

Vietnam Competition Law Series

Unfair Competitive Practices in Vietnam





UNFAIR COMPETITIVE PRACTICES IN VIETNAM

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

Apart from restraint of competition provisions (i.e. restrictive agreements, abuse of dominance, merger control) which regulate anti-competitive conduct and maintain competition in the market, the legislation also contains provisions relating to unfair competitive practices designed to protect consumers and enterprises from unfair practices like false advertising, unauthorised use of business secrets, etc.

This update covers the key differences between the current 2004 Law on Competition and the 2018 Law on Competition, and also examines regulatory changes pertinent to the enforcement of the new law.



Competition Regulator

The two competition agencies established under the 2004 Law on Competition have now been consolidated into a single regulator – the National Competition Commission.

The 2004 Law on Competition adopted a dual agency system to investigations and enforcement – the Vietnam Competition and Consumer Authority (VCCA) and the Vietnam Competition Council (VCC).

The VCCA was known as the Viet Nam Competition Administrative Department when the agency was first established under the 2004 Law on Competition, before being renamed the Vietnam Competition Authority (VCA). In August 2017, the VCA was restructured into two agencies – the VCCA (having competition and consumer protection functions) and the Viet Nam Trade Remedies Authority (having trade remedies functions).¹

The VCCA is constituted under the Ministry of Industry and Trade, and is responsible for:

- investigating (but not adjudicating) cases relating to restraint of competition (i.e. restrictive agreements, abuse of dominance, merger control);
- investigating and adjudicating cases involving unfair competitive practices; and
- assessing requests for exemption from restrictive agreements and merger control provisions, and preparing recommendations to the Ministry of Industry and Trade or the Prime Minister on the same, for them to take a final decision.

Where the VCCA considers that there is sufficient evidence of an infringement, it will refer the case to the VCC, which is responsible for hearing and adjudicating restraint of competition cases.

Under the 2018 Law on Competition, the two agencies will be consolidated into one – the National Competition Commission (NCC) – which will have the role of both investigating and adjudicating cases involving restraint of competition and unfair competitive practices. The Competition Case Investigation Agency will be established within the NCC to carry out investigations.² While there had previously been some discussions about constituting the NCC as an independent competition authority,³ the decision was finally made to place the NCC under the Ministry of Industry and Trade.⁴ Some concerns have been raised that constituting the competition regulator as an agency under the Ministry of Industry and Trade may affect its independence and impartiality, especially vis-à-vis state-owned enterprises.⁵



1 OECD, OECD Peer Review of Competition Law and Policy: Viet Nam (2018)

2 PaRR, Vietnam's amended competition law offers no mitigation for abuse of dominance, monopoly conduct - Asia Competition Law Forum (4 July 2018)

3 PaRR, Vietnam's independent competition authority to see less political interference, official says (20 July 2017)

4 PaRR, Vietnam competition regime to introduce competition test in amended law, official says (18 May 2018)

5 OECD, OECD Peer Review of Competition Law and Policy: Viet Nam (2018)

I Definition of 'Unfair Competitive Practices'



2004 Law on Competition

“Unfair competitive practices means competitive practices by an enterprise during the business process which are **contrary to the general standards of business ethics** and which cause or may cause damage to the interests of the State and/or to the legitimate rights and interests of other enterprises or of consumers.”

