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Competition Law Update - Offences

July 2006

This report discusses the range of competition offences, the prosecution thereof and the applicable administrative penalties in Vietnam.

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Introduction

A new Law on Competition was promulgated by the National Assembly of Vietnam at its November 2004 Session (**Competition Law**)¹ and became effective as of 1 July 2005.

The Competition Law governs two broad categories of practice:

- > Practices in restraint of competition:
 - Agreements in restraint of competition (such as price-fixing agreements);
 - Abuse of dominant market position or monopoly position (such as predatory pricing);
 - Economic concentrations (mergers, acquisitions, consolidations, joint ventures);
 and
- > Unfair competitive practices (such as misleading advertising).

Decree 120-2005-ND-CP of the Government dated 30 September 2005 on Dealing with Breaches in the Competition Sector (**Decree 120**) provides some insight into the types of market behaviour which will be deemed to amount to agreements in restraint of competition and abuse of dominant market position prohibited under the Competition Law, as well as indicating the level of penalties which apply to the various competition offences. Decree 120 became effective as of 25 October 2005.

Competition authorities

The Ministry of Trade is the Government body responsible for State administration of competition. As at the end of July 2006, Vietnam's competition authorities have been established under the Ministry of Trade but are not fully operational.

The Vietnam Competition Administration Department ("VCAD") is responsible *inter alia*:

- To accept and conduct investigations of competition cases concerning practices in restraint of competition;
- To conduct investigations into and deal with competition cases concerning unfair competitive practices and 'other practices in breach of the law on competition' (eg failure to co-operate with competition investigations).

VCAD is headed by a director, who is appointed (and subject to removal) by the Prime Minister on the proposal of the Minister of Trade. The present director of VCAD is Dr Dinh Thi My Loan. Two of VCAD's several deputy directors are in charge of competition matters, Mr Bui Xuan Dung and Mr Tran Anh Son. VCAD's head office is in Hanoi and it will open representative offices in HCMC and Da Nang (and other places as required).

The Vietnam Competition Council ("VCC") is responsible *inter alia*:

- To organize dealing with competition cases concerning practices in restraint of competition after investigation by VCAD;
- To establish case-specific competition panels of at least 5 VCC members to hold investigative hearings into specific competition cases.

The VCC's founding members have been appointed by the Prime Minister on the proposal of the Minister of Trade. 11 members have been appointed for 5 year terms (renewable). All appointees are serving officials of Vietnamese ministries. The VCC Chairman is Mr. Phan The Rue, Deputy Minister of Trade. The 2 Deputy Chairmen are Mr. Dinh Trung Tung, Deputy Minister of Justice, and Mr. Truong Chi Trung, Deputy Minister of Finance. Along with 3 other appointees from the Ministry of Trade, there are

1 Law 27-2004-QH11 on Competition dated 3 December 2004.

appointees from the Ministry of Transportation, Ministry of Industry, Ministry of Agriculture and Rural Development, Ministry of Planning and Investment and Ministry of Construction. The VCC has not yet issued its operational regulations so it is not officially in operation.

How many issues arising under the Competition Law will be interpreted by the Vietnamese competition authorities is difficult to predict in advance of any precedent cases decided by the competition authorities. Neither VCAD nor VCC is yet in a position to provide official interpretations of the Competition Law.

Who does Decree 120 apply to?

The scope of application of Decree 120 is broader than that of the Competition Law:

- > Decree 120 applies to organizations and individuals conducting business (defined as 'enterprises' in the Competition Law), including:
 - Domestic private enterprises,
 - State owned enterprises (**SOEs**),
 - Foreign invested enterprises (**FIEs**), and
 - Overseas enterprises operating in Vietnam.

The phrase 'overseas enterprises operating in Vietnam' is not defined in the Competition Law nor in Decree 116-2005-ND-CP of the Government dated 15 September 2005 Providing Detailed Regulations for Implementation of a Number of Articles of the Law on Competition (**Decree 116**)². The phrase is ambiguous, so the exact range of offshore foreign entities to which the Competition Law applies is not clear. We understand that the phrase 'overseas enterprises operating in Vietnam' is intended to encompass foreign commercial presences in Vietnam, such as foreign branch offices and foreign contractors with an office in Vietnam and/or directly supplying services in Vietnam³ (eg foreign construction contractors). It may also encompass offshore foreign entities, such as the foreign investors in a FIE in Vietnam, but this is yet to be confirmed.

- > Decree 120 applies to industry associations⁴ allowed to operate in Vietnam.
- > Of note, in addition to the above, Decree 120 applies to 'other organizations and individuals committing [acts in breach of other provisions of the laws on competition](#)', such as failure to supply information requested by competition authorities.

Decree 120 provides for administrative penalties to be imposed on the above entities when they intentionally *or* unintentionally commit a competition offence which does not amount to a criminal offence. Where there are indications of a criminal offence, the matter must be transferred to the criminal authorities for investigation and prosecution (and, interestingly, if an administrative penalty decision has already been issued, that decision must be rescinded).

Of note, Decree 120 does not apply to State administrative bodies, even though such bodies are subject to the Competition Law.⁵

2 Decree 116 is the principal legislation implementing the Competition Law and became effective as of 10 October 2005.

3 Our informal advice from the Ministry of Trade's Competition Law Drafting Committee in August 2004 is that the Competition Law is not intended to apply to offshore contractors supplying cross-border services.

4 'Industry associations' are defined as comprising trade associations and professional associations.

5 Under the Competition Law, State administrative bodies are prohibited from practices aimed at hindering competition in the market, such as forcing an enterprise, organization or individual to buy or sell goods or services to or from an enterprise appointed by such State administrative bodies, except in the case of goods and services deemed by law to be in State monopoly sectors.

