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Vietnam Competition Law

Key Changes in 2019



Introduction



Vietnam's competition law is poised for big changes as the new 2018 Law on Competition comes into force from 1 July 2019. It is critical for businesses already operating or considering investing in Vietnam to understand this evolving regulatory environment. This guide provides such an overview, and covers the key differences between the 2004 Law on Competition and the 2018 Law on Competition.

The guide was originally conceived as a Mayer Brown monthly periodical in late 2018 – the “Vietnam Competition Law Series” – in response to client demands for further clarity and guidance regarding the new competition law regime in Vietnam. This booklet is the culmination of the process, and consolidates the four issues in the series into an easy reference source.

This guide is presented in a simple and accessible manner, and is intended as a useful reference tool for businesses and in-house counsel to have a quick understanding of Vietnam Competition Law. It is, however, not meant to be a substitute for legal advice. Please contact us for assistance on specific matters you may have that touch on competition law in Vietnam.

About Mayer Brown's Antitrust and Competition Practice

Mayer Brown's Asia Antitrust and Competition practice is one of the leading providers of legal services relating to local and cross-border competition work in Asia. We have a dedicated team of antitrust and competition lawyers who are experienced in providing commercial advice relating to competition law regimes in Hong Kong, China, Vietnam and beyond.

Our team is regularly recognized as one of the leading practice in international ranking publications like Chambers and Partners, IFLR and Legal 500. Most recently, it has also been recognized as one of the top 25 competition practices globally in GCR's Global Elite Practice rankings.

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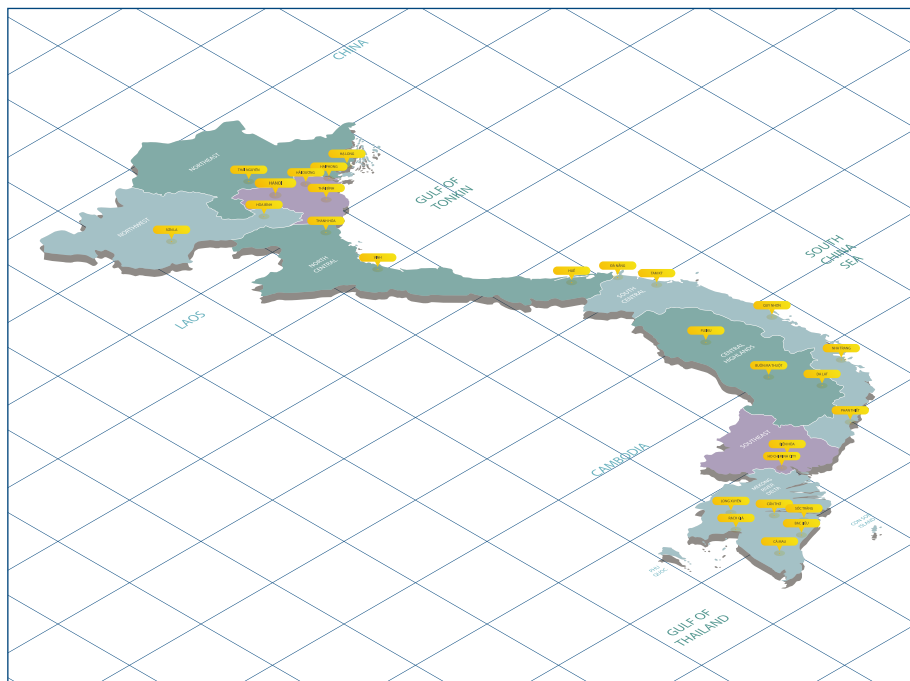
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Whom Does it Cover?



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

Competition Regulator



The 2004 Law on Competition adopts 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

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)

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

2004 Law on Competition

VCCA

- Investigates restraint of competition cases and refers cases to the VCC
- Investigates and adjudicates unfair competitive practices cases
- Assesses exemption requests and prepares recommendations to the Ministry of Trade/Prime Minister

VCC

- Hears and adjudicates restraint of competition cases

2018 Law on Competition

NCA

- Investigates and adjudicates restraint of competition cases
- Investigates and adjudicates unfair competitive practices cases
- Grants exemptions for restrictive agreements that would otherwise be prohibited

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)



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.

2004 Law on Competition

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

2018 Law on Competition

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.

