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Competition Law in Vietnam

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I. INTRODUCTION

2015 marks the 10th anniversary of the implementation of Vietnam's Competition Law 2004 ("the VCL"), which is the first-ever comprehensive competition law in Vietnam.[2] The enactment of the VCL in 2004 was considered to be a milestone in Vietnam's transition to a market economy, legal reform, and international integration process. Nevertheless, the enforcement of the VCL during the last ten years has been very poor even though there is no shortage of anticompetitive practices in the Vietnamese market. This is not only harmful to Vietnam's economy but also a challenge to Vietnam's joining the ASEAN Economic Community in 2015.[3]

In this article, the author will analyze the development as well as the enforcement of competition law in Vietnam. After a short introduction, Part II analyzes the major driving forces behind the enactment of the VCL in 2004. Next, Part III analyzes the main prohibitions. Part IV addresses the institutional arrangements. Part V highlights the regulatory processes. Finally, Part VI gives some assessment of the introduction of competition law in Vietnam.

II. FACTORS THAT WERE IMPORTANT IN INTRODUCING THE VCL IN VIETNAM

A. Vietnam's Transition from a Centrally Planned Economy to a Market Economy

After more than 10 years of economic stagnation and crisis under the planned economy, Vietnam made a historical decision to carry out a comprehensive and thoroughgoing reform widely known as *Doi Moi* ("Renovation") in 1986. The aims of the reform were to move from a centrally planned economic system towards a multi-sectoral economic system with a socialist orientation, known as a "socialist-oriented market economy" (*nen kinh te thi truong dinh huong*

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[2] The VCL was passed by the 10th Congress of National Assembly on 9 November 2004. After the enactment of the Competition Law, the Government issued several guidelines in the form of Governmental Decrees to implement the law. These include Decree No.116/2005/ND-CP on the details of implementing a number of Articles of the Law, dated 15 November 2005 (Decree No.116); Decree No.05/2006/ND-CP on establishing and determining functions, tasks, powers, and organization structure of the Vietnam Competition Council, dated 9 January 2006 (Decree No.05); Decree No.06/2006/ND-CP on establishing and determining functions, duties, powers and organization structure of Vietnam Competition Administration Department, dated 9 January 2006 (Decree No.06); Decree No.119/2011/ND-CP on amending some administrative procedures provided in Decree No. 116/2005 (Decree No.119); and Decree No.71/2014/ND-CP on dealing with breaches in competition, dated 21 July 2014 (Decree No.71);

[3] *See* Luu Huong Ly, *Regional Harmonization of Competition Law and Policy: An ASEAN Approach*, 2(2) ASIAN J. INT'L L. 291-321 (2012).

xa hoi chu nghia). Hand in hand with the recognition of a multi-sectoral economy has been the recognition of the freedom to conduct business and competition by the State. Competition, previously unacceptable in the planned economy, has become recognized in the new market economy. Relying on this political declaration, the legal framework for economic competition in Vietnam was established gradually.[4]

Further, with the increase of enterprises in terms of both number and scale, competition has become more and more vigorous, which is in contrast with the situation when under the command economy. The first index to show that there has been an increase in competition is the decrease in economic concentration. Both the Concentration Ratios ("CR") and the Herfindahl-Hirschman Index ("HHI") show that in seven years from 2000 to 2006, the market became less concentrated with the average CR4 falling from 37.22 percent to 29.41 percent and the average HHI decreasing from 1.151 to 470.[5]

The down-side of a more vigorous competition in the market is that anticompetitive practices also started to occur; for example, competitors agreeing to prevent other enterprises from entering the market, expanding their operations, or applying new technology; agreeing on fixing the output; boycotting; and refusing to trade.[6] This led to the call for the adoption of a comprehensive competition law in Vietnam.

B. Vietnam's Effort to Solve Serious Problems in Its Internal Market and to Promote Competition

First, there was a need to deal with administrative monopolies and a fragmented domestic market. Administrative monopolies in Vietnam originated from the establishment of a market economy without a corresponding privatization of production material resources.[7] Despite economic reforms over the past two decades, the state still plays a dual role as both a regulator and a participant in the market.

