



Vietnam – new competition law

Summary

Vietnam's long-awaited Competition Law, passed by the National Assembly on 9 November 2004, comes into effect on 1 July 2005. The Competition Law regulates unhealthy competitive practices and practices in restraint of competition, including agreements in restraint of competition, abuse of dominant market position or monopoly position, and economic concentrations. The law also establishes a Competition Commission and Competition Council and sets out enforcement measures. It is another important step in the development of a comprehensive system of commercial law.

Vietnam's long-awaited Competition Law was finally passed by the National Assembly on 9 November 2004, four years after the initial draft was circulated. This new law, which will come into effect on 1 July 2005, is yet one more important step in the ongoing development of a comprehensive system of commercial law in the country.

Competition rules before the Competition Law

The main regulations on anticompetitive measures before the Competition Law was passed included the following.

- The 1997 Commercial Law, which contains several provisions to protect consumers (including prohibitions on increasing or reducing prices to the detriment of producers and consumers, deceiving or misleading customers, using deceptive advertisements or conducting unlawful commercial promotions) and to prevent other unhealthy competitive acts (including speculation for market control, dumping of goods, defamation, obstructing, enticing, bribing or threatening the staff of customers or of other business entities and infringing the industrial property of other enterprises).
- Pricing regulations, in particular the Ordinance on Price of the Standing Committee of the National Assembly, dated 26 April 2002, that prohibit any agreements to fix prices aimed at dominating the market or exceeding the market share stipulated by law.
- Decree 54 of the Government dated 3 October 2000 on the protection of intellectual property rights

regarding trade secrets, geographical indication, trade names and protection against unhealthy competitive practices relating to intellectual property. Decree 54 defines certain practices as unhealthy competitive acts, including using misleading materials to take advantage of or damage the prestige or reputation of another business.

However, these provisions were poorly enforced and had little effect on actual market competition due to the lack of a comprehensive system of regulations focused on competition issues.

Overview of the Competition Law

The Competition Law is the first law comprehensively governing competition in the market. It regulates unhealthy competitive practices and practices in restraint of competition by all businesses in Vietnam, including 'overseas enterprises operating in Vietnam'.

The Competition Law also establishes supervisory authorities to regulate competitive practices in the market and sets out measures to enforce its provisions.

Unhealthy competitive practices

These are defined as business practices that are contrary to the normal norms of business ethics and that cause, or might cause, detriment to the interests of the state or the legitimate rights and interests of other enterprises or consumers.

Unhealthy competitive practices consist of such unethical practices as falsifying product information, infringing business secrets, coercing or defaming another enterprise, disrupting the business activities of another enterprise, using misleading advertisements and promotions, discriminating within an industry association, engaging in illegal multilevel selling of goods, and other acts of unhealthy competition as prescribed by the government. All such practices are prohibited and no exemptions will be granted for such activities.

Practices in restraint of competition

These are defined as practices that reduce, distort or hinder competition in the market. They include agreements in restraint of competition, abuse of dominant market position and monopoly position, and economic concentrations.

Agreements in restraint of competition

Boycotts and tender collusions are considered agreements in restraint of competition, regardless of the market share of the enterprises concerned, and no exemptions will be granted for such activities.

Enterprises that hold a combined market share of 30 per cent or more of the relevant market are prohibited from entering into price fixing and market sharing agreements; agreements to restrict output, technical developments, technology or investment; or agreements to impose trading conditions on other parties.

However, these enterprises may apply to the Competition Commission (see below) for an exemption for the above activities if such an agreement (i) rationalises an organisational structure or business scale and increases efficiency, (ii) promotes technical or technological progress, improving the quality of goods and services, (iii) promotes uniform applicability of quality standards and technical norms of certain types of products, (iv) unifies conditions on trading, delivery of goods and payment but not those relating to price or any pricing factors, (v) increases the competitiveness of medium and small-sized enterprises; or (vi) increases the competitiveness of Vietnamese enterprises in the international market. The Minister of the Ministry of Trade (MOT) will decide whether or not an exemption is warranted.

The criteria for whether such activities are agreements in restraint of competition are based on the enterprises' combined market share and not the activities themselves. Therefore, enterprises with less than a 30 per cent combined share of the relevant market may engage in activities that restrain competition.

This places a heavy burden on the new (to Vietnam) and difficult concept of market share. In order to calculate an enterprise's share of the relevant market, the authorities will use the following definitions set out in the Competition Law.

- 'Relevant market' is the market containing the goods and services that are substitutable in respect of characteristics, usage and price (relevant product market) or a specific geographical area in which goods and services are substitutable in similar competitive conditions and that is significantly distinct from the adjacent areas (relevant geographical market).
- 'Market share' is the percentage of the sales turnover of an enterprise over the total sales turnover of all enterprises trading the same goods or services in the relevant market or the percentage of the purchase turnover of an enterprise over the total purchase turnover of all enterprises trading the same goods or services in the relevant market, as calculated in a month, quarter or year.

