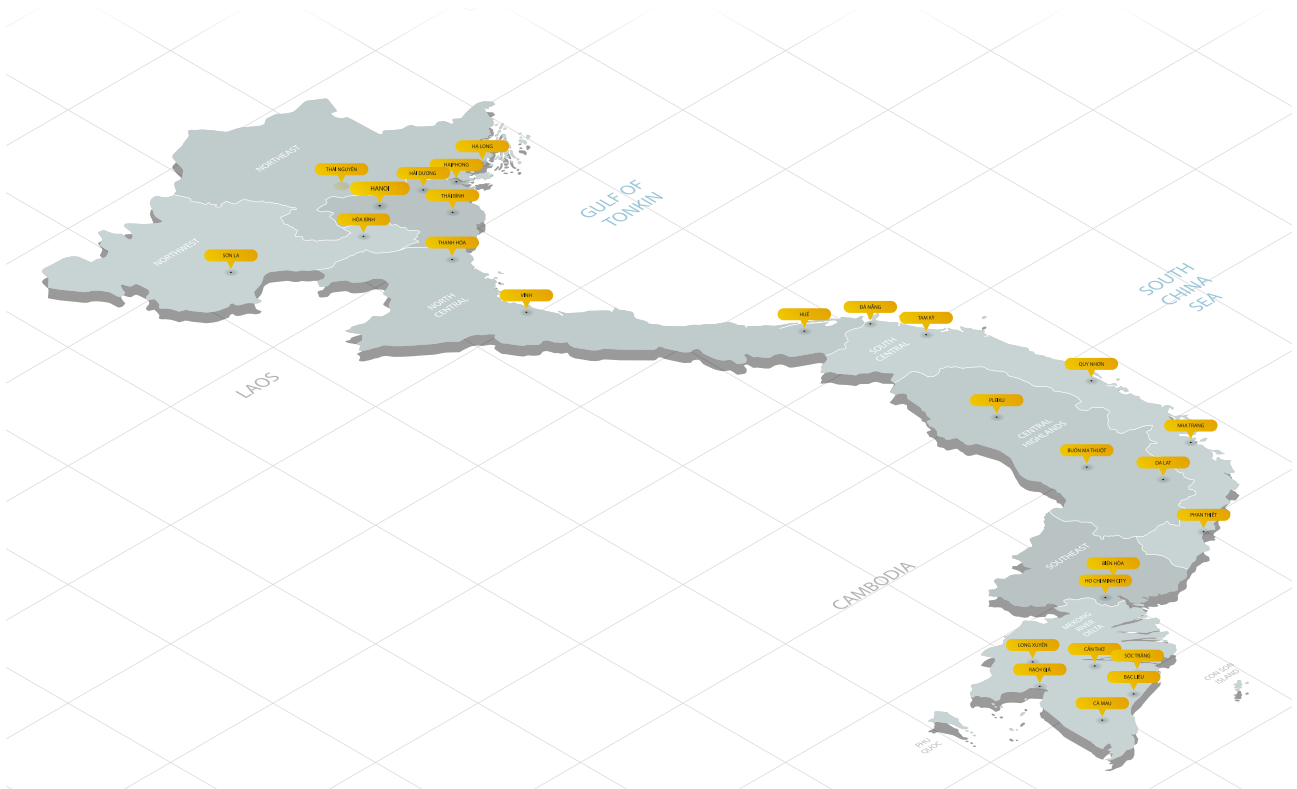
No Express Territorial Reach

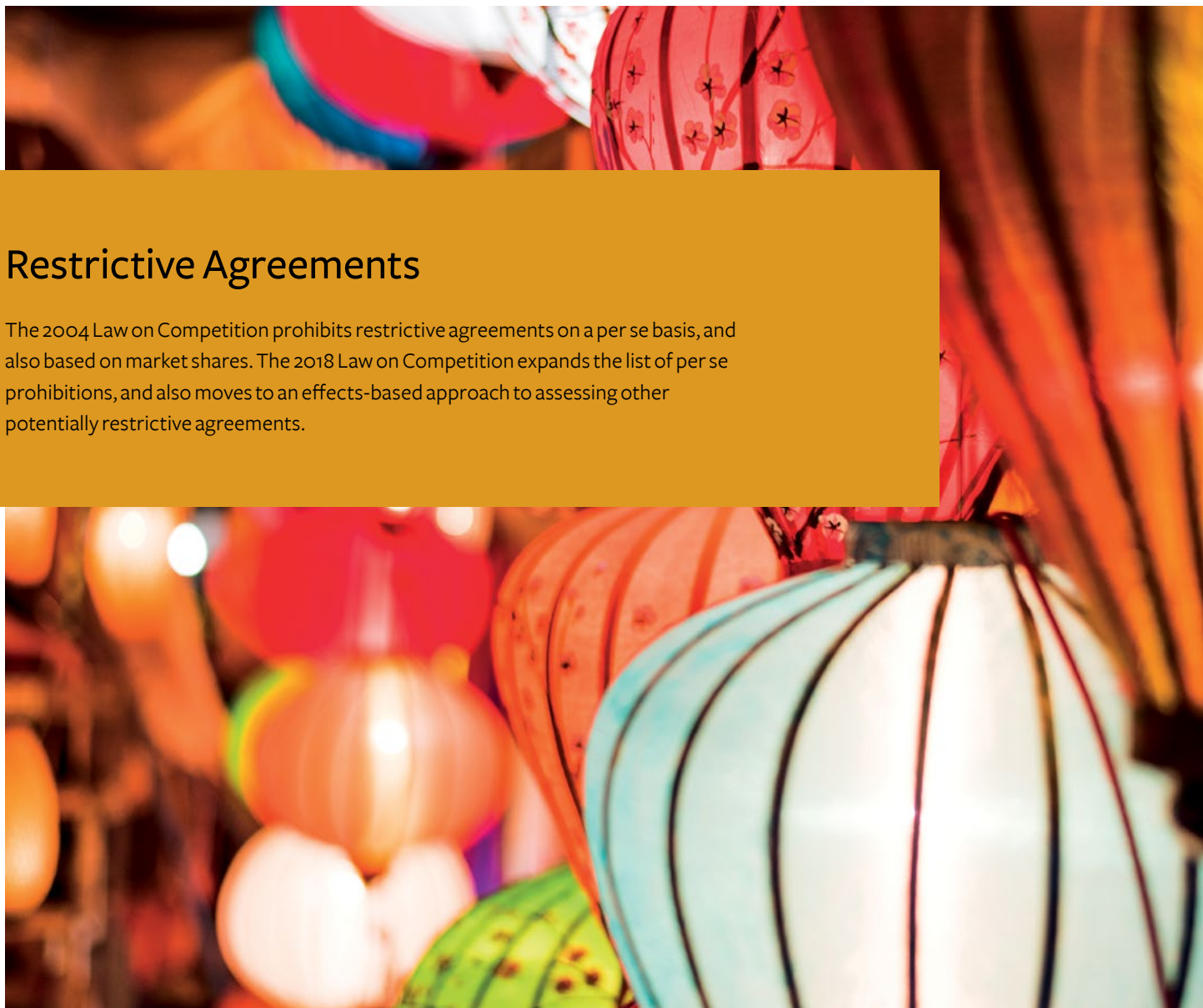
- No express provision stating that the law applies to foreign entities that do not operate in Vietnam

2018
Law on Competition

Express Extra-Territorial Reach

- Applies to any practices, whether by Vietnamese or foreign individuals or entities, which have or may have a competition restraining impact on Vietnam’s market
- Provisions cover public professional entities and professional associations operating in Vietnam and related domestic and foreign agencies, organisations and individuals





I Restrictive Agreements

The 2004 Law on Competition prohibits restrictive agreements on a per se basis, and also based on market shares. The 2018 Law on Competition expands the list of per se prohibitions, and also moves to an effects-based approach to assessing other potentially restrictive agreements.

The 2004 Law on Competition prohibits agreements that restrict competition. Agreements are generally divided into two categories – those that are prohibited per se (without the possibility of any exemptions), and those which are prohibited if the combined market share of the parties to the agreement exceeds 30 percent.