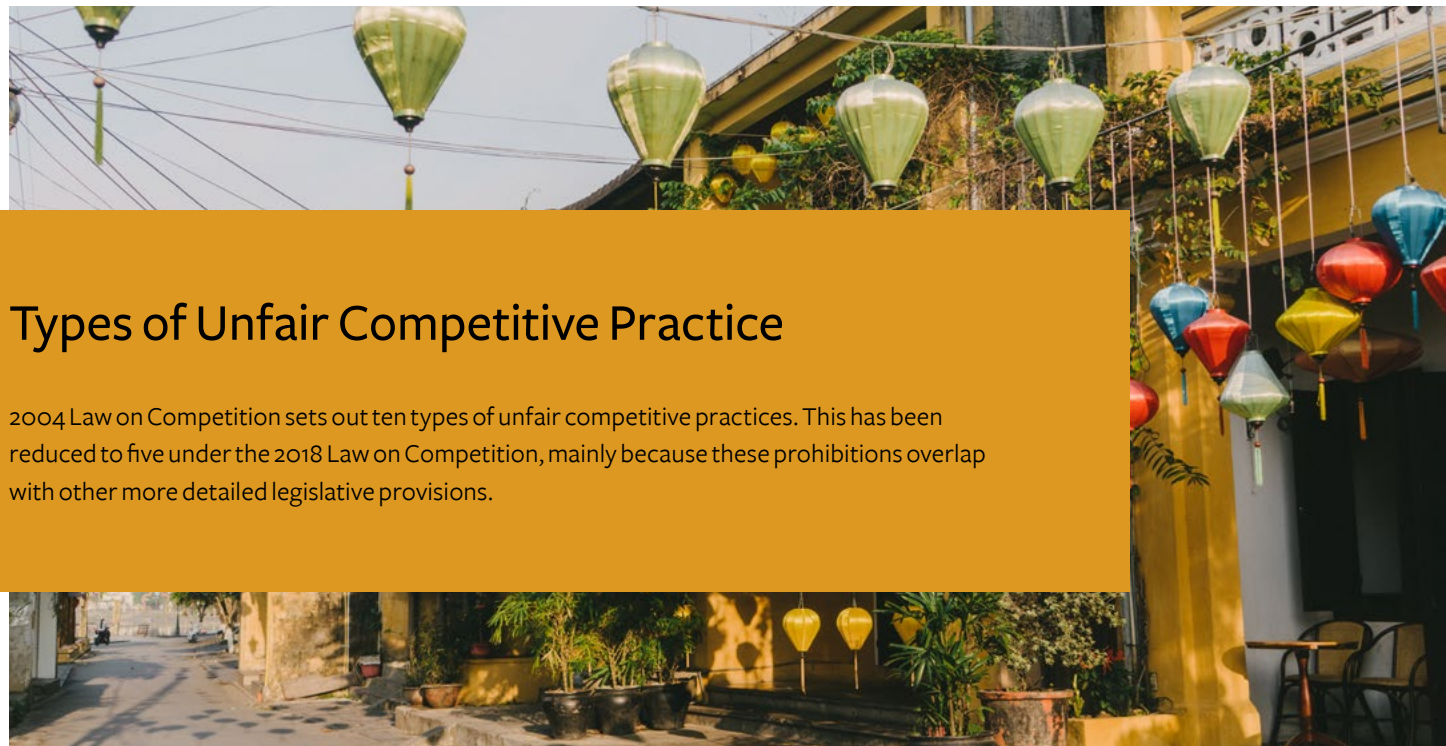
2018 Law on Competition

“Unfair competitive practices means practices by an enterprise which are **contrary to the principles of goodwill, honesty, commercial practice and other standards in business** and which cause or may cause loss and damage to the legitimate rights and interests of other enterprises.”

“Competition must be undertaken on the principles of honesty, fairness and wellbeing; and non-infringement of the interests of the State, the public interest, and the lawful rights and interests of enterprises and consumers.”

There appears to be a difference to how ‘unfair competitive practices’ is defined in the two legislation, and it is currently unclear if the 2018 Law on Competition’s expanded definition of unfair competitive practices, which includes conduct that is “contrary to the principles of goodwill, honesty, commercial practice and other standards in business”, represents a higher threshold compared to the original formulation in the 2004 Law on Competition.⁶ In practice, the generalised nature of this definition is likely to afford to the regulator a very broad latitude in determining what it believes represents unfair competitive practices.

⁶ Note also that enterprises are already held to standards of goodwill, honesty and social morals in other legislation relating to their civil and commercial activities (e.g. Article 3, 11 Civil Code, Article 11, Commercial Law).



Types of Unfair Competitive Practice

2004 Law on Competition sets out ten types of unfair competitive practices. This has been reduced to five under the 2018 Law on Competition, mainly because these prohibitions overlap with other more detailed legislative provisions.


The 2004 Law on Competition sets out ten types of unfair competitive practices that enterprises are prohibited from engaging in.


The 2018 Law on Competition retains some of the original prohibitions, but also removes a number of other prohibitions which overlap with more detailed legislative provisions that cover similar types of conduct (e.g. Commercial Law, Advertising Law).