How are penalties for competition offences determined?

Decree 120 enshrines a number of principles for determination of penalties for competition offences. A competition offence will be penalized once only. Where an enterprise commits multiple offences, it will be penalized for each offence (under multiple penalty decisions or a single penalty decision covering the multiple offences).

Decree 120 provides for consideration of the following matters when penalties are being determined:

- level of restraint on competition caused by the offence;
- amount of loss caused;
- capability of the offending entity to restrain competition;
- duration of offending practice;
- profits gained from offence;
- any aggravating or extenuating circumstances.

For offences relating to practices in restraint of competition and unfair competitive practices, the relevant aggravating and extenuating circumstances are stipulated in Decree 116.⁶ For offences relating to unfair competitive practices and other acts in breach of the laws on competition, the aggravating and extenuating circumstances prescribed in the 2002 Ordinance on Dealing with Administrative Offences may also be applied.⁷

At a minimum, offences relating to [practices in restraint of competition](#) will be penalized by fine. Consistent with the Competition Law, Decree 120 provides for fines to be capped at 10% of the total turnover⁸ of the offending entity in the financial year preceding the year in which the offence is committed.⁹ In most cases, a fine of up to 5% will be imposed. Similarly, at a minimum, offences relating to [unfair competitive practices](#) will be penalized by fine. Decree 120 provides for fixed bands of fines according to the type of practice: VND5-10 million (eg., for defamation), VND15-25 million (eg., for misleading advertising), and VND50-70 million (applicable only for multi-level selling). In contrast, [acts in breach of other provisions of the laws on competition](#)¹ may be penalized by warning only or fine, depending on seriousness of offence.

Depending on the type of offence, additional penalties may also be imposed, including: withdrawal of business registration certificate; revocation of licence or practising certificate; confiscation of material evidence and facilities used in commission of offence. In addition, a number of compulsory remedial measures may also be imposed, eg., corporate restructure.

6 Extenuating circumstances include: voluntary disclosure of offence before being discovered by the competent authority; implementation of preventive or mitigating measures; voluntary remedying of the consequences or payment of compensation; voluntary provision of evidence and information concerning the offence which were previously unknown to the competent authority; any positive effect of the offence on development of the economy. Aggravating circumstances include: multiple offences; recidivism; deliberate offence after official notification of refusal or revocation of exemption by the relevant authority; continuance of an offence despite request to desist; evasion and concealment of an offence.

7 Additional extenuating circumstances include: commission of an offence in a state of nervous excitement caused by the unlawful act of another person; commission of an offence under duress or during spiritual or material dependency; commission of an offence by a pregnant woman, an old and weak person, a disabled person or a person suffering from a disease which limited awareness of or control over his/her acts; commission of an offence in specially difficult circumstances not caused by the offender; commission of an offence as a result of a low intellectual level. Additional aggravating circumstances include: pre-organization of an offence; inducement by the offender of a minor to commit the offence or forcing by the offender of a person materially or spiritually dependent on the offender to commit the offence; commission of an offence in a state of intoxication; abuse of position or power by the offender to commit the offence; taking advantage of war, natural calamity or some other special social difficulty to commit the offence; commission of offence while the offender was serving a criminal sentence or subject to an administrative penalty.

8 According to the Competition Law Drafting Committee in March 2005, 'turnover' means gross VND sales/purchases. Under Decree 116, 'turnover' is determined in accordance with the tax laws and accounting standards of Vietnam (with special provisions in Decree 116 for affiliated entities, insurance companies and credit institutions).

9 Where the offending entity has been in operation for less than one financial year, it is the total turnover of the entity from the date of its establishment to the date of the decision to investigate the alleged offence that is used to calculate the applicable fine.

Compensation is payable where a competition offence causes loss to the interests of the State or to the lawful rights and interests of other organizations and individuals. Compensation is payable in accordance with civil laws.

Which entities are subject to penalties for competition offences?

Penalties are imposed on each enterprise participating in an offence. The maximum penalties stipulated in Decree 120 may be imposed on each participant (ie the maximum does not cap the aggregate penalties imposed on all participants).

Officers and employees of an enterprise do not appear to be liable personally for any breaches of the Competition Law by that enterprise. However, officers and employees may be subject to [administrative preventive measures](#) during investigations into the competitive conduct of an enterprise and while an enterprise's competition case is being dealt with. Also, officers and employees may be prosecuted personally if any individual criminal conduct is identified during a competition investigation. Further, it appears that officers and employees may be liable personally for any individual '[acts in breach of other provisions of the laws on competition](#)', such as failure to supply information requested by competition authorities.

Penalties for practices in restraint of competition

Generally, for practices in restraint of competition, a fine of up to 5% of the total turnover in the financial year preceding the year in which the offence is committed will be imposed on each party participating in the offence. A higher fine of between 5-10% will be imposed in a number of prescribed circumstances, noted below.¹⁰ One or more additional penalties and remedial measures may also be imposed.

> *Agreements in restraint of competition*

Generally, agreements in restraint of competition are prohibited only where the participating parties have a combined market share of 30% or more of the relevant market. Where the parties' have less than 30% combined market share, such agreements are not prohibited even if the agreements have the effect of substantially restraining competition. Exemptions are available if a prohibited agreement satisfies any of six very broad criteria (eg. increase in business efficiency) where the economic benefits to consumers outweigh the restriction on competition. A prohibited agreement may be performed only after an exemption has been obtained and only for the duration prescribed in it.

Of note, agreements in restraint of competition such as boycotts and tender collusion are *strictly* prohibited under the Competition Law. No exemptions are available.