At the central level, Vietnamese administrative bodies are well known for their interference in market activities both by deterring market entry (through the license and permit system) and by dividing markets (by issuing decisions or using trade associations to divide markets, or allocate suppliers or distributors), etc.[8] For example, it was reported that the enterprises winning a bid were always the enterprises belonging to the line ministries, or enterprises under a line ministry would always buy goods and services from other enterprises in

[4] PHAM DUY NGHIA, VIETNAMESE BUSINESS LAW IN TRANSITION, 67 (2002); Le Danh Vinh – Vice Minister of Trade, *Building Competition Law in Vietnam to Meet the Need of Regulating Market Economy and in the Light of Trade Liberalization and International Economic Integration*, Paper presented at ASEAN Conference on Fair Competition Law and Policy in the ASEAN Free Trade Area (AFTA), Bali, March 5-7 (2003).

[5] Calculations by Bui Nguyen Anh Tuan from data of the General Department of Statistics of Vietnam, in Bui Nguyen Anh Tuan, *Competition Policy from a Developing Country's Perspective*, VCAD Conference Paper, Hanoi, p. 22, in Vietnamese (2010).

[6] CIEM, *Legal and Institutional Issues on Business Competition and Monopoly Control Policy*—VIE/ 97/016, (CIEM, Hanoi), p.83, in Vietnamese (2002).

[7] Pham Duy Nghia, *Administrative Monopolies: Identifying and Approach of Competition Law*, 8 J. LEGISLATIVE STUDIES 56, p.57, in Vietnamese (2003).

[8] *Id.*

the same line ministry.[9] Further, there is a close relationship between administrative monopolies and state-owned enterprises ("SOEs") in Vietnam where numerous priorities and incentives are still given to SOEs and their monopolies in certain industries are still strictly protected by the State.[10]

In this context, and similar to many transitional economies, it is particularly necessary for Vietnam to have clear and specific regulations eliminating administrative monopolies and promoting a fair and equitable business environment. At the provincial level, the phenomenon of "provincialism" or "localism" does exist in Vietnam and is understood as local governments using their legislative and administrative powers to create and protect the privileges of their own enterprises and distorted competition within Vietnamese market. In practice, Vietnamese regional administrative bodies are well known for their interference in market activities by deterring market entry and dividing markets.[11] For instance, some local governments have prevented enterprises from other localities operating in their regions by refusing or restricting to grant licenses for them to open branches or representative offices.[12] Since regionalism is harmful to the unity of the national market, specific rules to deal with this problem are perceived to be necessary.

Second, there has been a need to subject SOEs to market discipline. The VCL was enacted in the context where "all monopolies in Vietnam are State monopolies which are protected by the State, there are no private or foreign-invested monopolies."[13] Monopolies in Vietnam included both administrative monopolies and natural monopolies (both are regulated by the State). Both single monopolies and group monopolies also existed and all monopolistic or dominant enterprises were SOEs—there were no private or FDI monopolies or dominant enterprises yet.[14]

Unfortunately, SOEs, especially monopolistic or dominant GCs, have been often involved in anticompetitive practices to maintain their monopolistic/dominant positions. Generally, SOEs' abusive practices relate to prices—either imposing very low buying prices or very high selling prices. Moreover, these enterprises are also involved in predatory pricing and discriminating practices. Price discrimination of the same goods or service among different customers also have occurred, e.g., the dual-pricing system in electricity, water supply, air tickets, and train tickets, etc. applied to foreign and Vietnamese customers[15] with the result that foreign customers are asked to pay more.

Tying practices frequently occur in the areas of insurance and transportation as well as in farming products.[16] Monopolistic enterprises are also reported to refuse trading with competitors

[9] CIEM, *supra* note 6, at 83.
[10] Pham Duy Nghia, *supra* note 7, at 61.
[11] Pham Duy Nghia, *supra* note 4 at 57.
[12] CIEM, *supra* note 6, at 80.
[13] Nguyen Nhu Phat, *Competition and Constructing Competition Law in Vietnam*, *available at* < http://www.law-vnu.netnam.vn/html/nghiencuu.html> (in Vietnamese).
[14] CIEM, *supra* note 6, at 63-66.
[15] *Id.* at 72.
[16] *Id.* at 85.

or consumers, especially in service industries.[17] Further, state monopolistic enterprises are notorious for high prices and low quality products and services. The reason is the lack of antitrust legislation and. Also, government control over monopoly prices has been insufficient.[18] Thus, a competition law has been needed to control these state monopolies.