The new 2018 Law on Competition expands the list of per se prohibitions by including price fixing, market sharing and output limiting agreements between competitors into the category. Importantly, it also drops the 30 percent market share criteria for prohibiting other types of agreements, and instead prohibits agreements if they cause or have the ability to cause a significant competition restraining impact in the market. This represents a shift from a more form-based market share approach to a more effects-based approach to assessing restrictive agreements.

Separately, the 2018 Law on Competition now expressly recognises a distinction between vertical agreements between non-competitors and horizontal agreements between competitors. While certain agreements are treated more strictly as per se restrictions if they are between competitors (e.g. price fixing, market sharing, output limitation), an effects-based approach is taken if they are vertical agreements between entities at different stages of the production, distribution or supply chain.

 2004 Law on Competition	Per se Prohibitions <ul style="list-style-type: none"> • Agreements which prevent, impede or do not allow other enterprises to participate in the market or to develop business • Agreements which exclude from the market other enterprises which are not parties to the agreement • Collusion in order for one or more parties to win a tender for the supply of goods and services Other Prohibitions <p>Prohibited if the combined market share of parties to the agreement exceed 30%:</p> <ul style="list-style-type: none"> • Agreements to restrain technical or technological developments or to restrain investment • Agreements to impose on other enterprises conditions for signing contracts for the purchase and sale of goods and services, or to force other enterprises to accept obligations which are not related in a direct way to the subject matter of the contract • Agreements either directly or indirectly fixing the price of goods and services (i.e. price fixing) • Agreements to share consumer markets or sources of supply of goods and services (i.e. market sharing) • Agreements to restrain or control the quantity or volume of goods and services produced, purchased or sold (i.e. output limiting) 	 2018 Law on Competition	Per se Prohibitions <ul style="list-style-type: none"> • Agreements which prevent, impede or do not allow other enterprises to participate in the market or to develop business • Agreements which exclude from the market other enterprises which are not parties to the agreement • Collusion in order for one or more parties to win a tender for the supply of goods and services • Price fixing between enterprises in the same relevant market • Market sharing between enterprises in the same relevant market • Output limiting between enterprises in the same relevant market Other Prohibitions <p>Prohibited if it causes or has the ability to cause a significant competition restraining impact in the market:</p> <ul style="list-style-type: none"> • Agreements to restrain technical or technological developments or to restrain investment • Agreements to impose on other enterprises conditions for signing contracts for the purchase and sale of goods and services, or to force other enterprises to accept obligations which are not related in a direct way to the subject matter of the contract • Vertical agreements involving price fixing • Vertical agreements involving market sharing • Vertical agreements involving output limitation • Agreements not to transact with other entities that are not parties to the agreement • Agreements on restricting consumer markets or the sources of supply of goods and services of other entities that are not parties to the agreement • Other agreements which have or may have a competition restraining impact
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The conduct in yellow reflects the new or amended categories of agreements that have been introduced under the 2018 Law on Competition.



I Exemptions

Restrictive agreements can be exempted under the 2004 Law on Competition if certain conditions are satisfied. The 2018 Law on Competition maintains, but narrows, the grounds for obtaining exemptions, and imposes statutory term limits on the exemptions.



Under the 2004 Law on Competition, restrictive agreements that are not per se prohibited may be allowed if they satisfy certain conditions (e.g. promotes technical or technological progress, increases business efficiency). An agreement that would otherwise be prohibited cannot be performed until an exemption is granted. The Vietnam regulator recently stated that export cartels meant to generate more revenue and jobs in Vietnam, or domestic television stations coming together to negotiate the best price on broadcasting rights for international sports programmes, are some examples of activities that would fall within the exemptions.¹

The 2018 Law on Competition narrows the scope of the applicable exemptions by removing some grounds for exemption. Importantly, while per se prohibitions cannot be exempted under the 2004 Law on Competition, the revised law allows the exemptions to apply to certain category of per se prohibited agreement, namely, price fixing, market sharing and output limiting agreements between competitors.

