

# Vietnam Competition Law Series

Abuse of Dominance in Vietnam – No Major Changes in 2019







# ABUSE OF DOMINANCE IN VIETNAM

## NO MAJOR CHANGES IN 2019

The new Vietnam 2018 Law on Competition will come into force from 1 July 2019.

While big changes have been made to regulating mergers and restrictive agreements, the new 2018 Law on Competition broadly retains the same principles and approach to abuse of dominance found in the 2004 Law on Competition. Importantly, the presumption of dominance is still market-share based, and the distinctions between individual dominance, group dominance and monopoly position have been retained.

This update covers the key differences between the current 2004 Law on Competition and the 2018 Law on Competition, and highlights the key abuse of dominance enforcement trends from the past decade.



## I Defining Dominance

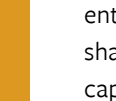

The 2004 Law on Competition adopts a formalistic market share-based approach to presuming dominance. It also allows for dominance to be found if the enterprise in question is capable of substantially restraining competition. The 2018 Law on Competition broadens the latter test by expressly identifying additional factors that may be considered when determining significant market power.



Under the 2004 Law on Competition, if an enterprise has more than 30 percent market share, it would be deemed dominant; if a group of enterprises cross various specified market share thresholds, they would be deemed collectively dominant. The presumption of dominance is not rebuttable, and is set at a low level compared to thresholds adopted by other major competition law jurisdictions.

Separately, an enterprise may also be deemed dominant if it is capable of “substantially restraining competition”. Factors that would be considered include the technological capability of the enterprise, whether it owns or has the rights to intellectual property, the scale of its distribution network and its financial capacity.

The 2018 Law on Competition maintains the market share-based dominance presumptions, and also allows dominance to be presumed if the relevant enterprise or group of enterprises together have significant market power. Instead of looking at whether the enterprises “substantially restrain competition”, this assessment of “significant market power” appears to be a broader test that allows potential competition (e.g. by looking at barriers to entry and exit) and countervailing buyer power (e.g. by looking at the ability to control consumption) to be considered when assessing dominance.

<div data-bbox="290 1034 670 1243">  <h2 data-bbox="290 1144 406 1176">2004</h2> <p data-bbox="290 1187 406 1220">Law on Competition</p> </div> <div data-bbox="290 1243 670 1897"> <h3 data-bbox="290 1243 406 1276">Dominant Position</h3> <ul data-bbox="290 1276 670 1411" style="list-style-type: none"> <li>Deemed dominant if enterprise has market share of <math>\geq 30\%</math> or is capable of substantially restraining competition</li> </ul> <h3 data-bbox="290 1422 406 1456">Monopoly Position</h3> <ul data-bbox="290 1456 670 1588" style="list-style-type: none"> <li>Enterprise deemed to hold a monopoly position if there are no other competing enterprises within the relevant goods or services market</li> </ul> <h3 data-bbox="290 1599 406 1632">Group Dominance</h3> <ul data-bbox="290 1632 670 1897" style="list-style-type: none"> <li>Group of enterprises deemed dominant if they act together to restrain competition and:               <ul style="list-style-type: none"> <li>2 enterprises have a market share of <math>\geq 50\%</math></li> <li>3 enterprises have a market share of <math>\geq 65\%</math></li> <li>4 enterprises have a market share of <math>\geq 75\%</math></li> </ul> </li> </ul> </div>	<div data-bbox="670 1034 1316 1243">  <h2 data-bbox="670 1144 786 1176">2018</h2> <p data-bbox="670 1187 786 1220">Law on Competition</p> </div> <div data-bbox="670 1243 1316 1897"> <h3 data-bbox="670 1243 786 1276">Dominant Position</h3> <ul data-bbox="670 1276 1316 1411" style="list-style-type: none"> <li>Deemed dominant if enterprise has market share of <math>\geq 30\%</math> or has <b>significant market power</b></li> </ul> <h3 data-bbox="670 1422 786 1456">Monopoly Position</h3> <ul data-bbox="670 1456 1316 1588" style="list-style-type: none"> <li>Enterprise deemed to hold a monopoly position if there are no other competing enterprises within the relevant goods or services market</li> </ul> <h3 data-bbox="670 1599 786 1632">Group Dominance</h3> <ul data-bbox="670 1632 1316 1897" style="list-style-type: none"> <li>Group of enterprises deemed dominant if they act together to restrain competition and have: <b>significant market power</b> OR If the following are met:               <ul style="list-style-type: none"> <li>2 enterprises have a market share of <math>\geq 50\%</math></li> <li>3 enterprises have a market share of <math>\geq 65\%</math></li> <li>4 enterprises have a market share of <math>\geq 75\%</math></li> <li>5 enterprises have a market share of <math>\geq 85\%</math></li> </ul> </li> </ul> <p data-bbox="670 1888 1316 1910"><i>Note: enterprises with market share of <math>&lt; 10\%</math> will not be included as part of the enterprises with group dominance</i></p> </div>
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*The conduct in yellow reflects the new amendments that have been introduced under the 2018 Law on Competition*