2004 Law on Competition

Market Share

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

2018 Law on Competition

Market Share

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

Restrictive Agreements



Prohibited 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

- 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

2018 Law on Competition

Per se Prohibitions

- 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

The conduct in blue reflects the new or amended categories of agreements that have been introduced under the 2018 Law on Competition.

Other Prohibitions

Prohibited if the combined market share of parties to the agreement exceed 30%:

- 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)

Other Prohibitions

Prohibited if it causes or has the ability to cause a significant competition restraining impact in the market:

- 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

The conduct in blue reflects the new or amended categories of agreements that have been introduced under the 2018 Law on Competition.



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.⁶

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 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.

⁶ Vietnam Investment Review, *Vietnam amends Competition Law to better manage cross-border deals* (24 September 2018).

2004 Law on Competition

Broader Scope of Exemptions

The agreement can be exempted if it:

- 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

The exemptions do not apply to all per se prohibited agreements.

2018 Law on Competition

Narrower Scope of Exemptions

The agreement can be exempted if it:

- 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

Exemptions do not apply to per se prohibited agreements, except for horizontal price fixing, output limiting, and market sharing.



Exemption Review Timelines

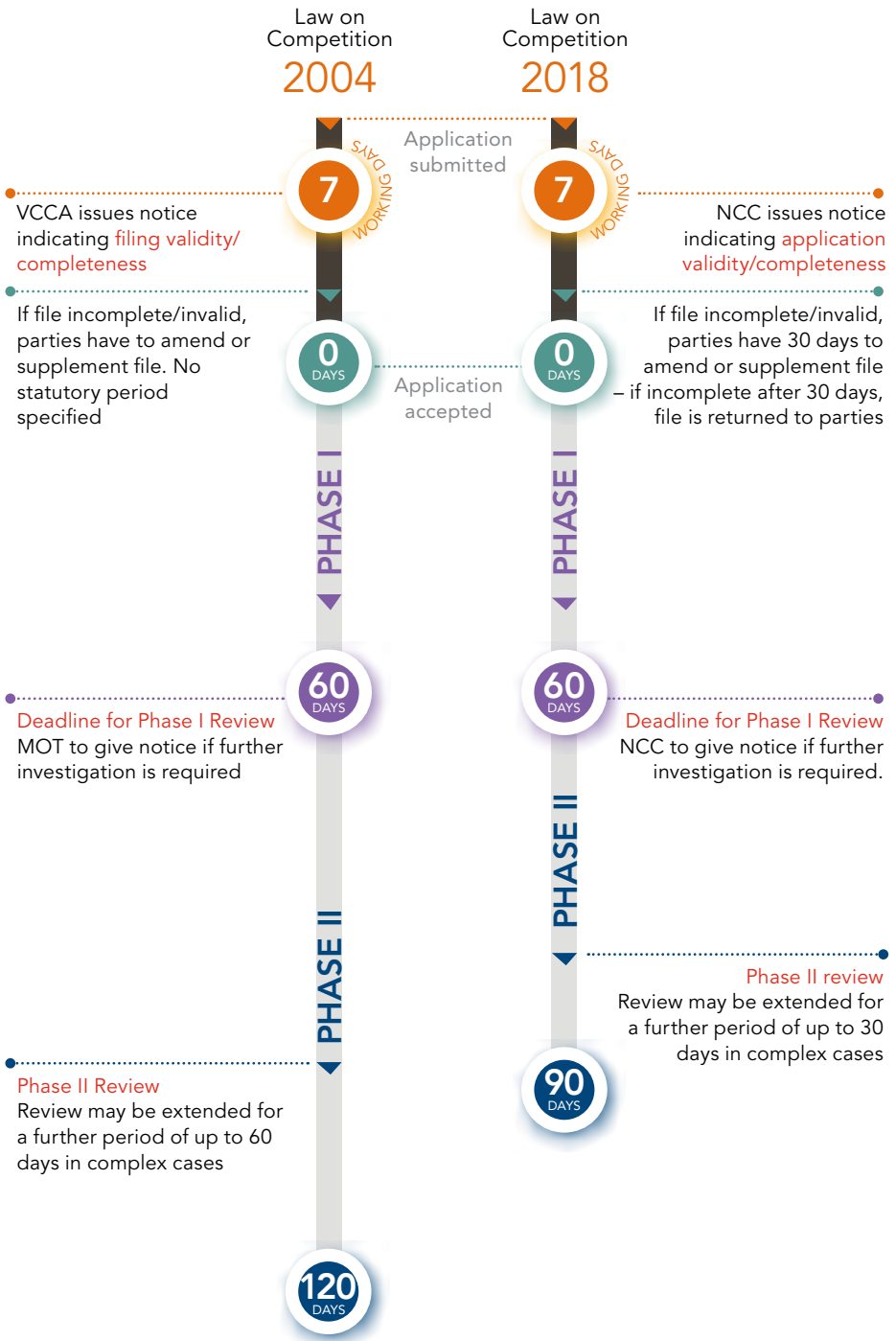
If enterprises intend to rely on exemptions to participate in restrictive agreements that would otherwise be prohibited, they would need to apply for exemptions, and cannot carry out the agreements without exemptions being granted.