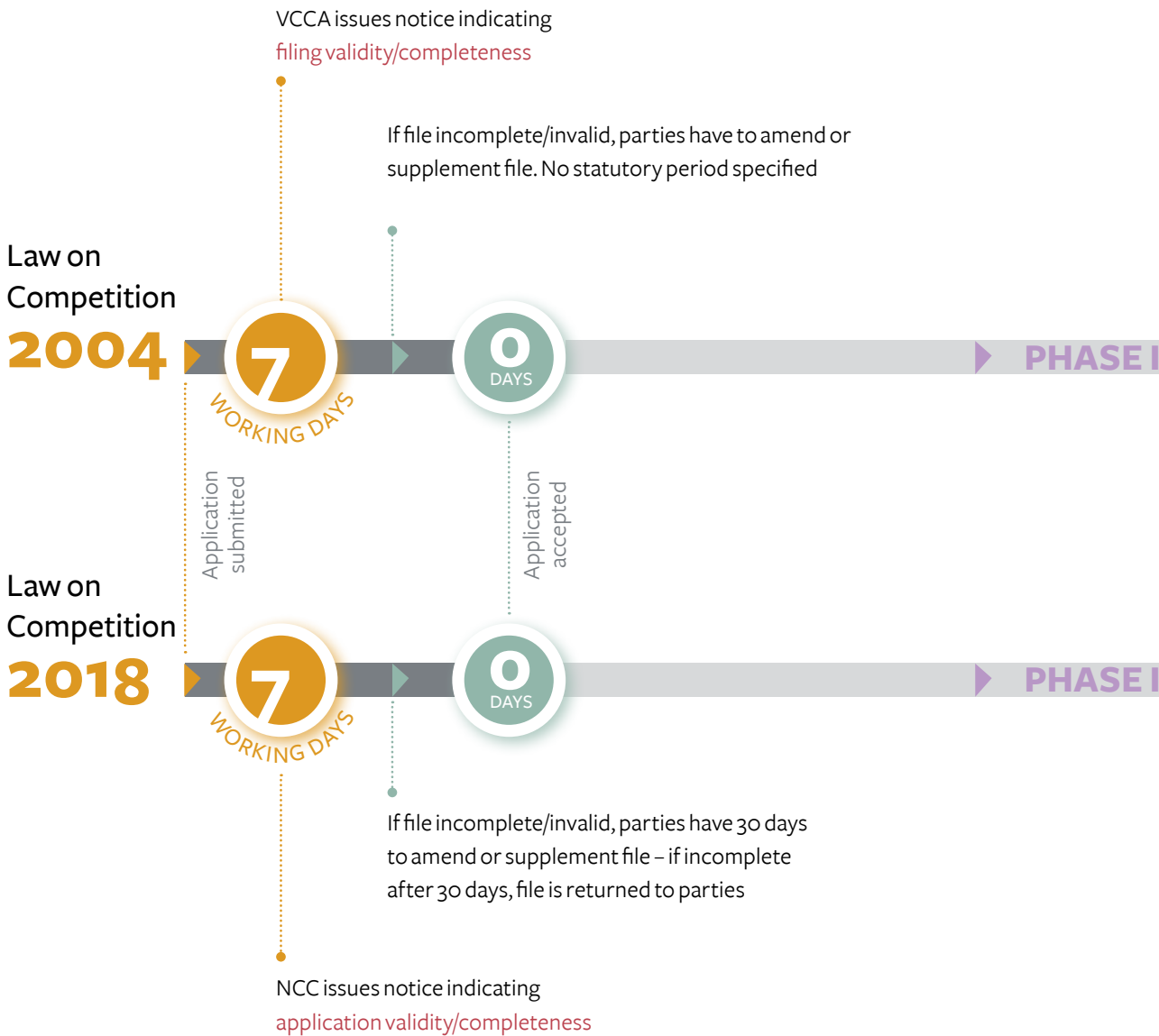
The 2018 Law on Competition also imposes a five year limit on any exemptions that may be granted. The new regulator under the 2018 Law on Competition, the National Competition Committee (NCC), is required to consider and decide whether to continue to permit the exemption within 90 days prior to the expiry of the exemption period. Any further extension is also limited to a maximum of five years.