## I Prohibited Acts of Abuse

The 2004 Law on Competition covers both exclusionary and exploitative abuses. It also subjects monopoly enterprises to a greater number of prohibited conduct. The 2018 Law on Competition generally retains these prohibitions, and also includes additional categories of abuse.



The 2004 Law on Competition sets out a list of conduct that an enterprise or group of enterprises in a dominant position would be prohibited from engaging in, for example, selling below prime cost,\* restraining production, or applying different commercial conditions to similar transactions. It also prohibits dominant enterprises from fixing unreasonable prices or minimum resale prices that cause loss to customers, which suggests that exploitative abuses are also covered under the abuse provisions, although the regulator has not brought such a case to date.

Interestingly, the 2004 Law on Competition carves out an additional category of prohibitions that only apply to enterprises in a monopoly position, for instance, by prohibiting them from unilaterally changing or cancelling a signed contract without legitimate reasons.

The 2018 Law on Competition generally retains the prohibitions contained in the 2004 Law on Competition, and also includes additional categories of abuse.

Neither the 2004 nor the 2018 Law on Competition provides express exemptions for prohibited abusive acts.

- Selling goods or services below total prime cost,\* aimed at excluding competitors
- Fixing an unreasonable selling or purchasing price or fixing a minimum re-selling price for goods or services, thereby causing loss to customers
- Restraining production or distribution of goods or services, limiting the market, or impeding technical or technological development, thereby causing loss to customers
- Applying different commercial conditions to the same transactions aimed at creating inequality in competition
- Imposing conditions on other enterprises signing contracts for the purchase and sale of goods and services or forcing other enterprises to agree to obligations which are not related in a direct way to the subject matter of the contract
- Preventing market participation by new competitors

All conduct that amounts to a prohibited abuse of dominance is also a prohibited abuse of monopoly position. Additionally, the following are prohibited:

- Imposing disadvantageous conditions on customers
- Abusing monopoly position in order to unilaterally change or cancel a signed contract without legitimate reason

2004

## Law on Competition



Broadly retains the list of abuse of dominance prohibitions in the 2004 Law on Competition, and includes the additional prohibition:

- Acts of abuse of dominant position that are prohibited by other laws

Broadly retains the list of abuse of monopoly position prohibitions in the 2004 Law on Competition, save that:

- Selling below total prime cost is not prohibited
- Acts of abuse of monopoly position that are prohibited by other laws are also prohibited under the 2018 Law on Competition

2018

## Law on Competition

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## I Relevant Market & Market Shares

### Relevant Market

Defining the relevant market is a crucial first step as market shares play an important role for many of the provisions in the Law on Competition:

- Market share thresholds are used to presume dominance.
- Market share thresholds are relevant for determining if an economic concentration needs to be notified, or would be prohibited.
- Under the 2004 Law on Competition, certain types of restrictive agreements are only prohibited if the combined market share of the parties to the agreement exceeds 30 percent.
- Whether or not criminal liability attaches for entering into certain types of restrictive agreements is dependent on whether the combined market share of the parties to the agreement exceeds 30 percent.

The 2004 Law on Competition and the accompanying Decree No. 116 go into significant details about the definition of the relevant product and geographic markets. In particular, it defines a relevant product market to mean a market comprising of goods or services which may be substituted for each other in terms of characteristic, use, purpose and price. It proceeds to adopt a prescriptive method to determine such substitutability by looking at whether the goods or services satisfy a prescriptive SSNIP Test (see box below), or whether they have the same physical/chemical/technical features, side effect on users, ability to assimilate, or the same use and purpose. It is only where these methods of determining the relevant product market produces inconclusive results that other factors will be considered e.g. supply-side substitutability, cross-elasticity of demand, length of use of goods or services, etc.