Third, there has been a need to control trade associations. Trade associations in Vietnam are voluntary associations but the establishment of these associations must be approved by the State. Vietnamese trade associations operating in key industries (such as textile, footwear, seafood, coffee, and tea) are often dominated by SOEs and enjoy close political connections with the supervising ministries. In reality, trade associations often play a very active role in assisting members to reach anticompetitive agreements. Collusion among members of trade associations is easy to perceive since they were normally expressed in official agreements.[19] Collusion in these associations normally relate to price-fixing, which result in high prices for consumers.[20] Therefore, it is strongly believed that trade associations must not be outside the scope of application of competition law.

C. Vietnam's Opening to the Outside World

Since the end of the 1980s, Vietnam has been carrying out a comprehensive diplomatic policy. Its participation in ASEAN (in 1997), APEC (in 1998), the Vietnam-U.S. Bilateral Trade Agreement (in 2000), and especially the WTO (in 2007) have affected directly Vietnam's legal development, especially laws concerning business activities.

First, international commitments (especially the commitment of equal treatment) have increased the competition pressure on domestic enterprises with the increase of imports and foreign competitors operating inside and outside the territory of Vietnam.[21] Since Vietnam opened its market, companies from economic powers like the United States, European Union, and Japan, etc. have been competing vigorously with Vietnamese enterprises right in the Vietnamese market. There was a real concern that "[w]ith experience and powerful economic potential, they do not hesitate to adopt all competition tactics to get customers and expand market" including anticompetitive measures and "[l]ike any other transitional economies, Vietnam is facing the challenge that foreign enterprises will take advantage of trade liberalization to impose their own restrictions like price-fixing, predatory pricing, other abuses to distort fair competition on the market."[22] Thus it was perceived that a competition law was needed to protect domestic enterprises from their foreign counterparts' anticompetitive practices.

Second, as a result of the opening policy, Vietnam's regulatory structure system for commercial activities also witnessed dramatic changes. International organizations such as the World Bank, the International Monetary Fund ("IMF"), the United Nations Development Program ("UNDP") and the Asian Development Bank ("AD"), etc. played an important role in

[17] *Id.* at 85.

[18] Le Dang Doanh, *Economic Reform and Development in Vietnam*, Working Paper No.92/1 (1992), Economic Division—Research School of Pacific Studies, Australian National University, p.3.

[19] CIEM, *supra* note 6, at 84.

[20] *Id.* at 84.

[21] *Id.* at 90.

[22] *See* Ly, *supra* note 3.

pushing legal reforms in general and the adoption of a competition law in particular. Further, these organizations have also given support to Vietnam to fulfil its tasks in legal reforms, especially in the commercial area.

Finally, and most importantly, the negotiations to become a member of the largest world trading system ("WTO") helped accelerate Vietnam's legal reform during the period 2001-2006, including the adoption of a comprehensive competition law. In 2001, the Politburo issued *Resolution No.7 on International Economic Integration*, in which the Politburo emphasized the need to accelerate the negotiation for Vietnam to accede to WTO, and required the Government to issue a specific action plan on international economic integration, including increasing economic efficiency and national competitiveness as well as amending and perfecting the current legal system. To implement *Resolution No.7*, the Prime Minister of Vietnam signed a Decision on the Government's Action Plan in which the Prime Minister required the Ministry of Justice, in cooperation with all relevant Ministries, Provincial People's Committees, and Legislative agencies, to review the current legal system, and to make recommendations on amendments or drafting of new laws and regulations in the areas of commerce and economics in accordance with WTO rules and international treaties to which Vietnam was a member.

In 2002, the Legal Needs Assessment sponsored by the Ministry of Justice confirmed that treaty accession rules place Vietnam lawmakers under pressure not only to harmonize substantive law, but also develop a procedural "rule of law" that makes private commercial rights credible. The law making agenda was accelerated with the drafting and renewed implementation of legislation directly relating to the market economy and international trade, including competition and antimonopoly law, and by the end of 2005, Vietnam had adopted or revised over 94 statutes and 265 legal acts, including the Competition Law 2004.