Table 1:

Types of agreement subject to up to 5% fine:
<p><i>Price-fixing (direct or indirect) agreement:</i></p> <ul style="list-style-type: none"> > Agreement to apply a uniform price to a number of or all customers > Agreement to increase or reduce a price by a fixed amount > Agreement to adopt a common price-calculation formula > Agreement to maintain a fixed ratio for the prices of relevant products > Agreement not to discount > Agreement to use uniform discounted price > Agreement on credit limits for customers > Agreement not to reduce prices if other parties to the agreement have not been notified thereof > Agreement to use a uniform price level at the beginning of negotiations

10 Of interest, the maximum fine for first-level offences was lowered from 7% (in the June 2005 draft of Decree 120) to 5% (in the final version of Decree 120). Similarly, for second-level offences, the band of fines was widened from 7-10% (in the draft) to 5-10% (in the final Decree 120).

<p><i>Agreement to divide markets or sources of supply of goods and services:</i></p> <ul style="list-style-type: none"> > Agreement on quantity or locations for purchase/sales of goods or services or on group of customers for each of the parties to agreement > Agreement that all parties to agreement will only purchase goods and services from one or a number of specified sources of supply
<p><i>Agreement to restrain or control quantity or volume of production, purchase or sale of goods or supply of services:</i></p> <ul style="list-style-type: none"> > Agreement to stop or reduce the quantity/volume of production, purchase or sale of goods/services in the relevant market as compared to previously > Agreement to fix the quantity/volume of production, purchase or sale of goods/services at a level sufficient to create a shortage in the market
<p><i>Agreement to restrain technical or technological development or restrain investment:</i></p> <ul style="list-style-type: none"> > Agreement to purchase an invention, utility solution or industrial design in order to destroy it or keep it from being used > Agreement not to provide additional capital for expansion of production, for improvement of quality of goods and services, or for other development and expansion
<p><i>Agreement to impose on other enterprises conditions for entering into contract for purchase/sale of goods or services or to force other enterprises to accept unrelated obligations:</i></p> <ul style="list-style-type: none"> > Agreement to impose on other enterprises conditions precedent prior to signing contract for purchase/sale of goods or services: <ul style="list-style-type: none"> - restrictions on production and distribution of other goods/purchase or supply of other services, which restrictions are not directly related to undertakings of a party accepting to act as an agent in accordance with the law on agency - restrictions on locations for re-sale of goods (except goods subject to conditions on or restricted from circulation) - restrictions on customers which may purchase goods for re-sale (except goods subject to conditions on or restricted from circulation) - restrictions on form and quantity of goods which may be supplied > Agreement to force other enterprises, when conducting purchase/sale of goods and services with any of the enterprises participating in the agreement, to purchase other goods and services from the supplier or other pre-nominated entity or to discharge one or more obligations outside the essential scope of performance of the contract
<p><i>Agreement which prevents, impedes or does not allow other enterprises to participate in a market or to develop business (strictly prohibited):</i></p> <ul style="list-style-type: none"> > Agreement not to trade with enterprises not being parties to agreement > Agreement to act together in requiring, persuading or coercing one's customers not to conduct purchase/sale of goods/services of enterprises not being parties to agreement > Agreement to act together to conduct purchase/sale of goods/services at prices sufficient to ensure that enterprises not being parties to agreement will not be able to participate in the relevant market; > Agreement to act together in requiring, persuading or coercing one's distributors and retail sellers to discriminate when purchasing from and selling goods/services to enterprises not being parties to agreement by causing difficulty for such enterprises to sell their goods > Agreement to act together to conduct purchase/sale of goods/services at prices sufficient to ensure that enterprises not being parties to agreement will not be able to expand their business scale
<p><i>Agreement which excludes from a market other enterprises not being parties to the agreement (strictly prohibited):</i></p> <ul style="list-style-type: none"> > Agreement not to trade with enterprises not being parties to agreement and to act together in requiring, persuading or coercing one's customers not to conduct purchase/sale of goods/services of enterprises not being parties to agreement > Agreement not to trade with enterprises not being parties to agreement and to act together in purchasing/selling goods at prices which will force enterprises not being parties to agreement to withdraw from the relevant market

<p><i>Collusion to allow one or more parties to win a tender for supply of goods or services (strictly prohibited):</i></p> <ul style="list-style-type: none"> > Agreement for one or more parties to agreement to withdraw a tender or an application to participate in a tender in order for one or more other parties to agreement to win the tender > Agreement for one or more parties to agreement to cause difficulties to enterprises not being parties to agreement when the latter participate in a tender by refusing to supply raw materials/enter ancillary contracts or by causing other difficulties > Agreement for all parties to agreement to propose a uniform non-competitive price or a competitive price with conditions attached that the party calling for tenders will not be able to accept in order for one or more of the parties to win the tender > Agreement to set in advance the number of times each party to agreement may win a tender in a certain period of time
<p>5-10% fine will apply:</p> <ul style="list-style-type: none"> > Where concerned goods and services are food, medical apparatus, drugs for human and animals, fertilizer, animal food, plant protection drugs, seeds or domestic animals, and medical and healthcare services > To an offender which has organized and/or induced others to participate in the offence
<p>Additional penalties/remedial measures (optional and in addition to fines):</p> <ul style="list-style-type: none"> > Confiscation of all material evidence and facilities for commission of offence, including profits gained from offending practice > Compulsory preclusion of offending terms from contract or business transaction

For implementation of an agreement in restraint of competition before an exemption decision is rendered (in cases where agreement is entitled to exemption), a fine of VND30-50 million will be imposed on each party, subject to a cap on the maximum fine of 3% of the offender's total turnover in the preceding financial year (see '[other breaches](#)' below).

> *Abuse of dominant market position or monopoly position*

Market dominance itself is not prohibited. Nor are monopolies. It is *abuse* of that position that is unlawful. And such abuse is *strictly* prohibited. No exemptions are available.