 2004 Law on Competition	Broader Scope of Exemptions	 2018 Law on Competition	Narrower Scope of Exemptions
	<p>The agreement can be exempted if it:</p> <ul style="list-style-type: none"> • Rationalises an organisational structure or a business scale or increases business efficiency • Promotes technical or technological progress or improves the quality of goods and services • Promotes uniform applicability of quality standards and technical ratings of product types • Unifies conditions on trading, delivery of goods and payment, but does not relate to price or any pricing factors • Increases the competitiveness of medium and small-sized enterprises • Increases the competitiveness of Vietnamese enterprises in the international market <p>The exemptions do not apply to all per se prohibited agreements.</p>		<p>The agreement can be exempted if it:</p> <ul style="list-style-type: none"> • Promotes technical or technological progress or improves the quality of goods and services • Promotes uniform applicability of quality standards and technical ratings of product types • Unifies conditions on trading, delivery of goods and payment, but does not relate to price or any pricing factors • Increases the competitiveness of Vietnamese enterprises in the international market <p>Exemptions do not apply to per se prohibited agreements, except for horizontal price fixing, output limiting, and market sharing.</p>

¹ Vietnam Investment Review, *Vietnam amends Competition Law to better manage cross-border deals* (24 September 2018).

Exemption Review Timelines

If enterprises intend to rely on exemptions to participate in restrictive agreements that would otherwise be prohibited, they would need to apply for exemptions, and cannot carry out the agreements without exemptions being granted.

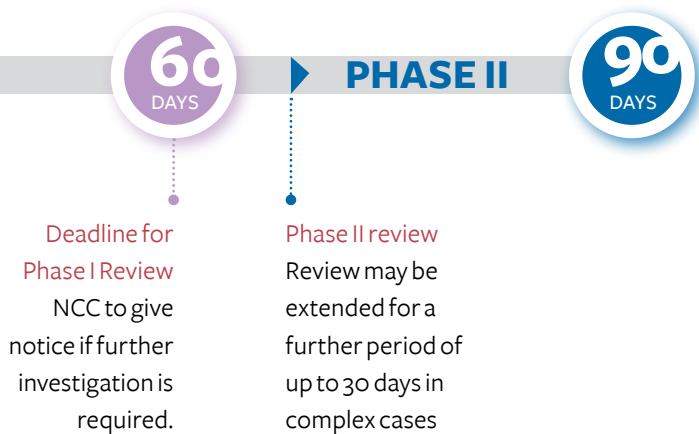
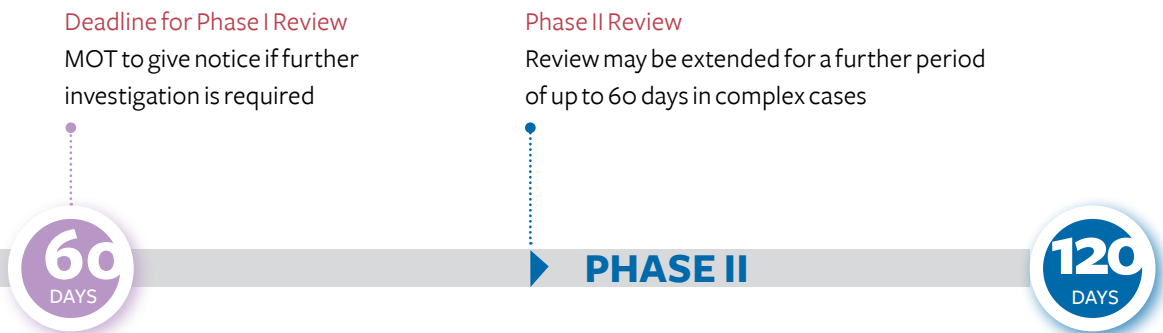


The 2004 Law on Competition requires enterprises to submit their exemption applications to the current competition regulator, the Vietnam Competition and Consumer Authority (VCCA), which would then forward its opinion to the Minister of Trade (MOT) for a decision.