III. THE MAIN PROHIBITIONS

Vietnam's competition law, to a large extent, has been constructed by legal transplantation with the support of international donors such as the World Bank and the Asian Development Bank. Although the drafters referred to competition law of various countries such as the United States, Canada, Australia, the European Union, China etc., the VCL has relied more on the EC model than the U.S. model.

The scope of the VCL is quite broad and regulates not only the three standard types of practices (agreements in restraint of competition, the abuse of a dominant or monopoly position, and anticompetitive economic concentrations) but also covers unfair competitive practices that harm competitors and/or deceive consumers.[23] This Article, however, will only focus on the core competition areas, i.e., agreements in restraint of competition, the abuse of a dominant or monopoly position, and anticompetitive economic concentrations. It should be noted that enterprises that operate in State monopoly sectors and/or are engaged in public utility sectors are under the control of the government and are outside the purview of the VCL so far as the activity

[23] Unfair competitive practices include, *inter alia*, misleading indications, infringement of business secrets, coercion in business, defamation of other enterprises, causing disruptions to the business activities of another enterprise, misleading advertisement, promotion aimed at unfair competition, discrimination by an association, and illegal multi-level selling of goods, *see* Art. 39 of the VCL.

that they are engaged in stays within the State monopoly sector and/or the provision of public utility products and services.

A. Agreements in Restraint of Competition

The primary prohibition on anticompetitive agreements is found in Article 8 of the VCL. The notion of "agreement" is not defined under the current Vietnamese competition regime and it is still unclear whether "agreement" is limited to written agreements, oral agreements, and/or gentlemen's agreements. It may be the case that all the above forms of agreements are caught by the Law. There is no clear distinction between horizontal agreements and vertical agreements in the VCL; however, technically the provisions relating to anticompetitive agreements in the VCL only apply to horizontal agreements.[24] In other words, vertical agreements are not subject to prohibition by the VCL.

Article 8 of the VCL prohibits the following eight categories of anticompetitive agreements:

i. agreements either directly or indirectly fixing the price of goods and services;
ii. agreements to share consumer markets or sources of supply of goods and services;
iii. agreements to restrain or control the quantity or volume of goods and services produced, purchased, or sold;
iv. agreements to restrain technical or technological developments or to restrain investment;
v. 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;
vi. agreements which prevent, impede, or do not allow other enterprises to participate in the market or to develop business;
vii. agreements which exclude from the market other enterprises which are not parties to the agreement; and
viii. collusion in order for one or more parties to win a tender for supply of goods and services.

Of the above agreements, agreements listed in (i) through (v) are only prohibited when the parties to the agreements have a combined market share of 30 percent or more of the relevant market and may be exempted from punishment. In contrast, the last three agreements are prohibited in any event, irrespective of the involved parties' market shares, and no exemptions are applicable to these agreements.

Vietnam adopted an exemption and exception system that operates on the basis of individually granted exemptions and must be applied for in advance. The granting of exemptions appears to be a politicized process, such that exemptions can be granted only by the Minister of

[24] Although Article 8 refers to "competition restriction agreements," which arguably may consist of both horizontal and vertical agreements, the term "combined market share of participating parties" in Article 9(2) of the VCL would suggest that the provisions of Article 8 only apply to horizontal agreements. "Combined market share" is defined as the total market share in the relevant market of participating enterprises (Article 3(6) of the VCL) and the relevant product market comprise goods or services which may be substituted for each other (Article 3(1) of the VCL); thus, such agreements can only be reached between parties operating at the same industrial level.

Industry and Trade, not the competition agencies. A prohibited agreement shall be entitled to exemption for a definite period if it satisfies one of the following criteria aimed at reducing prime costs and benefiting consumers: (i) it rationalizes an organizational structure or a business scale or increases business efficiency; (ii) it promotes technical or technological progress or improves the quality of goods and services; (iii) it promotes uniform applicability of quality standards and technical ratings of product types; (iv) it unifies conditions on trading, delivery of goods, and payment, but does not relate to price or any pricing factors; (v) it increases the competitiveness of medium- and small-sized enterprises; and/or (vi) it increases the competitiveness of Vietnamese enterprises in the international market.

B. Abuse of a Dominant or Monopoly Position

The VCL creates two different sets of presumptions; one applies to enterprises holding dominant positions and the other applies to monopolists, which may be a unique feature of the Vietnamese competition regime.