The 2004 Law on Competition requires enterprises to submit their exemption applications to the 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.



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 VCA, 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.⁷ 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.⁸

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.⁹

⁷ Vietnam Competition Authority, *Annual Report* (2015) at 8.

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

⁹ Vietnam Competition Council, *Vụ việc Thỏa thuận hạn chế cạnh tranh* (<http://www.hoidongcanhtranh.gov.vn/default.aspx?page=news&do=detail&id=99>)

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).¹⁰

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.¹¹

Case Statistics from 2006 - 2015¹²

	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

¹⁰ Vietnam Competition Council, *Vụ việc Hạn chế cạnh tranh trong bảo hiểm học sinh của 12 doanh nghiệp tại Khánh Hòa* (<http://www.hoidongcanhtranh.gov.vn/default.aspx?page=news&do=detail&id=100>)

¹¹ Vietnam Competition Authority, *Annual Report* (2016) at 10.

¹² Vietnam Competition Authority, *Annual Report* (2015) at 9.



Abuse of Dominance



Defining Dominance

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.

2004 Law on Competition

Dominant Position

- Deemed dominant if enterprise has market share of $\geq 30\%$ or is capable of substantially restraining competition

Monopoly Position

- Enterprise deemed to hold a monopoly position if there are no other competing enterprises within the relevant goods or services market

Group Dominance

- Group of enterprises deemed dominant if they act together to restrain competition and:
 - » 2 enterprises have a market share of $\geq 50\%$
 - » 3 enterprises have a market share of $\geq 65\%$
 - » 4 enterprises have a market share of $\geq 75\%$

2018 Law on Competition

Dominant Position

- Deemed dominant if enterprise has market share of $\geq 30\%$ or has **significant market power**

Monopoly Position

- Enterprise deemed to hold a monopoly position if there are no other competing enterprises within the relevant goods or services market

Group Dominance

- Group of enterprises deemed dominant if they act together to restrain competition and have: **significant market power**

OR

If the following are met:

- » 2 enterprises have a market share of $\geq 50\%$
- » 3 enterprises have a market share of $\geq 65\%$
- » 4 enterprises have a market share of $\geq 75\%$
- » **5 enterprises have a market share of $\geq 85\%$**

Note: enterprises with market share of $< 10\%$ will not be included as part of the enterprises with group dominance.



Prohibited Acts 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.

2004 Law on Competition

Prohibited Abuse of Dominant Position

- 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

2018 Law on Competition

Prohibited Abuse of Dominant Position

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 goods or services market

* The concept of “prime cost” is specifically defined under the accompanying Decree No. 116 to the 2004 Law on Competition.

Prohibited Abuse of Monopoly Position

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

Prohibited Abuse of Monopoly Position

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

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 VCA carried out less than five formal investigations into alleged abuse of dominance, leading to two infringement decisions.¹³ Interestingly, the first case brought before the 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 Competition¹⁴ 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.¹⁵ The amount of penalties imposed for abuse of dominance also remains relatively low.

¹³ Vietnam Competition Authority, *Annual Report* (2015).

¹⁴ 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)).

¹⁵ PaRR, *Vietnam's competition agency cowed by dominant state-owned players, official says* (19 March 2018)

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.¹⁶ 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.¹⁷

¹⁶ Vietnam Competition Authority, *Annual Report* (2015)

¹⁷ 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>)

Continued

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).¹⁸

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.¹⁹

¹⁸ The Saigon Times, *Anh Duong told to pay settlement fee in anti-competition case* (24 February 2017)

¹⁹ Saigon Times, *Vinapco told to abide by rule to ask airlines to pay fuel bills* (22 April 2009)

Continued

The Minister of Transport ordered Vinapco to continue supplying Jetstar, and the VCA commenced investigations into the matter shortly after.²⁰ 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.²¹ 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.²²