Interestingly, the 2018 Law on Competition also introduced a new form of unfair competitive practice – selling goods or services below total prime cost which excludes another enterprise from conducting business in the same type of goods or services. This provision potentially overlaps with abusive below-cost selling, and appears to suggest that below-cost selling can both be an abuse of dominance and an unfair competitive practice.

<div>2004</div> <div>Law on Competition*</div>	Misleading Instructions <ul style="list-style-type: none"> × using instructions containing misleading names, slogans, logos, packaging, geographical indications to mislead customers 	<div>2018</div> <div>Law on Competition</div>	Misleading Instructions <ul style="list-style-type: none"> Removed
	Infringement of Business Secrets <ul style="list-style-type: none"> × accessing or collecting business secrets by countering security measures × disclosing or using business secrets without permission from the owner × breach of confidence which is aimed at accessing, collecting and disclosing business secrets 		Infringement of Business Secrets <ul style="list-style-type: none"> × accessing or collecting business secrets by hacking security measures × disclosing or using business secrets without permission from the owner
	Coercion in Business <ul style="list-style-type: none"> × coercing customers or business partners to transact or cease a transaction 		Coercion in Business <ul style="list-style-type: none"> × coercing customers or business partners to transact or cease a transaction

* The list highlights the key prohibitions, and is not meant to be exhaustive. Other provisions relating to unfair competitive practices can be found in e.g. the Decree on Management of Multi-Level Marketing Activities (40/2018/ND-CP), the Decree on Imposition of Penalties for Violations against Law on Competition (No. 71/2014/ND-CP).

2004		Defamation	<ul style="list-style-type: none"> defaming another enterprise by providing false information, which adversely impacts the enterprise's reputation, financial position or business activities
		Causing Disruption	<ul style="list-style-type: none"> causing disruptions which hinder or interrupt the lawful business activities of another enterprise
		Advertising Aimed at Unfair Competition	<ul style="list-style-type: none"> directly comparing an enterprise's own goods and services with those of the same type of another enterprise imitating another advertising product to mislead customers providing false or misleading information to customers about price, quantity, quality, date of manufacture or expiry, origin of goods, warranty period, etc.
		Promotions Aimed at Unfair Competition	<ul style="list-style-type: none"> providing false prize information for promotion promotion that is untruthful or misleads customers about goods and services discriminating between similar customers in different promotional areas within the same promotional campaign offering free goods for trial use but subsequently exchanging it for similar goods from another enterprise
		Discrimination by Associations	<ul style="list-style-type: none"> refusing to admit or withdraw from the association any individual/organisation who has satisfied all necessary conditions, if it is discriminatory and competitively disadvantages the individual/organisation unreasonably restricting the business activities of enterprises that are part of the association
2004		Illegal Multi-Level Selling of Goods	<ul style="list-style-type: none"> requiring potential participants to first purchase an initial fixed quantity of goods or pay a sum of money to participate in the multi-level selling scheme failing to undertake to re-acquire goods sold to participants for resale at at least 90% of their original price allowing participants to receive commission and other financial benefits solely from enticing others to participate in the multi-level selling scheme providing false information about the benefits of participating in the multi-level selling scheme or the quality and use of goods to entice others to participate in the multi-level selling scheme
Law on Competition*			

2018		Defamation	<ul style="list-style-type: none"> defaming another enterprise by providing false information, which adversely impacts the enterprise's reputation, financial position or business activities
		Causing Disruption	<ul style="list-style-type: none"> causing disruptions which hinder or interrupt the lawful business activities of another enterprise
		Advertising Aimed at Unfair Competition	Removed
		Promotions Aimed at Unfair Competition	Removed
		Discrimination by Associations	Removed
2018		Illegal Multi-Level Selling of Goods	Removed
		Selling Below Cost	<ul style="list-style-type: none"> Selling goods or services below total prime cost, which excludes another enterprise from conducting business in the same type of goods or services
Law on Competition			



Penalties

The 2018 Law on Competition increases the maximum penalties that can be imposed for breaching the provisions against unfair competitive practices from the relatively low sum of VND 200 million (approx. USD 8,600) to VND 2 billion (approx. USD 86,000).





Under the 2004 Law on Competition, a violation of the provisions on unfair competitive practices could lead to warnings, fines, revocation of business licences, confiscation of facilities used to commit the breach and disgorgement of profits, amongst others.