Enterprises are deemed to be in a dominant position where their market share is 30 percent or greater, or if they are "capable of restricting competition considerably."[25] Thus, even an enterprise with less than 30 percent of market share may still be found to hold a market-dominant position. A group of enterprises shall be deemed to be in a market-dominant position if they act together in order to restrain competition and fall into one of the following categories: (i) two enterprises have a market share of 50 percent or more in the relevant market; or (ii) three enterprises have a market share of 65 percent or more in the relevant market; or (iii) four enterprises have a market share of 75 percent or more in the relevant market.

It seems that these enterprises cannot rebut the presumption that they have market dominance once their (combined) market share reaches the said threshold since Article 11 does not contain within it any measure that permits an enterprise to rebut the presumption of dominance. A monopoly is defined as an enterprise that has no competitors for goods it trades or for services it provides in the relevant market.

The VCL provides an exhaustive list of prohibited abuses of market dominance and monopoly. Enterprises holding dominant positions or monopolies are prohibited from doing the following:

i. selling goods or providing services below the total prime cost of the goods in an action aimed at excluding competitors;
ii. fixing an unreasonable selling or purchasing price or fixing a minimum re-selling price goods or services, thereby causing loss to customers;
iii. restraining production or distribution of goods or services, limiting the market, or impeding technical or technological development, thereby causing loss to customers;
iv. applying different commercial conditions to the same transactions aimed at creating inequality in competition;

[25] Art. 11(1) of the VCL.

v. 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; and
vi. preventing market participation by new competitors.

In addition to the above restrictions, monopolistic enterprises are further prohibited from:

vii. imposing unfavorable conditions on customers; and
viii. using the monopoly power held to unilaterally modify or cancel the contracts already signed without plausible reasons.

It is noteworthy that no exemption is available to any prohibited conduct; in other words, these conducts are prohibited *per se,* which is another unique feature of the Vietnamese competition regime.

C. Anticompetitive Economic Concentrations

Vietnam uses the concept of "economic concentration" which includes, *inter alia*, mergers, consolidations, acquisitions, and joint ventures. Pre-merger notification is compulsory and there is no exception for intra-enterprise concentrations. Where enterprises participating in an economic concentration have a combined market share in the relevant market of from 30 percent to 50 percent, the legal representative of such enterprises must notify to the VCAD prior to carrying out the economic concentration. Notification is not required where the enterprise after the economic concentration still falls within the category of medium- and small-sized enterprises.

A concentration is prohibited where the enterprises participating in the economic concentration have a combined market share of more than 50 percent in the relevant market. However, a prohibited concentration can be exempted where (i) one or more of the parties participating in the economic concentration is or are at risk of being dissolved or of becoming bankrupt; or (ii) the economic concentration has the effect of extending exports or contributing to socio-economic development and/or to technical and technological progress. While the first type of exemption is granted by the Minister of Industry and Trade, the second one can only be granted by the Prime Minister. These exemptions are individually granted and must be applied for in advance. Unfortunately, so far there has been no further interpretation to clarify these exemptions.

The VCL does not have any provisions on conditioned concentrations. Therefore, all concentrations that result in an enterprise with more than 50 percent of market share in the relevant market will be prohibited, regardless of whether the anticompetitive effects can be prevented or restricted or not, unless exemptions are granted.

D. Abuses of Administrative Power to Eliminate or Restrict Competition

In contrast to competition law in developed countries, which normally regulates competition practices of private entities only, competition law in Vietnam has to prevent competition distortion that comes from public entities. Vietnam's competition law has provisions requiring all government entities not to intervene unreasonably in market activities and create negative impacts on competition. Article 6 of the VCL states that State administrative

bodies shall not be permitted to perform the following acts in order to hinder competition in the market:

i. forcing an enterprise, organization, or individual to purchase or sell goods or services with an enterprise appointed by such body, except for goods and services belonging to State monopoly sectors or in cases of emergency as stipulated by law;
ii. discriminating between enterprises;
iii. forcing industry associations or enterprises to associate with each other aimed at excluding, restraining, or hindering other enterprises from competing in the market; and
iv. other practices which hinder the lawful business activities of enterprises.

However, a clear pitfall in Vietnam's competition law is that there are no sanctions behind those prohibitions that are intended to protect competition.