The case was upheld on appeal to the Hanoi People's Court in December 2010.²³

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.²⁴

²⁰ David Fruitman, 'Vietnam' in Mark Williams, *The Political Economic of Competition Law in Asia* (Edward Elgar Publishing Limited, 2013)

²¹ Nguyen Thuy Ngoc, *Abuse of Dominance/Monopoly Position in Vietnam* (1 June 2016)

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

²³ David Fruitman, 'Vietnam' in Mark Williams, *The Political Economic of Competition Law in Asia* (Edward Elgar Publishing Limited, 2013)

²⁴ David Fruitman, 'Vietnam' in Mark Williams, *The Political Economic of Competition Law in Asia* (Edward Elgar Publishing Limited, 2013)

Merger Control



Mandatory Pre-Merger Notification

Before a merger, acquisition, consolidation or joint venture (collectively “economic concentration”) is carried out, it would first have to be notified to the regulator if the prescribed notification thresholds are crossed. The notification thresholds in the 2004 Law on Competition are purely based on post-transaction market shares. The 2018 Law on Competition has expanded the threshold criteria to include assets, revenue and the value of the transaction.

2004 Law on Competition

Market share based

- Notification required if post-economic concentration market share is between 30% to 50%
- No notification required if post- economic concentration market share is less than 30% or where the post-economic concentration enterprise remains a small or medium enterprise (SME)*

2018 Law on Competition

Expanded criteria for notification

- Notification required if the following thresholds are met:**
 - » either party’s total assets in the Vietnam market exceeds VND 1000 billion (approx. USD 43 million);
 - » either party’s total turnover exceeds VND 1,000 billion (approx. USD 43 million) in the preceding fiscal year;
 - » the value of the transaction exceeds VND 500 billion (approx. USD 21.5 million)(only applies to economic concentrations in Vietnam); or
 - » the combined market share of the combining entities in the relevant market is 30% or more.

* Broadly, an SME generally includes an entity that has an annual average of 200 employees who contribute to social insurance, and (i) whose total capital does not exceed VND 100 billion (approx. USD 4.3 million); or (ii) whose total turnover in the immediately preceding year does not exceed VND 300 billion (approx. USD 13 million). These criteria may differ depending on the sector that the entity belongs to.

** These thresholds are contained in a draft decree issued in October 2018. The decree remains to be finalised.



The change in notification criteria calls for a significant shift to the way that businesses comply with merger control rules in Vietnam. Under the 2004 Law on Competition, many businesses found it challenging to be sure of its notification obligations because of the uncertainties surrounding what the relevant market should be, and the difficulties in obtaining market share information.²⁵ As a result, many transactions have simply not been notified.²⁶ A shift to notification based on assets, revenue and value of transaction, which are more objective measures, is expected to provide greater certainty to businesses on when the notification thresholds are met. It also becomes easier for the NCC to enforce the new notification requirements: instead of being involved in a protracted assessment of the correct relevant market to base market share calculations, it can simply point to the clearer and more objective indicia of assets, revenue and value of transaction to establish that the notification thresholds have been crossed.

From 2013 to 2016, the VCA received an average of four to five economic concentration notification dossiers annually.²⁷ Going forward, given the expanded criteria for notification and the relatively low notification thresholds proposed in the 2018 Law on Competition, the number of notifications is expected to increase once the new law comes into force.

²⁵ PaRR, *Vietnam's competition authority to remove market share threshold for merger reviews* (17 July 2017).

²⁶ APEC Economic Committee Report, *Use of Economic Evidence Experience from APEC Members and Implications to APEC Developing Economies and Viet Nam* (March 2018) at 21, 22.

²⁷ Vietnam Competition Authority, *Annual Report* (2013, 2014, 2015 and 2016).

Prohibition against Anti-Competitive Economic Concentrations

The 2004 Law on Competition prohibits economic concentrations that result in the post-transaction entity holding more than 50 percent market share in a relevant market. Exemptions may be granted if, for example, parties to the transaction are at risk of bankruptcy, or if the transaction contributes to socio-economic development and technical or technological progress.

The 2018 Law on Competition represents a fundamental shift in approach to assessing economic concentrations. Instead of prohibiting economic concentrations purely based on market shares, they will be assessed depending on whether they cause or are capable of significantly restricting competition in the Vietnam market.