### Prescriptive SSNIP Test under the 2004 Law on Competition

Goods or services shall be deemed capable of being substituted for each other in terms of price if above 50 percent of a random sample quantity taken from 1000 consumers living in the relevant geographical area change to purchasing or intend to purchase other goods or services with the same characteristics and use purpose as the goods they are currently using or intend to use where the price of such goods or services increases more than 10 percent and remains stable for six consecutive months.

Where the number of consumers living in the relevant geographical area stipulated in this clause is less than 1000, the minimum random sample quantity shall be equal to 50 percent of the total number of such consumers.

Commentators have noted that requiring the regulator to *actually* conduct a SSNIP Test survey in all cases, rather than seeing it as a helpful conceptual tool, can be expensive and time consuming. It may also not be fit for purpose in zero-priced markets. The prescriptive SSNIP Test has now been removed from the draft decree accompanying the 2018 Law on Competition, along with the two-stage process to considering factors that affected the relevant product market definition. The new draft decree instead adopts a more wholistic assessment of the relevant product market by considering the relevant factors at one go.



#### Defining the Relevant Market

- Two-stage approach to considering factors that affect relevant product market definition
- Use of a prescriptive SSNIP Test to define the relevant product market



#### Defining the Relevant Market

- Factors relevant to defining the relevant product market considered at one go
- Prescriptive SSNIP Test removed

### Market Shares

The 2004 Law on Competition defines market shares narrowly by calculating them on the basis of the relevant enterprises' sale or purchase turnovers. This narrow way of defining market shares has been expanded under the 2018 Law on Competition, which allows market shares to also be based on the quantity of goods or services bought or sold.



#### Market Share

- Calculated based on turnover of goods or services bought or sold



#### Market Share

- Calculated based on turnover or quantity of goods or services bought or sold

## Enforcement Trends

The regulator has not shied away from investigating potentially difficult abuse of dominance cases, including against state-owned enterprises. However, the amount of penalties currently remains relatively low.



From 2006-2015, the Vietnam Competition Authority (VCA) carried out less than five formal investigations into alleged abuse of dominance, leading to two infringement decisions.<sup>1</sup> Interestingly, the first case brought before the Vietnam Competition Council (VCC) which eventually led to a successful prosecution involved an abuse of dominance case, demonstrating that the Vietnamese regulators do not shy away from taking up potentially difficult abuse of dominance cases. State-owned enterprises (SOE) are generally not excused from complying with the Law on Competition<sup>2</sup> and enforcement action has been brought against them (e.g. Vinapco's abuse in the aviation fuel market), although the lack of regulatory independence from the Government has been cited as a difficulty that may continue to impede robust enforcement against SOEs going forward.<sup>3</sup> The amount of penalties imposed for abuse of dominance also remains relatively low.

### Anh Duong's Abuse of Dominance in the Travel Service Market

Trading Tourism Co., Ltd. (AB Tours) complained to the VCA in April 2014 that Anh Duong Manufacturing Trading Services Import & Export Co., Ltd. (Anh Duong) had abused its dominant position by entering into exclusivity agreements with various hotels in the Khanh Hoa area (Partner Hotels). The agreement required the Partner Hotels to only accept bookings from tourists coming from Russia, Ukraine and other Commonwealth of Independent States (collectively, CIS) if they came through Anh Duong. This prevented other competitors from booking rooms for CIS tourists in these Partner Hotels, even if there were vacancies.

The VCA opened a formal investigation in June 2014, and subsequently referred the case to the VCC in March 2016 after concluding investigations.<sup>4</sup> In its December 2016 decision, the VCC defined the relevant market as the travel service market for CIS tourists entering Vietnam at all tourist destinations across Vietnam. Given that Anh Duong had 51.6 percent market share at the time of the investigation (which crossed the 30 percent market share threshold for deemed dominance), Anh Duong was considered to hold a dominant position. The VCC held that Anh Duong breached Article 13(6) of the 2004 Law on Competition because its conduct of forcing Partner Hotels not to accept bookings from other competitors prevented market participation by new competitors. Separately, Anh Duong had also required the Partner Hotels to publish online room prices that were at least 15 – 20 percent higher, and had also restricted the Partner Hotels from selling and allowing other parties to sell tour packages to tourists who came via Anh Duong. This was a breach of Article 13(5) of the 2004 Law on Competition as it amounted to imposing conditions on enterprises that were not directly related to the subject matter of the contracts.<sup>5</sup>