The 2018 Law on Competition gives the new competition regulator, the NCC, the power to issue a decision on whether to grant an exemption, rather than leave the decision with the MOT.

Once parties have submitted a complete exemption application that has been accepted by the regulator, the statutory timelines start to run. The 2004 Law on Competition provides for an exemption decision to be issued within 60 days from application acceptance. This may be extended on two further occasions and each extension may not exceed 30 days.

The new 2018 Law on Competition shortens the review timeline by only allowing one 30 day extension.



| Leniency

While the 2004 Law on Competition does not have a leniency program, the 2018 Law on Competition introduces a new leniency policy for the first to third successful leniency applicants.

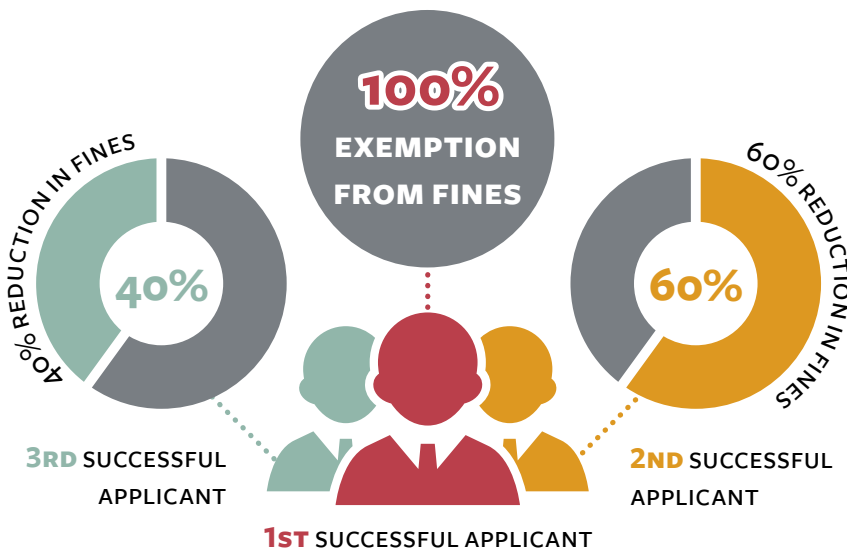


While the 2004 Law on Competition does not provide for a leniency program, it will be treated as a mitigating factor for parties to voluntarily report their conduct which restrains competition, prior to it being discovered by the regulator.

The 2018 Law on Competition introduces a new leniency policy. Parties may be entitled to an exemption or reduction in penalties if they:

- were or are participating in an agreement in restraint of competition;
- voluntarily declare the breach before the NCC issues a decision on investigation;
- declare honestly and provide all available information and evidence on the breach which is helpful for the discovery, investigation and resolution of the breach; and
- cooperate fully during the investigation and resolution of the breach.

Leniency is only available to the first three applicants who satisfy the above conditions (i.e. a successful applicant), on the following scale:



However, enterprises which instigated or coerced others to join the restrictive agreement cannot enjoy leniency.

Interestingly, the leniency policy is not limited to cartel conduct like horizontal price fixing, market sharing and bid-rigging. It applies to all restrictive agreements prohibited under the 2018 Law on Competition, which also include non-cartel conduct like entering into vertical agreements to allocate markets, or imposing additional and unrelated conditions on other enterprises in the course of selling and purchasing goods and services with them.

Sanctions

A violation of the Law on Competition could lead to warnings, fines, revocation of business licences, and divestiture/unwinding orders amongst others. Entering into restrictive agreements may also attract criminal liability in certain cases.



The 2004 Law on Competition specifies a list of sanctions that can be imposed for a breach of the laws on competition. The 2018 Law on Competition expands on the list of available sanctions.