Unlike sanctions for restraints of competition, there is no turnover cap to the amount of fines that can be imposed for engaging in unfair competitive practices. However, the Decree on Imposition of Penalties for Violations against Law on Competition (No. 71/2014/ND-CP) specifies penalties for different types of unfair competitive practices and the highest fine that can be imposed (for misleading customers with directions that are confusable with trade names, business logos, etc) is set at VND 200 million (approx. USD 8,600).

The 2018 Law on Competition expressly provides that the maximum fine that may be imposed for engaging in an unfair competitive practice will be capped at VND 2 billion (approx. USD 86,000) for organisations, and at VND 1 billion (approx. USD 43,000) for individuals.



Enforcement Trends

The regulator has been active in investigating and enforcement against unfair competitive practices. The bulk of these involve advertising aimed at unfair competition, and prohibited conduct within multi-sale arrangements.



The VCA (as it then was) has been active in investigating unfair competitive practices, and has generally investigated more such cases than cases involving restrictive agreements or abuse of dominance. A large number of these practices involve advertising aimed at unfair competition, although the VCA has also been active in policing multi-level sales arrangements.

It is important to note that provisions prohibiting unfair competitive practices are not only limited to the Law on Competition – allegations of unfair competition can also be based on other legislation. In 2017, for example, Vinasun reportedly commenced action against Grab,⁷ alleging that Grab had engaged in unfair business practices that contravened Decree No. 37/2006/ND-CP which⁸ prohibits each promotion programme from exceeding 40 days, and the total duration of all promotions from exceeding 90 days a year.⁹

⁷ Viet Nam News, Vietnamese taxi company sues Grab for unfair business practices (7 February 2018)

⁸ Decree No. 37/2006/ND-CP has been replaced by Decree No. 81/2018/ND-CP, which came into effect on 15 July 2018

⁹ The HCM City People's Court ruled in December 2018 that Grab had violated Decree 86 (a decree which sets out the conditions for doing business in the transportation sector) and Decision 24 (a pilot programme to operate e-hailing services), and ordered Grab to pay Vinasun VND 4.8 million. Grab is appealing the decision.

A Nguyen Trading's direct comparison of products¹⁰

In 2015, the VCA found that A Nguyen Trading Co. Ltd (A Nguyen Trading) infringed the prohibition against advertising aimed at unfair competition. In 2014, the company had organised a seminar in Ho Chi Minh City to introduce new products. At the seminar, an experiment was carried out to directly compare A Nguyen Trading's products with those of a competitor, Sprayway – TPR Co., Ltd (Sprayway). The experiment implied that Sprayway's products contained elements that led to health problems and polluted the environment. Sprayway gathered video recordings of the seminar, and lodged a complaint with the VCA. A Nguyen Trading's conduct was found to have breached the prohibition against directly comparing one's goods with those of another enterprise, and a fine was imposed on the company.

Synergy's illegal multi-level marketing practices¹¹

In June 2013, the VCA imposed a VND 80 million (approx. USD 3,400) financial penalty on Synergy Limited Company for providing false information on certain products for the purpose of inciting people to join the multi-level sales network. Amongst others, the company had stated that one of its health products "prevents aging and damage to the immune cells". Another also "stimulates enzyme and leucocytes cell, strengthens the body immune response, helps the body to eliminate toxins, improves anaemia, increases the number of red blood cell, [and] balances the body PH". The company was unable to show any evidence to prove the truth of the claims, and was found to have infringed the prohibition against providing false information about the quality and use of goods in order to entice others to participate in the multi-level sales scheme.

Number of established unfair competitive practice violations (2009 – 2016)¹²

Types of unfair competitive practices	2009	2010	2011	2012	2013	2014	2015	2016
Advertisement for unfair competition purpose	5	20	33	37	2	6	18	15
Promotion for unfair competition purpose	2	2	-	-	-	-	-	-
Interruption in other enterprises' business activities	-	-	-	1	-	-	-	-
Discrediting other enterprises	4	1	2	-	-	-	-	-
Misleading indication	-	1	-	-	-	1	1	-
Illegal multi-level sales	3	4	1	3	1	-	4	5
Total	14	26	36	41	3	7	23	20

¹⁰ Vietnam Competition Authority, Annual Report (2015)

¹¹ Vietnam Competition Authority, Annual Report (2013)

¹² Vietnam Competition Authority, Annual Report (2016)



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