There have been many calls for changes to the current competition regime but so far there has been no amendment to the VCL. Creating amendments to the VCL has not even appeared in the National Assembly's law-making agenda. However, when the Trans-Pacific Partnership Agreement ("TPP"), to which Vietnam is a negotiating Party and includes a Competition Policy Chapter, is signed, we can expect some positive changes to the VCL.

IV. INSTITUTIONAL ARRANGEMENTS

A. Competition Regulator

To implement the VCL, two enforcement agencies were established, one is the Vietnam Competition Administration Department ("VCAD") with investigation powers and the other is the Vietnam Competition Council ("VCC") with adjudicatory powers.

The VCAD was established in 2003 within the Ministry of Trade and Industry. The Head of the VCAD is appointed by the Prime Minister on the recommendation of the Minister of Industry and Trade. The VCAD has the power to accept and conduct investigations of competition cases, to assess files for request of exemption and forward them to the Minister of Trade and Industry or to the Prime Minister, and to control the process of economic concentration. The VCAD is headquartered in Hanoi and has representative offices in Da Nang and Ho Chi Minh City.

The VCC was established in 2006 and is an independent agency chaired by a Vice-Minister of Trade and Industry and composed of 11 high ranking officials from different ministries, representing the interests of different industries of the State including the Ministries of Trade and Industry, Justice, Finance, Transportation, Agriculture and Rural Development, Construction, Planning, and Investment etc. Members of the VCC are appointed, and may be dismissed, by the Prime Minister on the recommendation of the Minister of Industry and Trade. Members of the VCC are required to have a bachelor degree in law or in economics or in finance and to have at least nine or more years work experience in one of such areas. Appointments are for five-year terms and there is no statutory limitation on the number of consecutive appointments that any one member may hold.

The primary role of the VCC is to address complaints relating to breaches of the VCL based on the results of the VCAD's investigation. The VCC does not have the power to initiate investigations. Each specific competition-restriction case shall be handled by the Competition

Case Handling Council, which comprises of at least five members of the VCC selected by the VCC Chairman.

B. The Judiciary

Under the Vietnamese regime, there is a right to appeal against decisions taken by the VCC by applying for an administrative review and bringing an administrative action (i.e. challenging the decision in the Administrative Court). Thus, aggrieved parties are required to apply for administrative reconsideration by the VCC before initiating an administrative lawsuit against the VCC's administrative review decision. The time limitation for such an administrative lawsuit is 30 days after the aggrieved parties received the VCC's administrative review decision. The procedures for administrative and judicial review in general are respectively governed by the Law on Administrative Review 2011 and the Law on Administrative Litigation 2010.

During the proceedings, the Administrative Court fully reviews regulatory decisions including both the facts and the law and may apply interim remedies to protect evidence or to ensure enforcement of a judgment such as suspending the implementation of the decision of a competition case, or prohibiting a party from doing something, or requiring a party to do something. Where the decision on handling a competition case is found to be unlawful, the Administrative Court has the power of revoking the whole or part of it and requiring the competition agencies to review such decision.

V. REGULATORY PROCESSES—THE PROCEDURES USED BY THE REGULATOR ETC

A. Dealing With Breaches

Any individual or organization who considers that their legitimate rights and interests have been infringed may lodge a complaint to the VCAD. The time limit for such a complaint is two years from the date on which the infringing conduct was carried out. This is in line with the time limit of two years that is available to the VCAD to initiate an investigation into infringing conduct. The injured parties must file a complaint application in the form issued by the VCAD together with evidence of the anticompetitive practice. Within a time limit of seven working days from the date of receipt of a complaint file, the VCAD shall provide written notice to the complainant(s) about acceptance of jurisdiction. Complainant(s) must pay provisional fees for dealing with competition cases, which is VND 100 million (approximately U.S. $5,000). These fees may be recovered wholly or partially by the party that is concluded to be in breach of the competition law. Except for these fees, each party shall bear their own costs.

During the competition legal proceedings, the head of VCAD or the Chairman of the VCC, dependent on the stage of the proceedings, may make decisions on application, amendments, or revocation of administrative preventive measures to prevent in a timely manner a breach of the laws on competition or to ensure a competition case is dealt with. The complainant and the investigator of the case may recommend application of administrative preventive measures, which include:

i. temporary detention of a person in accordance with administrative procedures;
ii. temporary detention of material evidence and facilities;
iii. body searches;

iv. searches of vehicles and other objects; and
v. searches of places used to hide material evidence and facilities.