The move from a market share based prohibition to an effects based prohibition recognises that anti-competitive effects arising from an economic concentration cannot be solely assessed on market shares alone – an economic concentration that results in a post- concentration entity with significant market shares does not necessarily restrict competition if, for example, barriers to entry are low or countervailing buyer power is high. This change also opens the way for the NCC to consider other theories of harm (e.g. vertical, conglomerate) apart from horizontal theories of harm that comes from a narrow focus on combined market shares.²⁸ Moving forward, a greater level of analysis and sophistication of review is expected, as the regulator moves from a purely market share based-approach to an effects based approach to assessing economic concentrations.

²⁸ APEC Economic Committee Report, *Use of Economic Evidence Experience from APEC Members and Implications to APEC Developing Economies and Viet Nam* (March 2018) at 21, 22.

2004 Law on Competition

Prohibition based on market share

- Economic concentrations that result in a market share over 50% are prohibited (50 Percent Market Share Prohibition)
- An economic concentration may be exempted if:
 - » one or more parties to the concentration are at risk of dissolution/bankruptcy
 - » it extends exports or contributes to socio-economic development and/or technical or technological progress (Article 19 Exemptions)
- Not prohibited if post-concentration entity remains an SME

2018 Law on Competition

Prohibition based on effect

- Removed prohibition solely based on market share
- Prohibits concentration that causes or is capable of causing the effect of significantly restricting competition in the Vietnam market
- Factors to consider when assessing the positive impact of economic concentration:
 - » positive impact on development of industries, science and technology in accordance with State strategies and masterplans
 - » development of SMEs
 - » enhance Vietnamese enterprise's competitiveness in the international market

Foreign to Foreign Economic Concentrations

The merger control provisions apply to foreign to foreign economic concentrations, both under the 2004 Law on Competition, and under the 2018 Law on Competition.

While the 2004 Law on Competition does not expressly provide that the merger control provisions would apply to foreign to foreign economic concentrations, the VCA's practice has been to review such foreign to foreign concentrations.

In December 2016 for example, the VCA looked into Boehringer Ingelheim's acquisition of Sanofi SA's worldwide veterinary drug business. While the acquisition involved parties outside Vietnam, the parties had business in Vietnam through local subsidiaries. The VCA considered that the transaction was covered by merger control provisions under the 2004 Law on Competition. It was eventually cleared as the parties' combined market shares for the production and distribution of veterinary drugs in Vietnam was less than 50 percent, and the acquisition did not give rise to competition concerns.²⁹

The 2018 Law on Competition now clearly states that it applies to any acts by foreign individuals or entities which have or may have the effect of restricting competition in Vietnam's markets.

²⁹ Vietnam Competition Authority, *Annual Report* (2016).

2004 Law on Competition

No Express Extra-Territorial Reach

- No express provision stating that the law applies to foreign entities that do not operate in Vietnam although in practice the VCA has applied it extra-territorially to foreign to foreign economic concentrations