Although the regulation of practices in restraint of competition will rely heavily on these two concepts, the definitions are unfortunately vague enough that investors will have to wait to see how they are applied in practice.

Abuse of dominant market position or monopoly position

Abuse of dominant market position

Enterprises that have dominant market positions will be subject to additional restrictions. An enterprise will be deemed to hold a dominant market position if it (i) holds a market share of 30 per cent or more of the relevant market or (ii) is capable of significantly restraining competition. A group of enterprises acting together will be deemed to hold a dominant market position if they hold a combined market share of 50 per cent or more (for two enterprises), 65 per cent or more (for three enterprises) or 75 per cent or more (for four enterprises)

in the relevant market. It appears that parallel action by the group of enterprises is sufficient to constitute action together, without need for an agreement.

Such an enterprise or group of enterprises is prohibited from selling below cost, fixing unreasonable selling or purchasing prices or minimum reselling prices, restricting production or distribution, restricting the market or technical or technological developments, applying discriminatory commercial conditions, imposing conditions for signing contracts, bundling unrelated obligations into a contract or preventing other enterprises from entering the market.

Several of these practices are not prohibited per se but are prohibited if they actually cause loss to consumers or have the intention of harming competition. However, no criteria or guidelines for assessing such effect or intentions are set out.

Abuse of monopoly position

An enterprise will be deemed to be in a monopoly market position if there are no other enterprises competing in the relevant market for the goods that it trades or the services it provides. An enterprise in a monopoly market position is subject to the same prohibitions on its competitive practices as enterprises holding dominant market positions. In addition, it may not impose disadvantageous conditions on customers or abuse its monopoly position to unilaterally change or rescind a signed contract without a legitimate reason.

State monopoly sectors

The state will continue to control state-owned enterprises (SOEs) operating in sectors it has declared to be 'state monopoly sectors' by deciding the quantities, volumes, prices and market scope of goods and services that these enterprises produce. However, if an SOE in a state monopoly sector conducts business outside this sector, it will be held to the same standards as private enterprises (eg if an electric utility began selling ice-cream, the ice-cream sales would be subject to the Competition Law). It is unclear if its activities in the state monopoly sector are subject to other provisions of the Competition Law (ie prohibited from unhealthy competitive practices and practices in restraint of competition).

Economic concentration

Economic concentrations, including mergers, acquisitions, consolidations, joint ventures and other forms of economic concentration, are subject to new regulations. These regulations apply to existing foreign-invested enterprises, but they would not apply to a new foreign investor with no other presence in Vietnam or if the proposed economic concentration would result in a 'small or medium-sized enterprise'.

A small or medium-sized enterprise is defined by Decree 90 of the Government dated 23 November 2001 as a domestic enterprise having a registered capital of no more than 10bn dong or employing on average no more than 300 employees in a year. As the Competition Law does not define small or medium-sized enterprises, the definition from Decree 90 will likely be applied, though the implementing decree will have to confirm this.

If the parties to an economic concentration have a combined market share of between 30 per cent and 50 per cent of the relevant market they must notify the Competition Commission 30 days before the proposed economic concentration. The proposed economic concentration can only be carried out after written confirmation has been received from the Competition Commission that the economic concentration is not prohibited.

If the participating parties have a combined market share above 50 per cent in the relevant market, an economic concentration is prohibited. However, the parties may apply to the Competition Commission for an exemption from such prohibition if (i) one or more of the parties to the economic concentration is at risk of being dissolved or declared bankrupt or (ii) the economic concentration has the effect of contributing to socioeconomic development, technical progress or the increase of exports. Applications for the first type of exemption will be decided by the MOT, while the Prime Minister will decide whether to grant exemptions for the second type.

Competition authorities

Competition activities will be administered by the Competition Commission and the Competition Council.

Competition Commission

The Competition Commission will be established under the MOT with the power and duty to control economic concentrations, accept applications for exemptions and make recommendations to the MOT or the Prime Minister on such requests, investigate cases concerning practices in restraint of competition and unhealthy competitive practices and impose fines for unhealthy competitive practices. One of the main issues with the new law is whether this body will be truly independent given that numerous businesses have been established by the MOT itself.

Competition Council

The Competition Council will comprise 11 to 15 members appointed by the Prime Minister at the recommendation of the MOT. The Competition Council will be responsible for hearing and resolving cases concerning practices in restraint of competition.

Competition proceedings

Any organisation or individual that believes its legal rights and interests have been infringed due to a breach of the Competition Law can submit a complaint to the Competition Commission. The Competition Commission can also initiate an investigation if it discovers a breach of the Competition Law.

The Competition Commission will conduct a preliminary inquiry. Where indications of an offence are found, an official inquiry will be conducted. The investigator's report on the results of the official inquiry must be forwarded to the Competition Council, which can hold a detailed hearing. In addition, the investigator may refer a breach of the Competition Law for criminal prosecution in certain cases.