An individual enterprise will be deemed to be in a dominant market position if it has a market share of 30% or more in the relevant market *or* is capable of substantially restraining competition. The following groups of enterprises will be deemed to be in a dominant market position if they act together in order to restrain competition:

- Two enterprises with a market share of 50% or more in the relevant market;
- Three enterprises with a market share of 65% or more in the relevant market;
- Four enterprises with a market share of 75% or more in the relevant market.

Table 2:

<p>Abuses of dominant market position subject to up to 5% fine:</p> <ul style="list-style-type: none"> > <i>Selling goods or providing services below total prime cost of the goods aimed at excluding competitors (commonly known as predatory pricing)</i> > <i>Fixing an unreasonable selling/purchasing price or fixing a minimum reselling price for goods/services, thereby causing loss to customers (commonly known as price-rigging or minimum resale price maintenance)</i> > <i>Restraining production or distribution of goods and services, limiting the market, or impeding technical or technological development, thereby causing loss to customers:</i> <ul style="list-style-type: none"> - ceasing or reducing the quantity of goods/services supplied on the relevant market as compared to previously in conditions where there are not large fluctuations in the supply and demand relationship, there is not any economic crisis, natural disaster or calamity, and there is no major technical breakdown or emergency situation - fixing the quantity of goods/services supplied at a level sufficient to create a shortage in the market - hoarding and not selling goods in order to create instability in the market - supplying goods/services in only one or some specific geographical areas - purchasing goods/services only from one or some specified sources of supply (unless other sources of supply fail
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<p>to satisfy conditions set by purchaser, which conditions are both reasonable and consistent with normal commercial practice)</p> <ul style="list-style-type: none"> - purchasing invention, utility solution or industrial design in order to destroy it or keep it from being used - threatening or compelling a person engaged in research on technical or technological development to stop or abandon such research <p>> <i>Discrimination between enterprises regarding conditions for purchase/sale, price, time for payment, or volumes of transactions of purchase/sale of goods/services similar in value and characteristics in order to place one or more enterprises in a better competitive position than other enterprises (commonly known as discrimination in trading conditions)</i></p> <p>> <i>Imposing on other enterprises conditions precedent prior to signing contract for purchase/sale of goods or services:</i></p> <ul style="list-style-type: none"> - restrictions on production and distribution of other goods/purchase or supply of other services, which restrictions are not directly related to undertakings of a party accepting to act as an agent in accordance with the law on agency - restrictions on locations for re-sale of goods (except goods prohibited from or subject to conditions on circulation) - restrictions on customers which may purchase goods for re-sale (except goods prohibited from or subject to conditions on circulation) - restrictions on form and quantity of goods which may be supplied <p>> <i>Forcing other enterprises to accept obligations which are not related in a direct way to the subject matter of the contract:</i></p> <ul style="list-style-type: none"> - tying the purchase/sale of goods/services which are the subject matter of the contract to the purchase of other goods/services from the supplier (commonly known as product tying or bundling) or other pre-nominated entity (commonly known as third line forcing) or to the discharge of one or more obligations outside the essential scope of performance of the contract <p>> <i>Preventing market participation by new competitors:</i></p> <ul style="list-style-type: none"> - requiring one's customers not to trade with a new competitor - threatening or coercing distributors and retail sales stores not to agree to distribution of the goods of a new competitor - selling goods at prices which results in a new competitor not being able to access the market (other than cases of price-rigging and minimum resale price maintenance above)
<p>5-10% fine will apply:</p> <ul style="list-style-type: none"> > Where concerned goods and services are food, medical apparatus, drugs for human and animals, fertilizer, animal food, plant protection drugs, seeds or domestic animals, and medical and healthcare services > In the case of a single enterprise, if it has a market share of 50% or more in the relevant market > In the case of a group of enterprises: <ul style="list-style-type: none"> - to the enterprise having the biggest market share in the dominant group - to the enterprise which organized and/or induced others to participate in offence
<p>Additional penalties/remedial measures (optional and in addition to fines)</p> <p>In all cases:</p> <ul style="list-style-type: none"> > Confiscation of all material evidence and facilities for commission of offence, including profits gained from offending practice > Compulsory preclusion of offending terms from contract or business transaction > Compulsory restructure of a dominant enterprise <p>In case of restraining production or distribution of goods and services, limiting the market, or impeding technical or technological development, thereby causing loss to customers:</p> <ul style="list-style-type: none"> > Compulsory restoration of technical, technological development conditions that the enterprise impeded > Compulsory use or re-sale of invention, utility solution or industrial design which was purchased but not used > Compulsory removal of measures which prevent or impede other enterprises from participating in the market or from developing business

An enterprise will be deemed to be in a monopoly position in the relevant market if there are no other enterprises competing in the goods and services in which that enterprise conducts business (ie. it is a single seller).¹¹

Table 3:

Abuses of monopoly position subject to up to 10% fine	Additional penalties/remedial measures (optional)
<ul style="list-style-type: none"> > Abuses in Table 2 above > Imposing disadvantageous conditions on customers > Changing or cancelling unilaterally a signed contract without prior notice to the customer and without having to bear any sanction > Changing or cancelling unilaterally a signed contract based on one or more grounds not directly related to conditions essential for continued complete performance of the contract and without having to bear any sanction 	<ul style="list-style-type: none"> > Confiscation of all material evidence and facilities for commission of offence, including profits gained from offending practice > Compulsory preclusion of offending terms from contract or business transaction/disadvantageous conditions imposed on customers > Compulsory restoration of technical, technological development conditions that the enterprise impeded > Compulsory restoration of contract provisions which have been changed without legitimate reason/of contract which has been cancelled without legitimate reason

> *Economic concentrations*

Any merger, consolidation, acquisition, joint venture or other (undefined) form of economic concentration where the participating parties have a combined market share above 50% is prohibited under the Competition Law, unless the economic concentration results in a small or medium sized enterprise (**SME**) or an exemption is granted. Exemptions are available where one or more of the participating parties is at risk of being dissolved or becoming insolvent (as decided by the Minister of Trade) or where the economic concentration enhances export, socio-economic development or technical progress (as decided by the Prime Minister).