2018 Law on Competition

Express Extra-Territorial Reach

- Applies to any acts, 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

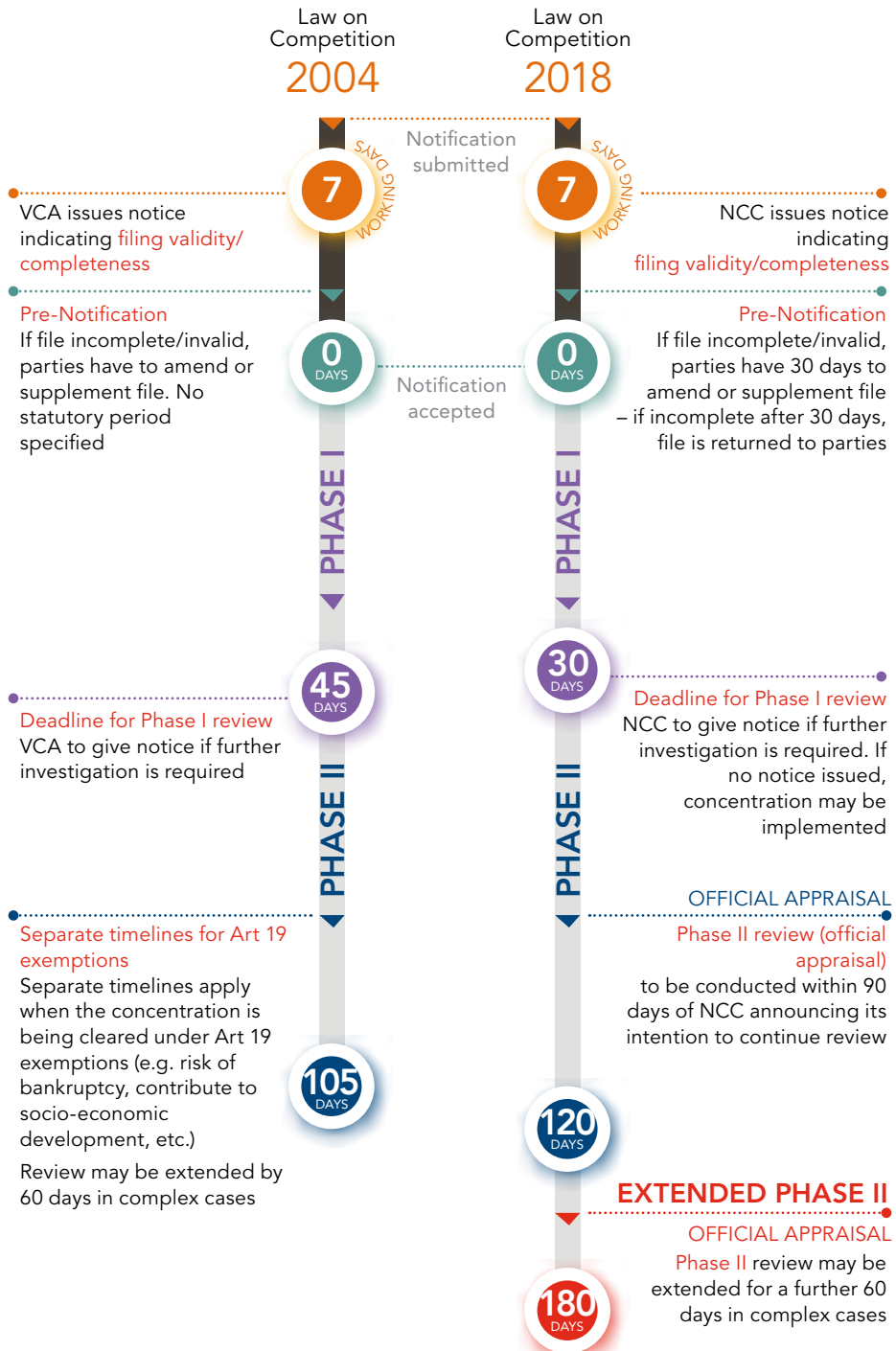


Merger Review Timelines

Before filing a notification, it is important for parties to consider whether it would be helpful to have a pre-merger consultation with the regulator to clarify whether their transaction would need to be notified or if it would be prohibited. This tends to be an informal process that is not set out in any statutory instruments or governed by fixed timelines, but is an important and cost-free first step to clarifying the merger control obligations.

Once parties have submitted a complete notification that has been accepted by the regulator, the statutory timelines start to run. The 2004 Law on Competition provides for an economic concentration to be cleared within 45 days from notification if the review is not complex. This may be extended by a further 60 days in complex cases.

The new 2018 Law on Competition extends the review timelines. Under the new regime, the preliminary review would be completed within 30 days from notification. If a more detailed official appraisal is required, the NCC is given a further 90 days to conduct the review. This can be further extended by 60 days in complex cases. The clock may also be stopped during the process if the NCC requests parties to provide additional information and documents as part of the review.



Enforcement Trends

In the past, compliance with the merger control provisions on the 2004 Law on Competition had been described by commentators as being “very poor”.³⁰ Several significant economic concentrations were carried out that apparently ignored the merger control requirements.

However, in more recent years, there appears to have been increasing levels of enforcement, the VCA reportedly stating in 2014 that merger control enforcement was going to be a priority.³¹

Earlier Cases that Had Not Been Notified

In a Prime Minister approved merger in 2011 between two wholly state owned enterprises (Viettel and EVN Telecom), the post-transaction entity reportedly held a market share of between 30 – 50 percent in the market for 3G mobile phone services,³² but the transaction was not notified to the VCA. This was despite complaints from a competitor that the transaction violated the 2004 Law on Competition.³³

In 2012, the Ministry of Transportation’s proposed merger between Jetstar Pacific Airline and Vietnam Airlines was approved without any scrutiny from the VCA. The transaction allowed the post-merger entity to hold nearly 100 percent market share in the domestic air transportation market.³⁴ The Prime Minister had released a decision approving the merger.