The party against which administrative preventive measures are applied is entitled to lodge a complaint about the decision on application of such measures in accordance with the laws on complaints and denunciations.

Upon the finding of an infringement of competition law, the VCC will impose a fine up to ten percent of the total turnover of the organization or individual in breach in the financial year preceding the year in which the prohibited practice took place. It is notable that such penalties are not explicitly limited to sales revenue derived from business operations in Vietnam or from the relevant market. Further, the VCC has the power of withdrawing business registration certificates, revoking the right to use a license or practicing certificate, and/or confiscating materials and facilities used to commit the breach of the laws on competition.

The VCC also has the power of applying one or more of the following measures to remedy the effects of the restraint on competition caused by the practice in breach:

i. restructure of an enterprise which abused its dominant market position;
ii. division or split of an enterprise which merged or consolidated;
iii. compulsory re-sale of that part of an enterprise which was acquired;
iv. public retraction;
v. removal of illegal terms and conditions from a contract or business transaction;
vi. compulsory use or re-sale of inventions, utility solutions, or industrial designs which were purchased but not used;
vii. compulsory removal of measures which prevent or impede other enterprises from participating in the market or from developing business;
viii. compulsory restoration of conditions for technical or technological development which an enterprise impeded;
ix. compulsory removal of disadvantageous conditions imposed on customers;
x. compulsory restoration of contractual conditions which were changed without any legitimate reason; and
xi. compulsory restoration of a contract that was cancelled without any legitimate reason.

There is no leniency provision under the Law or the accompanying Decrees. However, there are certain extenuating circumstances, as follows:

i. voluntary testimony of the conduct in breach prior to its discovery by the competent body;
ii. the violating party has taken measures to prevent or mitigate the adverse impact of the breach, or has voluntarily redressed the consequences or has already paid compensation for it;
iii. the violating party has voluntarily provided evidence or information relating to the breach to the competent body which was previously unknown to such body; and
iv. the conduct in breach has a positive impact on the development of the economy.

The existence of one of these extenuating circumstances in a specific case does not exempt the violating party from being sanctioned, but it is important in reducing the specific fine amount imposed on that party.

B. Merger Review Process

The merger approval process contains two basic steps. First, the VCAD must notify in writing to the applicant, in seven working days after the receipt of the notification dossier, whether the notification dossier is complete. Second, once a complete notification dossier has been accepted by the VCAD, in 45 working days it will make one of two decisions: (a) that the concentration does not fall within one of the prohibitions; or (b) that the concentration is prohibited. It should be noted that this period may be extended by a maximum of 30 working days, up to two times, which means that in complicated cases the merger review may take up to 111 working days.

In case the concentration is prohibited, the VCAD is required to clearly state its reasons for applying the prohibition in writing. Yet, since the VCL makes no reference to the competition test, it's very likely that the only reason may be limited to a statement of the finding that the market-share thresholds that invoke the prohibition are satisfied. The relevant enterprises may conduct procedures for the economic concentration only after having received a written reply from the administrative body for competition that the economic concentration is not within the prohibited category. In the event that the merging parties disagree with VCAD's decision, they can lodge an appeal to the Minister of Trade and Industry according to the normal administrative review procedure.

VI. THE IMPACT OF THE INTRODUCTION OF COMPETITION LAW IN VIETNAM

So far, awareness of the competition law by the business and legal professions has been relatively high. However, knowing about the existence of the VCL is just one thing, taking it seriously and using it in practice in quite another thing.

In practice, the enforcement of the VCL during the last ten years has been very poor even though there has been no shortage of anticompetitive practices in Vietnamese market.

For example, on the front against cartels, so far only one case has been handled[26] even though it is widely perceived that collusion among SOEs is a very popular situation in Vietnam. One example of blatant price-fixing that involved SOEs, but escaped punishment by the VCL, is the Steel case in 2008, three years after the VCL took effect. This is also the first price-fixing agreement under investigation by the VCAD.