Any economic concentration where the participating parties have a combined market share of 30%-50% must be notified to VCAD, unless the economic concentration results in a SME. VCAD must confirm in writing whether the proposed economic concentration can proceed without exemption or requires prior exemption.

Procedures to implement economic concentrations may be conducted at the relevant State licensing or business registration body *only after* an exemption is granted or written confirmation that no exemption is required has been issued.

Table 4:

Prohibited economic concentration subject to up to 5% fine	Circumstances for 5-10% fine	Additional penalties/remedial measures (optional)
<ul style="list-style-type: none"> > Merger (Note: Penalties imposed on the merging enterprises and the merged enterprise.) 	<ul style="list-style-type: none"> > The merged enterprise coerced directly or indirectly the merging enterprise(s) to merge 	<ul style="list-style-type: none"> > Compulsory demerger of merging enterprises and compulsory split of merged enterprise to pre-merger status
<ul style="list-style-type: none"> > Consolidation (Note: Fines imposed on each consolidating enterprise.) 	<ul style="list-style-type: none"> > The consolidation results in a significant increase in the price of goods and services 	<ul style="list-style-type: none"> > Withdrawal of business registration certificate of consolidated enterprise

11 Of note, State owned monopolies are subject to the Competition Law, but the extent to which the prohibitions on abuse of monopoly position apply is qualified by the right of the State to 'control' SOEs and any other enterprises in State monopoly sectors in various ways prescribed in the Competition Law.

Prohibited economic concentration subject to up to 5% fine	Circumstances for 5-10% fine	Additional penalties/ remedial measures (optional)
	in the relevant market	> Compulsory division/split of consolidated enterprise to pre-consolidation status
> Acquisition (Note: Penalties imposed on acquiring enterprise only.)	> The acquiring enterprise coerced directly or indirectly the acquired enterprise to sell	> Compulsory sale of assets acquired
> Joint venture (Note: Penalties is imposed on each joint venture party.)	> The joint venture results in a significant increase in the price of goods and services in the relevant market	> Withdrawal of business registration certificate of each party to the joint venture and of joint venture enterprise

For failure to notify of a proposed economic concentration, a fine of 1-3% of total turnover in the preceding financial year will be imposed on each party.

For implementation of economic concentrations before an exemption decision is rendered (in cases where concentration is entitled to exemption), a fine of VND30-50 million will be imposed on each party, subject to a cap on the maximum fine of 3% of each offender's total turnover in the preceding financial year (see ['other breaches'](#) below).

Penalties for unfair competitive practices

For unfair competitive practices, fines are not based on % of revenue, but rather are based on the type of offending practice and the corresponding fixed band of monetary fines. Within each band, higher monetary fines will be imposed in a number of prescribed circumstances, noted below. One or more additional penalties may also be imposed.

Table 5:

Band 1: Types of unfair competitive practices subject to VND5-10 million fine	Circumstances for VND10-20 million fine	Additional penalties (optional)
<p><i>Misleading instructions:</i></p> <ul style="list-style-type: none"> > Using instructions containing misleading information re. trade names, business slogans, business logos, packaging, geographical indications of the offending enterprise in order to mislead customers in their understanding of goods/services for competitive purposes > Conducting business in goods/services which use misleading instructions 	<ul style="list-style-type: none"> > Where concerned goods and services are food, medical apparatus, drugs for human and animals, fertilizer, animal food, plant protection drugs, seeds or domestic animals, and medical and healthcare services > Where goods and services are circulated/supplied in two or more cities/provinces under central authority 	<ul style="list-style-type: none"> > Confiscation of all material evidence and facilities for commission of offence, including profits gained from offending practice > Public retraction
<p><i>Infringing business secrets:</i></p> <ul style="list-style-type: none"> > Accessing or collecting information constituting business secrets by countering the security measures taken by the lawful owner of such business secrets > Disclosing or using information constituting business 	<ul style="list-style-type: none"> > Business secrets are used to produce/circulate goods or supply services in two or more cities/ 	<ul style="list-style-type: none"> > Confiscation of all material evidence and facilities for commission of offence,