³⁰ Luu Huong Ly, *Competition Law in Vietnam* (August 2015) 1 CPI Antitrust Chronicle.

³¹ DFDL, *Focus on Merger Activity by the Vietnam Competition Authority* (16 April 2014).

³² Phan Cong Thanh, *Competition Law Enforcement of Viet Nam and the Necessity of a Transparent Regional Competition Policy* (December 2015), ERIA Discussion Paper Series.

³³ The Saigon Times, *Viettel bid for EVN Telecom violates Law: Hanoi Telecom* (14 November 2011).

³⁴ Luu Huong Ly, *Competition Law in Vietnam* (August 2015) 1 CPI Antitrust Chronicle.



Recent Review Cases

In 2014, the VCA reviewed a merger between the Vietnam National Financial Switching Joint Stock Company and Smartlink Card Services Joint Stock Company, which were companies active in the field of intermediary bank for payment. The merger would have created a monopoly, with the existence of only one united card union on the market. While the VCA noted that the transaction would have been prohibited under the 50 Percent Market Share Prohibition, it evaluated the parties' request for an exemption and submitted its report to the Prime Minister for consideration.³⁵ An exemption was granted for a period of five years, and would be automatically renewed every five years on the condition that the post-merger entity fulfilled various conditions, including the requirement not to discriminate amongst customers, and to comply with the State Bank of Vietnam's instructions and regulations when adjusting service fees. This was the first time that an exemption was granted for a merger that would have otherwise been prohibited under the 50 Percent Market Share Prohibition.

On 18 May 2018, the Vietnam Ministry of Industry and Trade commenced a formal investigation into Grab's acquisition of Uber's operations in Southeast Asia, after preliminary investigations indicated that the post-transaction entity could have a market share of more than 50 percent in Vietnam.³⁶ This followed an announcement in March 2018 that Grab had agreed to purchase Uber's Southeast Asian business in consideration of Uber having a 27.5 percent share in Grab. The Vietnam regulator has never prohibited an economic concentration since the Vietnam 2004 Law on Competition was passed, and this in-depth scrutiny of the Uber/Grab transaction represents a more assertive approach.

³⁵ Vietnam Competition Authority, Annual Report (2014).

³⁶ Ministry of Industry and Trade of the Socialist Republic of Vietnam, *Cục Cạnh tranh và Bảo vệ người tiêu dùng - Bộ Công Thương quyết định điều tra chính thức vụ việc tập trung kinh tế giữa Grab và Uber tại thị trường Việt Nam* (18 May 2018); Ministry of Industry and Trade of the Socialist Republic of Vietnam, *Kết thúc điều tra sơ bộ vụ việc Grab mua lại hoạt động của Uber tại thị trường Việt Nam* (16 May 2018).

Unfair Competitive Practices



Definition of 'Unfair Competitive Practices'

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 Law on Competition 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.

'Unfair Competitive Practices' is defined as follows:

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.³⁷ 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.

Types of Unfair Competitive Practice

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.

³⁷ 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).

2004 Law on Competition*

Misleading Instructions

- using instructions containing misleading names, slogans, logos, packaging, geographical indications to mislead customers

Infringement of Business Secrets

- 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

Coercion in Business

- coercing customers or business partners to transact or cease a transaction

Defamation

- defaming another enterprise by providing false information, which adversely impacts the enterprise's reputation, financial position or business activities

Causing Disruption

- causing disruptions which hinder or interrupt the lawful business activities of another enterprise

2018 Law on Competition

Misleading Instructions

- Removed

Infringement of Business Secrets

- accessing or collecting business secrets by hacking security measures
- disclosing or using business secrets without permission from the owner

Coercion in Business

- coercing customers or business partners to transact or cease a transaction

Defamation

- defaming another enterprise by providing false information, which adversely impacts the enterprise's reputation, financial position or business activities

Causing Disruption

- causing disruptions which hinder or interrupt the lawful business activities of another enterprise

* 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).

Advertising Aimed at Unfair Competition

- 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.