In this case, as a result of a CEO Conference organized by the Vietnam Steel Association ("VSA") in Hanoi on October 7, 2008, the VSA adopted a resolution to require its members to fix their selling price at 13,7-14 million VND/ton.[27] The reason for this agreement was that due to a sudden decrease in steel prices in 2008, at least four steel producers had to close down their

[26] Decision No.14/QD-HDXL of the Competition Case Handling Council on 29/7/2010 on Handling Competition Case No.KNCT-HCCT-0009 (insurance cartel).

[27] *VCAD Started Investigating the Vietnam Steel Association*, THE SAIGON TIMES (October 17, 2008), *available at* http://atpvietnam.com/vn/thongtinnganh/20962/index.aspx (in Vietnamese).

factories and it was afraid that firms would exit the market if prices continued to fall. The Association Chairman was quoted as saying: "we clearly understand that we will violate the Competition Law and also the Law on Pricing if we join hands to hurt consumers, and we are not allowed to do so. However, the laws should not be applied here."[28] Surprisingly, this case was closed at the investigation period without any punishment on the ground that all the relevant enterprises voluntarily withdrew from their agreement twelve days later!

There are also various reports in the media about enterprises "shaking hands" in buying various agricultural products to the detriment of farmers, yet so far there has been no investigation conducted by competition agencies and these cartels appear to have escaped the scrutiny of the VCL.

On the prohibition of abuses of market dominant positions, it should be born in mind that the current dominant and monopolistic positions in Vietnam are mainly held by SOEs, especially State-owned general corporations and economic groups. Most private companies in Vietnam are still small and unlikely to be caught by the VCL's provisions on abuses of a market-dominant position. It is suspected that abuses of MDP by SOEs are rampant in the economy, yet so far only one case has been handled.[29]

Similarly, some mergers between SOEs have appeared to be "irrelevant" to the VCL. In 2011, Vietnamese media reported on mergers between Vietnam Airlines and Jetstar Pacific Airline ("JPA") (proposed by the Ministry of Transportation), as well as a potential merger between Vinaphone and Mobiphone (proposed by the Ministry of Information and Telecommunications). These mergers raised great concern from the public for fear of detriment to competition.

At the time, Vinaphone, Mobiphone, and Viettel were the three biggest mobile phone services in Vietnam; the merger between Vinaphone and Mobiphone would result in a provider with 60 percent market share, which is detrimental to competition and consumers' interests.[30] The merger between Vietnam Airlines and JPA received even more serious criticism. Under the proposal of the Ministry of Transportation, the 70 percent State capital in JPA, currently supervised by SCIC, would be transferred to Vietnam Airlines. With Vietnam Airlines holding an 80 percent market share and JPA holding a 7 percent market share in a domestic air transportation market with five carriers, the merger would result in a carrier (Vietnam Airlines) with nearly a 100 percent market share. Some authors commented that this merger would be a "back to front" reform in the air transportation market.[31]

Unfortunately, in the end the merger between Vietnam Airlines and JPA was approved. On January 16, 2012, the Vietnam's Prime Minister released Decision No.95, which stated that all SCIC's shares in Jetstar Pacific would be transferred to Vietnam Airlines. The point is, from what

[28] *Id.*

[29] Decision No. 11/QD-HDXL of the Competition Case Handling Council on 14/4/2009 on Handling the case of Vietnam Aviation Petroleum Company's suspending of jet fuel supply to Jetstar Pacific Airlines.

[30] *Merger between Vinaphone and Mobiphone will Damage Competition*, VNEXPRESS (April 27, 2011).

[31] Du Tran, *In Order Not to Be a "Back-to-Front" Reform*, TUOI TRE (December 12, 2011).

was written by the media, the competition agencies appeared to play no role in these mergers. They seemed to be simply "forgotten."

VII. CONCLUSION

Vietnam enacted its first-ever comprehensive competition law in 2004 under the influence of both internal and external factors; however, the most direct and important reason for the introduction of the VCL in 2004 was Vietnam's effort to join the WTO. The promulgation of the VCL was the last step to be done by the government of Vietnam to fully qualify for being a member of WTO. Thus, there has been no real political will from the government of Vietnam to vigorously enforce it in practice. Consequently, so far competition law has had very little impact on the Vietnamese economy and may not help much in Vietnam's integration process into the ASEAN Economic Community.