Sanctions Under the 2004 Law on Competition	Warnings
	Fines
	Withdrawal of business registration certificate, revocation of right to use a licence/practicing certificate
	Confiscation of exhibits and facilities used to commit the breach
	Restructure of the enterprise that abuses its dominant position
	Division or split of the enterprise that has merged or consolidated, or compulsory sale back of the acquired enterprise
	Public correction
	Removal of illegal terms and conditions from a contract, agreement or business transaction
	Other necessary measures to remedy the effects of the practice in breach
Additional Sanctions under the 2018 Law on Competition	Confiscation of proceeds from the breach
	Being subject to the control of the competent State agency in terms of the purchase prices or selling prices of goods and services or other trading conditions in the contracts of an enterprise which is formed after an economic concentration

MAXIMUM CAPS TO FINES

While the 2004 Law on Competition caps the level of fines at no more than 10 percent of the total turnover of the enterprise in breach, the 2018 Law on Competition potentially lowers the maximum fines by introducing lower maximum percentage caps in certain situations, and by requiring the percentage cap to be calculated by reference to the infringing enterprises' turnover in the relevant market where the breach occurred, as opposed to their total turnover more generally.

	Restrictive Agreements	Abuse of Dominance	Economic Concentrations
2004 Law on Competition	10% of total turnover*	10% of total turnover	10% of total turnover
2018 Law on Competition	10% of total turnover in relevant market where the breach occurred (for organisations)	10% of total turnover in relevant market where the breach occurred (for organisations)	5% of total turnover in relevant market where the breach occurred (for organisations)
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	5% of total turnover in relevant market where the breach occurred (for individuals)	5% of total turnover in relevant market where the breach occurred (for individuals)	2,5% of total turnover in relevant market where the breach occurred (for individuals)

* "total turnover" in this table = total turnover in the financial year prior to the year of breach



I Criminal Liability

Entering into restrictive agreements may attract criminal liability under Vietnam's Criminal Code. All the restrictive agreements that have been prohibited under the 2004 Law on Competition can be subject to criminal enforcement, if certain additional conditions are met (e.g. in relation to quantum of damage caused, illegal profits gained, repeat offenders, etc.).

If the entity enters into any restrictive agreement prohibited under the 2004 Law on Competition (save for bid-rigging*), and either:

- Causes damage assessed from VND 1 billion to under VND 5 billion (approx. USD 42,700 - USD 213,700)
- Obtains an illegal profit of between VND 500 million to under VND 3 billion (approx. USD 21,400 – USD 128,200)

GENERAL SANCTIONS

Primary sanctions:**

- Fine of VND 200 million to VND 1 billion (approx. USD 8,600 - USD 42,700)
- 2 years community sentence
- 3 - 24 months imprisonment

Additional sanctions:

- Fine of VND 50 million to VND 200 million (approx. USD 2,100 - USD 8,500)
- Prohibition from holding certain positions or doing certain work for 1 - 5 years

SANCTIONS FOR CORPORATE LEGAL ENTITIES

Primary sanctions:

- Fine of VND 1 billion to VND 3 billion (approx. USD 42,700 – USD 128,200)

Additional sanctions:

- Fine of VND 100 million to VND 500 million (approx. USD 4,300 - USD 21,400)
- Banned from operating in certain fields or raising capital for 1 - 3 year

* Article 222 of the Criminal Code provides separate penalties for bid-rigging.

** Infringing enterprises can be imposed with one primary sanction and possibly one or more additional sanctions.



If the entity enters into any restrictive agreement prohibited under the 2004 Law on Competition (save for bid-rigging), and either:

- obtains an illegal profit of VND 3 billion (approx. USD 128,200) or more
- incurs damage of VND 5 billion (approx. USD 213,700) or more
- takes advantage of its dominant position or monopoly in the market
- uses deceitful methods
- is a repeated offender

GENERAL SANCTIONS

Primary sanctions:

- Fine of VND 1 billion to VND 3 billion (approx. USD 42,700 – USD 128,200)
- 1-5 years imprisonment

Additional sanctions:

- Fine of VND 50 million to VND 200 million (approx. USD 2,100 - USD 8,500)
- Prohibition from holding certain positions or doing certain work for 1-5 years

SANCTIONS FOR CORPORATE LEGAL ENTITIES

Primary sanctions:

- Fine of VND 3 billion to VND 5 billion (approx. USD 128,200 - USD 213,700)
- 6-24 months suspension of operation

Additional sanctions:

- Fine of VND 100 million to VND 500 million (approx. USD 4,300 - USD 21,400)
- Banned from operating in certain fields or raising capital for 1-3 years

While the criminal offences retain the 2004 Law on Competition formulation for identifying prohibited agreements, including the 30 percent market share criteria for certain agreements, the 2018 Law on Competition has removed these market share criteria. Functionally, this means that while the NCC would investigate horizontal price fixing, market sharing and output limitations, once the combined market share of the entities involved crosses 30 percent, it could become a criminal investigation to be handled by the Vietnam police.²

2 PaRR, *Vietnam's revised crimes code to lift police profile in major cartel investigations* (3 August 2017) <https://app.parr-global.com/intelligence/view/prime-2480239>; See also Article 85 of the 2018 Law on Competition, which sets out a transfer mechanism for suspected criminal offences to be transferred from the NCC to the competent State agency for criminal offences.

Enforcement Trends

While the number of formal infringement decisions that have been issued are low, the regulator has been active in using initial investigations (that do not result in a final infringement decision) to supervise markets and change market conduct.



From the time that the 2004 Law on Competition came into effect to date, there have been less than five infringement decisions involving anti-competitive agreements. However, there have been a significantly greater number of initial investigations commenced by the Vietnam Competition Authority (VCA) (which became the VCCA since August 2017), and the VCA has stated that it actively conducts initial investigations in many markets to gather information, and keeps an eye on the market for signs of competition law violations.³ The VCA's 2015 annual report indicated that initial investigations have been carried out in the market for milk, beer, seaport, maritime transportation, banking and electricity.⁴

Motor Vehicle Insurance

In 2010, 19 insurance companies in Vietnam (holding a combined market share of 99.79%) were fined a total of VND 1.7 billion (approx. USD 73,200) for being involved in unlawful price-fixing activities. The VCA had commenced an investigation into cartel practices in the insurance sector in November 2008, and discovered, amongst other things, that various insurance company executives had met in September 2008 and reached an agreement to cooperate on the level of motor vehicle insurance to be charged. The penalties imposed were low (calculated at 0.025% of each parties' turnover, plus administrative fees) as it was intended to serve as a warning, given the low awareness of Vietnam's Competition Laws at that time.⁵

Student Insurance

In 2011, 12 companies that provided insurance for students in Khanh Hoa Province and held a combined market share of 99.81% were found to have agreed to fix student insurance fees in May 2011. Although the parties voluntarily terminated the agreement in September 2011 on discovering that it was illegal, they were each required to pay administrative fees of VND 100 million (approx. USD 4,300).⁶

Investigation into the Sugar Market

In 2016, the VCA conducted an initial investigation into the sugar market in Vietnam. The Sugar Association had requested its members not to increase the purchase price of raw materials, and the VCA considered that this conduct could potentially amount to a competition law violation. The VCA subsequently issued a recommendation to the Sugar Association and other related companies to address the competition concern.⁷

CASE STATISTICS FROM 2006 - 2015⁸

	2006	2007	2008	2009	2010	2011	2012	2013	2014	2015	Total
Initial Investigation	5	3	7	7	10	10	14	12	10	5	83
Investigation	0	1	1	1	1	2	1	0	1	0	8
Decision	0	0	0	1	2	0	0	1	1	0	5

Note: Table reflects cases involving anti-competitive agreements and abuse of dominance

3 Vietnam Competition Authority, *Annual Report (2015)* at 8.

4 Vietnam Competition Authority, *Annual Report (2015)* at 8.

5 Vietnam Competition Council, *Vụ việc Thỏa thuận hạn chế cạnh tranh* (<http://www.hoidongcanhtranh.gov.vn/default.aspx?page=news&do=detail&id=99>)

6 Vietnam Competition Council, *Vụ việc Hạn chế cạnh tranh trong bảo hiểm học sinh của 12 doanh nghiệp tại Khánh Hoà* (<http://www.hoidongcanhtranh.gov.vn/default.aspx?page=news&do=detail&id=100>)

7 Vietnam Competition Authority, *Annual Report (2016)* at 10.

8 Vietnam Competition Authority, *Annual Report (2015)* at 9.



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