Advertising Aimed at Unfair Competition

- Removed

Promotions Aimed at Unfair Competition

- 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

Promotions Aimed at Unfair Competition

- Removed

Discrimination by Associations

- 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

Discrimination by Associations

- Removed

Illegal Multi-Level Selling of Goods

- 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

Illegal Multi-Level Selling of Goods

- Removed

Selling Below Cost

- Selling goods or services below total prime cost, which excludes another enterprise from conducting business in the same type of goods or services



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,³⁸ alleging that Grab had engaged in unfair business practices that contravened Decree No. 37/2006/ND-CP which³⁹ prohibits each promotion programme from exceeding 40 days, and the total duration of all promotions from exceeding 90 days a year.⁴⁰

³⁸ Viet Nam News, Vietnamese taxi company sues Grab for unfair business practices (7 February 2018)

³⁹ Decree No. 37/2006/ND-CP has been replaced by Decree No. 81/2018/ND-CP, which came into effect on 15 July 2018

⁴⁰ 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 products⁴¹

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 practices⁴²

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.

⁴¹ Vietnam Competition Authority, Annual Report (2015)

⁴² Vietnam Competition Authority, Annual Report (2013)

Number of established unfair competitive practice violations (2009 – 2016)⁴³

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

⁴³ Vietnam Competition Authority, Annual Report (2016)

Sanctions



General Sanctions

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
Additional Sanctions under the 2018 Law on Competition	Other necessary measures to remedy the effects of the practice in breach
	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

Merger Control Specific Sanctions

Under the 2004 Law on Competition, apart from the general sanctions specified above, Decree 120 on Dealing with Breaches in the Competition Sector (2005) specifies the following penalties for a breach of the merger control provisions:

Type of Economic Concentration	Sanctions
Prohibited Mergers	<ul style="list-style-type: none"> • Fine of up to 10% of total turnover* of the merging and merged enterprises • Unwinding/split of post-merger entity
Prohibited Consolidation	<ul style="list-style-type: none"> • Fine of up to 10% of total turnover of the consolidating enterprises • Withdrawal of business registration certificate; division or unwinding
Prohibited Acquisitions	<ul style="list-style-type: none"> • Fine of up to 10% of total turnover of the acquiring enterprise • Compulsory sale of acquired assets
Prohibited Joint Ventures	<ul style="list-style-type: none"> • Fine of up to 10% of total turnover of each JV party • Business registration certificate of JV and JV parties may be withdrawn
Failure to notify Economic Concentration	<ul style="list-style-type: none"> • Fine of up to 10% of total turnover
Completing an economic concentration before an Article 19 Exemption is granted	<ul style="list-style-type: none"> • Fine of VND 100 – 200 million (USD 4,300 – 8,600)

* "Total turnover" in this table = total turnover in the financial year prior to the year of breach
Maximum fines: 10 % of the enterprise's total turnover

Apart from the general sanctions specified above, further implementing legislation is needed to provide details on the specific sanction that would apply for a breach of the merger control provisions under the 2018 Law on Competition.

Maximum Caps to Fines

The 2004 Law on Competition caps the level of fines for a breach of the restraint of competition provisions (i.e. restrictive agreements, abuse of dominance, merger control) 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.

The maximum caps for fines arising from unfair competitive practices are expressed in absolute figures, rather than a percentage of turnover.

	Restrictive Agreements	Abuse of Dominance	Economic Concentrations	Unfair Competitive Practices
2004 Law on Competition	10% of total turnover*	10% of total turnover	10% of total turnover	Range of penalties for different practices set out in the Decree on Imposition of Penalties for Violations against Law on Competition (No. 71/2014/ND-CP)

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

	Restrictive Agreements	Abuse of Dominance	Economic Concentrations	Unfair Competitive Practices
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)	VND 2 billion (approx. USD 86,000) (for organisations)
	-- 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)	-- VND 1 billion (approx. USD 43,000) (for individuals)

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.⁴⁴

⁴⁴ 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.

Leniency

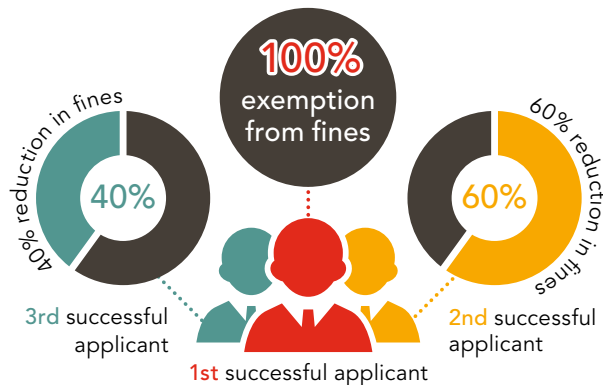


While the 2004 Law on Competition does not provide for a leniency program, it will be treated as a mitigating factor for parties to voluntarily report their conduct which restrains competition, prior to it being discovered by the regulator.

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.



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