

➤ Vietnamese competition law reform: what you need to know

In brief: Vietnam is undertaking a major overhaul of its competition law framework to bring it into line with current international practice. The fifth draft Law on Competition has been submitted to the Standing Committee of the National Assembly for review. It is expected to pass in May 2018 and become effective from 1 January 2019, replacing the current Law on Competition. The first draft Decree to implement the new Law on Competition has also been released.

We look at the key changes proposed under the Draft Law and the Draft Decree, and their implications.

REGULATORY BODIES

- > The Ministry of Industry and Trade (the **MOIT**) will remain responsible for the administration of competition.
- > The Vietnam Competition Authority is renamed the National Competition Agency (the **NCA**). The NCA will be an advisory agency assisting the MOIT in the administration of competition, and have the duties of organising investigations, handling competition cases, reviewing exemption requests and controlling economic concentrations.
- > The Competition Investigation Agency (the **CIA**) will be an organisation under the NCA, tasked with detecting and investigating breaches of the provisions of the new Competition Law.
- > The NCA's decisions will be published on its website.



Implications:

- For parties considering transactions, the publication of NCA's decisions will be a helpful source of information on the approach the NCA may take in a given situation.

EXPANDED APPLICATION

- > While it is unclear whether the Current Law has extraterritorial jurisdiction in relation to offshore activities and transactions, the Draft Law clearly applies to any acts, whether by Vietnamese or foreign individuals or entities, 'which have or may have a competition restraining impact' in a Vietnamese market.
- > 'Competition restraining impact' is broadly defined as 'an impact which excludes, reduces, distorts or hinders competition in the market'.



Implications:

- Parties engaging in transactions or arrangements in or outside Vietnam that could lessen competition in the Vietnamese market will need to take into account the extraterritorial application of Vietnamese competition laws and consider applying to the competition authority for approval of potentially problematic transactions.

AGREEMENTS IN RESTRAINT OF COMPETITION

- > Under the Current Law:
 - only agreements that prevent market access, exclude market participation or involve bid rigging are prohibited outright;
 - many cartel arrangements are only prohibited if the combined market share of the parties is 30 per cent or more; and
 - it is not entirely clear under the Current Law whether it applies to both vertical and horizontal arrangements.
- > Under the Draft Law, hardcore cartels between competitors (ie price fixing, customer allocation, restrictions on output, bid rigging) will become strictly prohibited, regardless of the market share.
- > The Draft Law replaces the combined market share test with a test based on whether vertical agreements or other horizontal agreements 'have or may have significant competition restraining impact in the market'.
- > The NCA will apply certain criteria in making its assessment, including market shares and the impact of the agreement on prices.



Implications:

- The criteria for assessment of whether an agreement 'has or may have significant competition restraining impact on the market' are broad and will offer the NCA a level of discretion in the interpretation it applies.

EXEMPTIONS

- > An agreement in restraint of competition may be permitted for a definite period if it benefits consumers and satisfies the conditions prescribed by law, eg such agreement has an impact on promoting technical or technological progress, or improves the quality of goods and services; or such agreement increases the competitiveness of Vietnamese enterprises in the international market.
- > The parties to an agreement in restraint of competition must obtain an exemption from the NCA first before implementing such agreement.



Implications:

- The exemptions are available in a broad range of circumstances and are therefore likely to capture a number of agreements.
- The reach of the exemptions will depend on whether the NCA adopts a narrow or broad interpretation of when a particular exemption is met.

LENIENCY PROGRAM

- > For the first time the Draft Law introduces a leniency policy allowing an enterprise that has entered into an agreement in restraint of competition to have its penalty reduced or exempted if it voluntarily reports its participation to the NCA before the competent agency issues a decision on investigation.
- > The leniency program is unavailable to enterprises that play the role of forcing or organising other enterprises to participate in the agreement.
- > The program is only available to the first three successful applicants. The first successful applicant can receive an exemption of up to 100 per cent of the penalty. The second and third applicants are entitled to a reduction of 60 per cent and 40 per cent respectively.

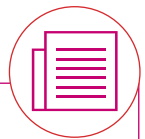


Implications:

- Introduction of the leniency policy will bring Vietnam's competition laws in line with the international practice to encourage reporting of anti-competitive arrangements.
- However, under the Draft Law, the leniency policy remains general, and does not address matters that potential leniency applicants may be concerned to secure, such as confidentiality.
- Furthermore, the leniency policy affords discretion to the NCA in determining the extent of the immunity or penalty reduction, which may result in potential leniency applicants being less willing to self-report.

ECONOMIC CONCENTRATION NOTIFICATION THRESHOLDS AND CLEARANCE

- > Under the Current Law, economic concentration must be notified to the competent authority if the relevant parties have a combined market share of 30 per cent to 50 per cent. Economic concentration that results in a combined market share of more than 50 per cent is prohibited unless an exemption is granted.
- > Such market share based notification thresholds have been removed under the Draft Law and Draft Decree and replaced by certain monetary thresholds. In particular, the Draft Decree has suggested the following monetary thresholds:
 - either party's total assets of VND500 billion (c. US\$20 million);
 - either party's total turnover in the preceding fiscal year of VND1,000 billion (c. US\$45 million); or
 - the transaction value of VND500 billion (c. US\$20 million).
- > The 50 per cent combined market share test for prohibited economic concentration has been replaced with the test of whether an economic concentration has, or may have, a significant competition restraining impact.
- > The Draft Law introduces the possibility of conditional clearance for economic concentrations if the parties undertake to implement certain measures (such as divestitures) to remedy the anti-competitive effects.



Implications:

- The notification thresholds currently outlined in the Draft Decree are relatively low compared with international standards and may result in a substantial increase in the number of notification filings.
- The concept of 'significant competition restraining impact' for prohibited economic concentrations and the assessment criteria in the Draft Law are in line with antitrust laws in other major jurisdictions, which focus on whether an economic concentration will have the effect of substantially lessening competition in a market.
- Similarly, the conditional clearance is in line with those in place in other major jurisdictions and introduces a degree of flexibility into the clearance process.

ECONOMIC CONCENTRATION REVIEW PROCESS

- > The Draft Law introduces a two-phase review process (being preliminary review and official review), which replaces the single phase process under the Current Law.
- > The preliminary review will focus on the market share of the parties and the impact of the proposed economic concentration in the particular market; and in this phase, the NCA will determine whether the economic concentration is permissible or will be subject to the official review phase.
- > In the official review, the NCA will focus on assessing the competition restraining impact as well as any positive impacts on the economy that the economic concentration may bring.



Implications:

- In cases involving the full two-phase review process, the total review period will take place over six months (210 days) from receipt of completed application documents, if the NCA requests no additional information. This may cause significant delay to transactions that require clearance from the NCA.

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