However, given that Anh Duong voluntarily ceased its illegal conduct, and AB Tours subsequently withdrew its complaint, the VCC only required Anh Duong to pay a settlement fee of VND 50 million (approx. USD 2,200).<sup>6</sup>

1 Vietnam Competition Authority, *Annual Report* (2015).

2 Cf there are provisions that grant the state control over enterprises operating in state monopoly sectors in relation to e.g. price, quantity and scope of goods and services. See e.g. Article 28, 2018 Law on Competition; Article 15, 2004 Law on Competition. Note also the criticism in relation to merger control involving SOEs which ignored the merger control provisions (see Phan Cong Thanh, *Competition Law Enforcement of Vietnam and the Necessity of a Transparent Regional Competition Policy* (2015).

3 PaRR, *Vietnam's competition agency cowed by dominant state-owned players, official says* (19 March 2018)

4 Vietnam Competition Authority, *Annual Report* (2015)

5 Vietnam Competition Council, *Thông cáo báo chí của Hội đồng Cạnh tranh về vụ việc vi phạm hạn chế cạnh tranh, lạm dụng vị thế thống lĩnh trên thị trường du lịch* (<http://www.hoidongcanhtranh.gov.vn/default.aspx?page=news&do=detail&id=135>)

6 The Saigon Times, *Anh Duong told to pay settlement fee in anti-competition case* (24 February 2017)



## Vinapco's Abuse of Monopoly in the Aviation Fuel Market

Jetstar Pacific Airlines Company Limited (Jetstar) contracted with the only supplier of aviation fuel in Vietnam civil airports, the Vietnam Air Petrol Company Limited (Vinapco), for the supply of fuel at VND 593,000 per ton for 2008. In March 2008, Vinapco cited global price fluctuations as the reason for having to unilaterally increase the price to VND 750,000 per ton. Jetstar rejected the price increase, as Vinapco did not apply a similar price increase to its parent company, Vietnam Airlines, which also competed with Jetstar. On 1 April 2008, about 30 Jetstar flights were cancelled or delayed because Vinapco refused to supply Jetstar with fuel due to the impasse.<sup>7</sup>

The Minister of Transport ordered Vinapco to continue supplying Jetstar, and the VCA commenced investigations into the matter shortly after.<sup>8</sup> The case was brought to the VCC in January 2009, and the VCC found that Vinapco's conduct was an abuse of a monopoly position in breach of Article 14 of the 2004 Law on Competition. Vinapco was fined VND 3.378 billion (approx. USD 145 million), amounting to 0.05 percent of Vinapco's turnover in 2007. The illegal terms were also removed from the contract.<sup>9</sup> While the statutory maximum fine that could be imposed was up to 10 percent of annual turnover in the year preceding the infringement, the VCC reportedly stated that the relatively low penalty was meant as a warning to Vinapco.<sup>10</sup>

The case was upheld on appeal to the Hanoi People's Court in December 2010.<sup>11</sup>

## Vietnam Brewery Limited Case

Following a competitor's complaint, the VCA commenced an investigation in 2007 into allegations that Vietnam Brewery Limited had abused its dominant position. While the competitor had based its complaint on a narrower geographic market, the VCA ultimately considered that the relevant geographic market was national. Accordingly, even though Vietnam Brewery Limited had required customers to agree to exclusionary clauses, the VCA considered that it had not engaged in an abuse of dominance as it was not dominant in the relevant market.<sup>12</sup>

7 Saigon Times, *Vinapco told to abide by rule to ask airlines to pay fuel bills* (22 April 2009)

8 David Fruitman, 'Vietnam' in Mark Williams, *The Political Economic of Competition Law in Asia* (Edward Elgar Publishing Limited, 2013)

9 Nguyen Thuy Ngoc, *Abuse of Dominance/Monopoly Position in Vietnam* (1 June 2016)

10 Saigon Times, *Vinapco told to abide by rule to ask airlines to pay fuel bills* (22 April 2009)

11 David Fruitman, 'Vietnam' in Mark Williams, *The Political Economic of Competition Law in Asia* (Edward Elgar Publishing Limited, 2013)

12 David Fruitman, 'Vietnam' in Mark Williams, *The Political Economic of Competition Law in Asia* (Edward Elgar Publishing Limited, 2013)



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