

> Vietnam reforms its competition law to bring it up to international standards

In brief: Vietnam has voted to replace its Current Law for competition with a New Law. The New Law introduces substantial changes to the country's existing competition framework, with lawmakers striving to match Vietnam's competition governance to international standards. The New Law is effective from 1 July 2019, and various implementing regulations will be issued before then to guide its implementation.

We discuss the key changes introduced under the New Law, and their implications.

COMPETITION AUTHORITIES

- > The Ministry of Industry and Trade (**MOIT**) will remain the authority in charge of competition administration. The National Competition Commission (**NCC**) will be set up as a unit under the MOIT, and will be responsible for handling competition cases and proceedings. The Competition Investigation Agency will be established under the NCC, charged with detecting and investigating breaches of competition law.

Implications:

- With the establishment of the NCC, Vietnam will have a single dedicated competition authority that will replace the current dual model, which comprises the Vietnam Competition Authority and the Vietnam Competition Council.

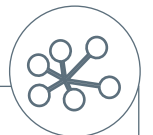


EXPANDED SCOPE OF APPLICATION

- > It is unclear whether the Current Law has extraterritorial jurisdiction in relation to offshore activities and transactions. However, the New Law now makes it clear that it applies to any acts, whether by Vietnamese or foreign individuals or entities, 'which have or may have a competition restraining impact' in the 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.



MERGER FILINGS

- > Under the Current Law, 'economic concentrations' (such as mergers, acquisitions and joint ventures) must be notified if the parties have a combined market share of 30 per cent to 50 per cent in any relevant market. An economic concentration that results in a combined market share of more than 50 per cent is prohibited unless an exemption is granted.
- > Under the New Law, market share is no longer the only test for merger filing analysis. The New Law now looks at one of the following criteria of the parties to the economic concentration to determine whether a transaction must be notified: (i) total assets on the Vietnamese market; (ii) total turnover on the Vietnamese market; (iii) transaction value; or (iv) combined market share of the parties in the relevant market. Specific notification thresholds will be set out in the implementing decree to be issued.
- > The prohibition on economic concentrations that result in more than 50 per cent market share has been replaced with an effects test. An economic concentration will be prohibited if it 'has, or may have, a significant competition restraining impact in the Vietnamese market'. The New Law provides for various factors to determine the 'significant competition restraining impact' of an economic concentration, such as the combined market share of parties, the level of concentration in the relevant market and the impact on the chain of production, distribution and supply.
- > The New Law introduces for the first time 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 before or after the transaction.

Implications:

- The new notification thresholds may result in a substantial increase in the number of filings.
- The concept of 'significant competition restraining impact' and the assessment criteria in the New Law are in line with antitrust laws in other major jurisdictions, and focus on whether an economic concentration will have the effect of substantially lessening competition in a market.
- Similarly, the ability to offer remedies and obtain a conditional clearance is a significant improvement to the current position, and aligns Vietnam with other major jurisdictions, introducing a degree of flexibility into the clearance process.



MERGER REVIEW PROCESS

- The New Law introduces a two-phase review process (being preliminary review and official review) that replaces the single phase process under the Current Law.
- The preliminary review will focus on the combined market share of the parties in the relevant market, relationship of parties in the supply chain, and the level of concentration in the particular market before and after the transaction. In this phase, the NCC will determine whether the economic concentration is permissible or will be subject to the official review phase. If the NCC does not respond to the parties within 30 days from receipt of the complete notification dossier, the parties can proceed with the transaction.
- In the official review phase, the NCC will focus on assessing the competition restraining impact as well as any positive impacts on the economy that the economic concentration may bring. This phase will be conducted within 90 days, which can be extended once for not more than 60 days.

Implications:

- In cases involving the full two-phase review process, the total review period will be about six months (180 days) from receipt of the complete notification dossier by the NCC. This may cause significant delay to transactions that require clearance from the NCC.



AGREEMENTS IN RESTRAINT OF COMPETITION

- Unlike the Current Law, the New Law no longer provides for an exhaustive list of agreements in restraint of competition (ie anti-competitive agreements) and captures any 'agreement which has or may have a competition-restraining impact'.
- While currently most hard-core cartel arrangements (such as price fixing, market allocation and output restrictions) are only prohibited if the combined market share of the parties involved is 30 per cent or more, they will be prohibited outright under the New Law.
- The New Law now clearly applies to both vertical and horizontal arrangements, with certain arrangements being prohibited outright (such as bid rigging or boycotts to prevent a firm from entering a market) and other arrangements being prohibited if they 'have or may have a significant competition restraining impact' (such as agreements not to deal with a firm which is not a party to the agreement).

Implications:

- The scope of the agreements in restraint of competition is expanded and the criteria for assessment of whether an agreement 'has or may have a significant competition restraining impact on the market' are broad. Therefore, the NCC will have a level of discretion in the interpretation it applies.



EXEMPTIONS OF AGREEMENTS IN RESTRAINT OF COMPETITION

- An agreement in restraint of competition may be permitted for a definite period if it benefits consumers and satisfies one of the conditions prescribed by law, including (i) promoting technical or technological progress, or improving the quality of goods and services; or (ii) increasing the competitiveness of Vietnamese enterprises in the international market.
- Such exemption is, however, not available for bid rigging, prevention of market participation and exclusion of non-parties from the market.

Implications:

- The New Law provides a clearer set of conditions and process for application for an exemption. The reach of the exemptions will depend on the NCC's interpretation of the broad range of conditions prescribed by the New Law.



LENIENCY POLICY

- The New Law introduces for the first time a leniency policy allowing an enterprise that has entered into an agreement in restraint of competition to obtain immunity or have its penalty reduced if it voluntarily reports its participation to the NCC before the competent agency issues a decision on investigation.
- The policy is only available to the first three successful applicants. The first successful applicant can receive an exemption of 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.
- Enterprises that organise for other enterprises to participate in the anti-competitive agreements cannot benefit from the leniency policy.

Implications:

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



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