<p>secrets without permission from the lawful owner of such business secrets</p> <ul style="list-style-type: none"> > Breaching a confidentiality contract or cheating/abusing the confidence of a person under a confidentiality obligation, aimed at accessing, collecting or disclosing business secrets > Accessing or collecting business secrets of another person when such person is conducting business-related procedures or procedures to circulate products by countering security measures taken by State bodies, or using such information for business objectives or for the objective of applying for issuance of a business-related permit or a permit to circulate products 	<p>provinces under central authority</p> <ul style="list-style-type: none"> > Business secrets are provided or disclosed to competitor(s) of lawful owner of business secret 	<p>including profits gained from offending practice</p>
<p><i>Coercion in business:</i></p> <ul style="list-style-type: none"> > Coercing customers or business partners of another enterprise by threatening or coercive conduct in order to compel them not to transact or to cease a transaction with such other enterprise 	<ul style="list-style-type: none"> > Coercion is of the largest customer or business partner of competitors 	<ul style="list-style-type: none"> > Confiscation of all material evidence and facilities for commission of offence, including profits gained from offending practice
<p><i>Disruption of competitors' businesses:</i></p> <ul style="list-style-type: none"> > Disrupting the lawful business activities of another enterprise by any direct or indirect act which hinders or interrupts the business activities of another enterprise 	<ul style="list-style-type: none"> > Where now impossible for the disrupted enterprise to conduct business 	<ul style="list-style-type: none"> > Confiscation of all material evidence and facilities for commission of offence, including profits gained from offending practice > Public retraction
<p><i>Defamation:</i></p> <ul style="list-style-type: none"> > Any indirect act of providing false information which adversely impacts upon the reputation, financial status or business activities of another enterprise 	<ul style="list-style-type: none"> > Any direct act of providing false information which adversely impacts upon the reputation, financial status or business activities of another enterprise 	<ul style="list-style-type: none"> > Confiscation of all material evidence and facilities for commission of offence, including profits gained from offending practice > Public retraction
<p>Band 2: Types of unfair competitive practices subject to VND15-25 million fine</p>	<p>Circumstances for VND30-50 million fine</p>	<p>Additional penalties (optional)</p>
<p><i>Advertisement aimed at unfair competition:</i></p> <ul style="list-style-type: none"> > Comparing directly ones own goods and services with those of the same type of another enterprise > Imitating another advertising product in order to mislead customers > Providing false or misleading information to customers about one of the following matters: price, quantity, quality, usage, design, type, packaging, date of manufacture, use expiry, origin of goods, manufacturer, place of manufacture, processor or place of processing; manner of use, method of service, warranty period; other false or misleading information 	<ul style="list-style-type: none"> > Where concerned goods and services are food, medical apparatus, drugs for human and animals, fertilizer, animal food, plant protection drugs, seeds or domestic animals, and medical and healthcare services > Scale of advertisement covered two or more cities/provinces under central authority 	<ul style="list-style-type: none"> > Confiscation of all material evidence and facilities for commission of offence, including profits gained from offending practice > Public retraction

<p><i>Promotion aimed at unfair competition:</i></p> <ul style="list-style-type: none"> > Conducting promotion with false information about prizes > Conducting promotion which is dishonest or misleading about goods and services in order to deceive customers > Discriminating between similar customers in different promotion areas within the same promotional campaign > Offering free goods to customers for trial use but requiring exchange of goods of the same type manufactured by another enterprise which the customer is currently using so that the customer will use the goods of the promoting entity 	<ul style="list-style-type: none"> > Where concerned goods and services are food, medical apparatus, drugs for human and animals, fertilizer, animal food, plant protection drugs, seeds or domestic animals, and medical and healthcare services > Promotion is conducted in two or more cities/ provinces under central authority 	<ul style="list-style-type: none"> > Confiscation of all material evidence and facilities for commission of offence, including profits gained from offending practice > Public retraction
<p><i>Discrimination by an association:</i></p> <ul style="list-style-type: none"> > Refusing admission to or refusing withdrawal from the association by any organization or individual which satisfies the conditions for entry or withdrawal, if such refusal constitutes discriminatory treatment and gives such organization or individual a competitive disadvantage > Unreasonably restricting the business activities or other activities involving a business objective of a member enterprise 	<ul style="list-style-type: none"> > Multiple offences against one enterprise > Offence against multiple enterprises at the same time > Unreasonable restrictions in order to force a member to withdraw 	<p>Not applicable</p>
<p>Band 3: Types of unfair competitive practices subject to VND50-70 million fine</p>	<p>Circumstances for VND70-100 million fine</p>	<p>Additional penalties (optional)</p>
<p><i>Illegal multi-level selling:</i></p> <ul style="list-style-type: none"> > Requiring persons who wish to participate to pay a deposit, to buy an initial fixed quantity of goods or to pay a sum of money (in form of fees for study, training, seminars, social or similar activities) in order to have the right to participate in the multi-level sales network > Failing to undertake to re-acquire the goods sold to the participant and pay refund; avoiding re-acquisition/refund by termination of contract > Allowing participants to receive commission, bonuses and/or other economic benefits essentially only from enticing other participants into the multi-level sales network > Providing untruthful information about the benefits of participation in the multi-level sales network or untruthful information about the quality and purpose of use of goods in order to entice other participants 	<ul style="list-style-type: none"> > Illegal multi-level selling is conducted in two or more cities/ provinces under central authority 	<ul style="list-style-type: none"> > Confiscation of all profits gained as a result of the offence (imposed on enterprise engaging in multi-level selling) > Public retraction

Penalties for 'other acts in breach of the laws on competition'¹²

For 'other acts in breach of the laws on competition', fines are not based on % of revenue, but rather are based on the type of offending practice and the corresponding fixed band of monetary fines. Within each band, higher monetary fines will be imposed in a number of prescribed circumstances, noted below. One or more additional penalties may also be imposed.

Table 6:

Types of offence subject to warning or VND500,000 to VND1 million fine	Circumstances for VND1-3 million fine	Additional penalties (optional)
<i>Breaches of provisions on supply of information and materials:</i> <ul style="list-style-type: none"> > Failure to supply information and data, at all or adequately or on time, upon request of competent body > Deliberate supply of false or misleading information and data or falsifying information and data > Coercing others to supply false information and data > Concealing or destroying information and data relevant to a competition case 	<ul style="list-style-type: none"> > Information and data requested was particularly important for proper resolution of competition case 	<ul style="list-style-type: none"> > Compulsory supply of complete information and data
<i>Breaches of provisions on investigations and dealing with competition cases:</i> <ul style="list-style-type: none"> > Deliberately or negligently disclosing information and data the subject of a secret investigation > Disrupting an investigative hearing 	As above	<ul style="list-style-type: none"> > Confiscation of material evidence/facilities used to commit offence
Types of offence subject to VND30 million to VND50 million fine		
<i>Implementation of agreements in restraint of competition or of economic concentrations before an exemption decision is rendered (in cases where entitlement to exemption exists)</i>		
Note: Maximum fine not to exceed 3% of total turnover in preceding year of each offender		

Powers of competition authorities

- > VCAD and the head of VCAD:
 - Duties and powers to investigate all competitive practices.
 - Power to impose penalties is limited to offences concerning unfair competitive practices and 'other acts in breach of the laws on competition'.
 - Power to impose additional penalties is limited to: (i) confiscation and (ii) public retraction.