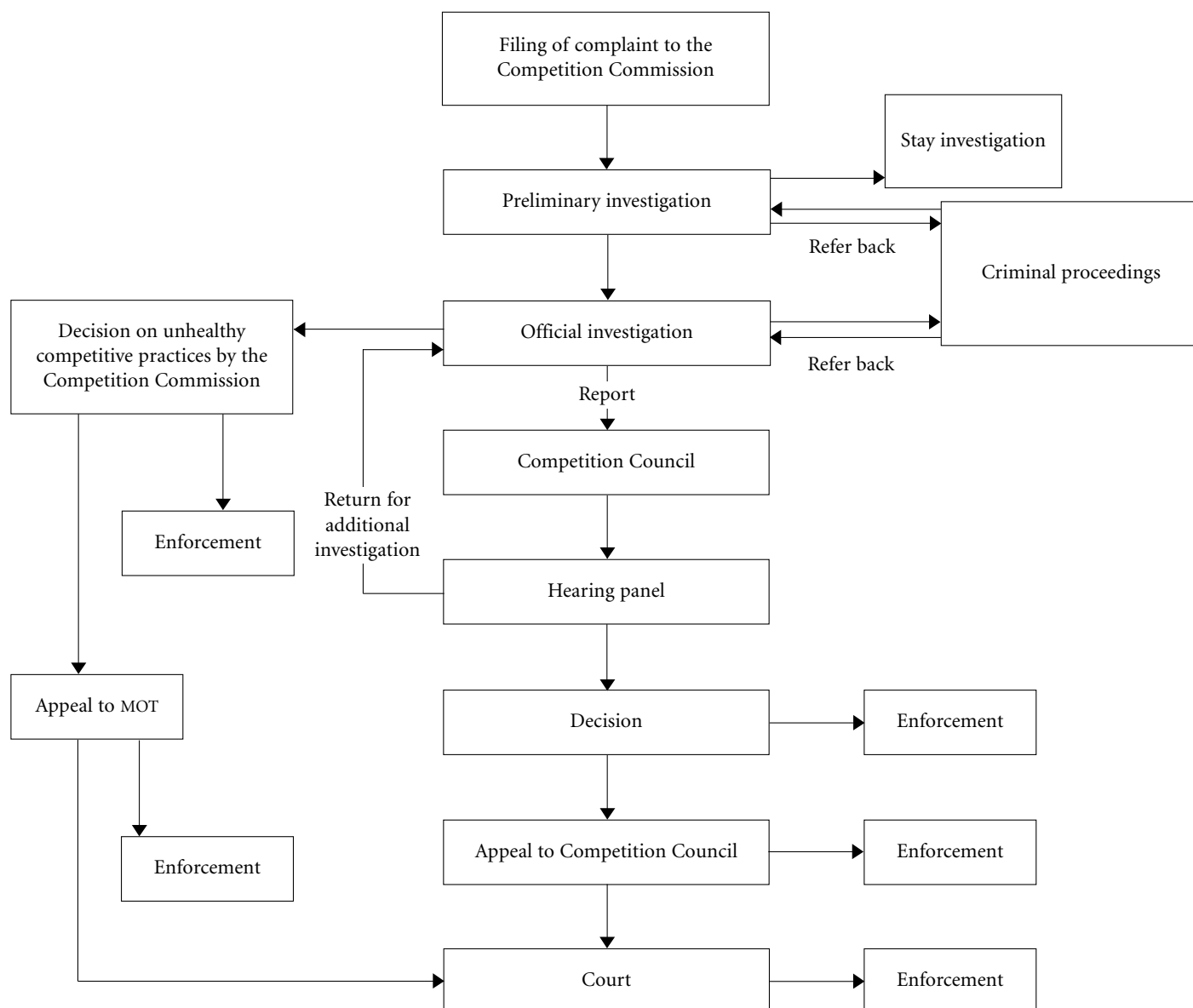
The consequences of a breach of the Competition Law are different for unhealthy competitive practices and practices in restraint of competition. For the latter, fines of up to 10 per cent of the total turnover in the preceding year are possible, and divestitures can be required for unlawful economic concentrations. In addition, compensation may have to be paid to those who have suffered loss.

Please see the next page for an overview of the Competition Law enforcement structure.

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Enforcement structure



Unhealthy competitive practices

Sanctions:

- Warning
- Monetary fine
- Confiscation
- Public rectification

Practices in restraint of competition

Sanctions:

- Warning
- Monetary fine
- Confiscation
- Restructuring
- Division, separation of enterprise, compulsory resale of the acquired portion of enterprise
- Public rectification
- Removal of unlawful terms from the contract or the transaction
- Withdrawal of business certificate, licence or professional practising certificate
- Other measures to limit the anticompetitive effect

Criminal offences

Sanctions:

- Criminal sanctions depending on the cases