The head of VCAD has the power to decide on application (as well as amendment and rescission) of administrative preventive measures pending the transfer of a competition case to the VCC.

VCAD (but, curiously, not VCC) has the power to refer cases for criminal prosecution.
- > VCC and case-specific competition panels:
 - Duties and powers to hear and penalize competition cases concerning practices in restraint of competition.
 - Power to impose the following additional penalties and remedial measures:
 - (i) confiscation,
 - (ii) public retraction,
 - (iii) compulsory preclusion of offending terms from contract or business transaction,

12 See Decree 120, Chapter II, Section 5 for details 4.

- (iv) compulsory use or re-sale of invention, utility solution or industrial design which was purchased but not used,
 - (v) compulsory removal of measures which prevent or impede other enterprises from participating in the market or from developing business,
 - (vi) compulsory restoration of technical, technological development conditions that the enterprise impeded,
 - (vii) compulsory removal of disadvantageous conditions imposed on customers,
 - (viii) compulsory restoration of contractual conditions which were changed without any legitimate reason;
 - (ix) compulsory restoration of a contract which was cancelled without any legitimate reason.
- Power to request the relevant competent body to withdraw a business registration certificate or to revoke the right to use a licence or practising certificate (additional penalties).
 - Power to request the relevant competent body to apply the remedial measures of:
 - (x) compulsory restructure of an enterprise which has abused its dominant market position,
 - (xi) compulsory division/split of an enterprise being party to a prohibited merger or consolidation, or
 - (xii) compulsory re-sale of any part of an enterprise which was acquired in a prohibited acquisition.

The VCC chairman has the power to decide on application (as well as amendment and rescission) of administrative preventive measures when dealing with a competition case.

- > Other State bodies: For offences concerning unfair competitive practices and involving intellectual property rights, other State bodies are authorized to impose penalties in accordance with the law on dealing with administrative offences.

Limitation periods for competition offences

The limitation period for complaint about or commencement of an investigation into a competition offence is 2 years from the date of the offence. If an offender commits a new competition offence or deliberately evades or hinders the imposition of a penalty within the limitation period, the above limitation period will be re-calculated as from the date of the new offence or the date on which the evasion or hindrance ceases.

Procedures for dealing with offences

- > For offences concerning practices in restraint of competition and unfair competitive practices, procedures are stipulated in the Competition Law and Decree 116:

Competitive practices may be investigated by VCAD on its own initiative or upon receipt of a complaint. Where a preliminary investigation of a competitive practice indicates the existence of an offence, an official investigation will be conducted. Minutes of official investigation must be prepared. After official investigation of an unfair competitive practice, the head of VCAD will make a decision on dealing with the case. After official investigation of a practice in restraint of competition, the case is transferred to the VCC and a case-specific panel will be established. Where there is sufficient evidence of a breach and the offending competitive practice has not been voluntarily terminated, a decision to hold an investigative hearing will be issued. No time-limit on the duration of an investigative hearing or panel deliberation is specified in the Competition Law. A decision on

imposition of penalties will be issued as appropriate, and must be sent to the parties concerned within 7 days.

- > For offences concerning 'other acts in breach of the laws on competition', procedures are stipulated in Decree 120:

Upon discovery of an offence, the authorized person will issue an order suspending immediately the offending conduct. Minutes (in duplicate) must be prepared, particularising, amongst other things: name, address and occupation of the individual and/or organization in breach, date, location and description of breach, administrative preventive measures (if any), status of seized material evidence and facilities (if any), declaration of the individual in breach or of the representative of the organization in breach; details of any witness or any person suffering loss. One copy of minutes is handed to the offender.

A decision dealing with a breach of other provisions of the laws on competition must be issued within 10 days from the date of preparation of minutes (in complex circumstances, extendable up to 30 days). Such decision must particularise, amongst other things: details of offender and offending act, conduct or practice, any circumstances relevant to resolution, clause and articles of applicable legislation, penalty(ies) and remedial measures (if any). Such decision becomes effective upon signing, unless otherwise stipulated in the decision. Of note, Decree 120 allows up to 3 days for decision to be served on the offender and delivered to the fine-collecting agency (calculated from date of issuance).

- > For application of administrative preventive measures, procedures are stipulated in the Competition Law and Decree 116:¹³

To prevent a breach of the laws on competition or to ensure a competition case is dealt with, the following administrative preventive measures may be applied during investigations and while dealing with a competition case:

- temporary detention of a person pursuant to administrative procedures (when essential to collect and verify important elements as the basis for a decision dealing with a competition case);
- temporary detention of evidence and facilities used to commit a breach of the laws on competition (when essential to verify important elements as the basis for a decision dealing with a competition case or in order to halt immediately a practice in breach) for up to 10 days, or 60 days in complex cases;
- searches of persons (when there are grounds for believing an individual is hiding on his or her person things, data and facilities in breach of the laws on competition);
- searches of vehicles and other objects;
- searches of places which could be used to hide evidence and facilities used to commit a breach of the laws on competition (if place is a residence, the written agreement of the chairman of the district people's committee is required).

Administrative preventive measures may be imposed (during the investigation stage) by the head of VCAD on his/her own initiative, on the recommendation of the investigator or at the request of the complainant and (during the hearing stage) by the VCC chairman on his/her own initiative, on the recommendation of the chairman of the case-specific panel or at the request of the complainant.¹⁴ A request or recommendation for application of administrative preventive

13 See Decree 116, Chapter III, Section 7 for details.

14 Under the 2002 Ordinance on Dealing with Administrative Offences, administrative preventive measures may also be imposed by other competent persons, such as the heads of ward and district police, of border guard offices, of market control teams, or the

measures must contain the prescribed information and must be accompanied by evidence of the necessity for such measures. Where the request is made by the complainant, a security deposit must be lodged.

A decision on application (as well as amendment or rescission) of administrative preventive measures is effective immediately. A copy must be delivered immediately to the applicant (if any), the person subject to the administrative preventive measure(s), and to other concerned organizations and individuals. A decision on rescission of administrative preventive measures must be issued at the request of the original applicant or where the time-limit for temporary detention of material evidence has expired.

> For offences with indications of criminal offence:

If during a competition investigation it is identified that a criminal offence has been committed, the competent body must transfer the file and any material evidence and facilities used in the commission of the offence to the State body with authority to institute a criminal prosecution. If a decision dealing with a competition offence has already been issued, the body which issued such decision must rescind it and transfer the file to the State body with authority to institute a criminal prosecution (within a time-limit of three working days from the date of rescission of the decision on the competition offence).

If the State body with authority to institute a criminal prosecution considers that there are no grounds for proceeding with a criminal prosecution pursuant to the Criminal Procedure Code, the file must be returned to the competition authorities and the competition investigation will recommence.

Complaints and appeals

> For offences concerning practices in restraint of competition and unfair competitive practices:

Any concerned party having grounds for believing a part or all of a decision is contrary to law or infringes the complainant's lawful rights and interests may lodge a complaint, but only within 30 days of signing of the decision. In the case of decisions on dealing with unfair competitive practices made by the head of VCAD, complaints are lodged with VCAD and resolved by the Minister of Trade. In the case of decisions dealing with practices in restraint of competition made by case-specific competition panels, complaints are lodged with the panel and resolved by the VCC.

Complaints must be resolved within 30 days of receipt, extendable in (undefined) complex cases but for not more than another 30 days. If there are insufficient grounds for the complaint, the original decision will stand. If the original decision is considered not to have been issued correctly in accordance with law, a part or the whole of the original decision may be changed. If insufficient evidence is found to have been collected and verified, the original decision will be rescinded and the case reconsidered. In the case of decisions dealing with practices in restraint of competition, the original decision may also be rescinded if membership of the case-specific competition panel is found not to comply with the Competition Law or some other serious breach of the Competition Law's provisions on competition legal proceedings is found. A decision resolving a complaint will become effective as of the date of its issuance.

Any concerned party disagreeing with a part or the whole of a decision resolving such complaint has the right to institute administrative appeal proceedings at the provincial-level people's court. The Competition Law provides for guidelines on instituting such proceedings to be issued by the People's Supreme Court.

captains of aeroplanes. The interrelationship between the powers of these persons and the powers of the competition authorities is not clear in the competition legislation.

- > For offences concerning 'other acts in breach of the laws on competition':

Any concerned party having grounds for believing a part or all of a decision is contrary to law or infringes the complainant's lawful rights and interests may lodge a complaint, but only within 30 days of signing of the decision. Complaints will be resolved in accordance with the law on complaints and denunciations.

Any concerned party disagreeing with a part or the whole of a decision resolving such complaint has the right to institute administrative appeal proceedings in accordance with the law on complaints and denunciations and the procedures for resolution of administrative court proceedings.
- > For application of administrative preventive measures:

Any concerned party being subject to a decision imposing administrative preventive measure and having grounds for believing a part or all of a decision is contrary to law or infringes the complainant's lawful rights and interests may lodge a complaint with the competent body. Complaints will be resolved in accordance with the law on complaints and denunciations.

Any concerned party disagreeing with a part or the whole of a decision resolving such complaint has the right to institute administrative appeal proceedings in accordance with the law on complaints and denunciations and the procedures for resolution of administrative court proceedings.
- > For denunciations:

All citizens may make a denunciation with the competent body about a breach of the law during the process of dealing with breaches of the laws on competition when the breach causes loss or threatens to cause loss to the interests of the State or to the lawful rights and interests of a body, organization or individual. Denunciations will be resolved in accordance with the law on complaints and denunciations. Compensation may also be payable by the party in breach.

Any organization or individual making a false complaint or denunciation which harms the reputation of the entity complained about or of the person denounced will be dealt with in accordance with law.

Enforcement

Any parts of a decision which are the subject of complaint and/or appeal may not be enforced.

In the absence of a complaint and/or an appeal, if one of the parties fails to execute voluntarily a decision on dealing with the competition case within 30 days of its effectiveness, the judgment creditor may lodge a request with the competent State administrative body for enforcement of remedial measures prescribed in the decision. If the decision relates to assets of a judgment debtor, the judgment creditor may request the civil judgment execution office of the city or province under central authority where the judgment debtor has its headquarters or resides or where the assets of the judgment debtor are located to enforce the decision on dealing with the competition case.

In the absence of a complaint and/or an appeal, if a decision dealing with a 'breach of other provisions of the laws on competition' is not complied with voluntarily within 10 days of it being served on the offender, compliance will be enforced in accordance with the 2002 Ordinance on Dealing with Administrative Offences and Decree 37-2005-ND-CP of the Government dated 18 March 2005 on procedures applicable to enforcement of administrative penalties.

Fines are payable into the State Treasury.