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## Competition Law Update

July 2006

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>>> *This update looks at the new Competition Law regime and how it will affect businesses in Vietnam*

## Legal framework

The much anticipated Law on Competition was approved by Vietnam's National Assembly at its November 2004 Session ("Competition Law")<sup>1</sup> and came into force on 1 July 2005. Below we examine the new Competition Law regime and how it will affect businesses in Vietnam.<sup>2</sup>

Legislation to implement the Competition Law was expected to be issued by the Government in mid-June in time to come into effect with the Competition Law on 1 July 2005. This did not occur. Belatedly, the following implementing legislation has now been issued:

- > Decree 110-2005-ND-CP of the Government dated 24 August 2005 on Supervision of Multi-Level Selling;
- > Decree 116-2005-ND-CP of the Government dated 15 September 2005 on Detailed Provisions for Implementation of the Law on Competition ("Decree 116") - one of the most important items of implementing legislation;
- > Decree 120-2005-ND-CP of the Government dated 30 September 2005 on Dealing with Breaches in the Competition Sector ("Decree 120").

Even more belatedly, implementing legislation with respect to the competition authorities has now been issued:

- > Decree 06-2006-ND-CP of the Government dated 9 January 2006 on Functions, Duties, Powers and Organizational Structure of Competition Administration Department;
- > Decree 05-2006-ND-CP of the Government dated 9 January 2006 on Functions, Duties, Powers and Organizational Structure of Competition Council;
- > Decision 843-2006-QD-TTg of the Government dated 12 June 2006 on Membership of Competition Council.

## Competition policy

The Competition Law enshrines the right of businesses to compete with each other. However, competitive practices must be within the framework of the law and must be undertaken on the principles of honesty and not infringing the national interest, the public interest, or the lawful rights and interests of other businesses and consumers.

Two broad categories of competitive practices are regulated under the Competition Law:

1. Practices in restraint of competition:
  - > Agreements in restraint of competition;
  - > Abuse of dominant market position or monopoly position;
  - > Economic concentration; and
2. Unfair competitive practices.

The objective of the Competition Law's regulation of practices in restraint of competition appears to be protection of the process of competition, rather than the interests of competitors. By protecting the process of competition, which goods and services are produced and the price of those goods and services is determined by the market. The objective of the Law's regulation of unfair competitive practices is largely protection of consumers so they can make free and informed choices from amongst the goods and services in the market.

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

2 This report is based on Phillips Fox's English translation of the Competition Law and implementing legislation, as well as our informal discussions with various members of the Competition Law Drafting Committee and the Competition Administration Department of the Ministry of Trade since late 2003.

### Who will the Competition Law apply to?

All organizations and individuals conducting business (defined as "enterprises" in the Competition Law) will be subject to the Competition Law, including:

- > domestic private enterprises;
- > State owned enterprises ("SOEs");
- > foreign invested enterprises ("FIEs", comprising joint venture enterprises and 100% foreign owned enterprises); and
- > overseas enterprises operating in Vietnam.

The phrase "overseas enterprises operating in Vietnam" is not defined in the Competition Law or Decree 116. It is understood to encompass foreign commercial presences in Vietnam, such as:

- foreign branch offices;
- foreign contractors with an office in Vietnam and/or directly supplying services in Vietnam, such as foreign construction contractors (but query offshore contractors supplying cross-border services).

The phrase "overseas enterprises operating in Vietnam" may also encompass offshore foreign entities investing in onshore FIEs or in onshore foreign commercial presences (in addition to and separately from the FIEs or foreign commercial presences in which they have invested). However, this is yet to be confirmed by Vietnam's competition authorities, so the exact range of foreign entities which are subject to the Competition Law remains uncertain.

Industry associations (comprising trade associations and professional associations) are also subject to the Competition Law.

The Competition Law also applies to State administrative bodies, but only in so far as they are prohibited from the following prescribed practices aimed at hindering competition in the market:

- forcing an enterprise, organization or individual to buy or sell goods or services to or from an enterprise appointed by such State administrative body, except for goods and services belonging to sectors deemed by law to be State monopoly sectors;
- discriminating between an enterprise in the industry or locality which the State administrative body manages and any other enterprise;
- forcing industry associations or enterprises to associate with each other aimed at excluding, restricting or hindering other enterprises from competing in the market;
- other practices which hinder the lawful business activities of enterprises.

## Competition authorities

In anticipation of Vietnam's new competition regime, the Competition Administration Department<sup>3</sup> was established under the Ministry of Trade<sup>4</sup> in early 2004. Effective as of 5 February 2006, the Vietnam Competition Administration Department ("VCAD") has now been delegated its statutory powers.

Wearing its competition hat, VCAD is responsible *inter alia*:

- To accept and conduct investigations of competition cases concerning practices in restraint of competition (eg abuses of dominant market position);
- 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);
- To assess files for request of exemption and forward them to the Minister of Trade for his decision or to the Prime Minister for his decision;
- To control the process of economic concentration (ie mergers and acquisitions).
- To build and manage a system of information on enterprises in a dominant market position and enterprises in monopoly position, on competition rules of associations, and on cases of exemption from competition law.

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. Of VCAD's 6 divisions, 3 are dedicated to competition matters.<sup>5</sup> Two of VCAD's several deputy directors are in charge of competition matters, Mr Bui Xuan Dung and Mr Tran Anh Son. VCAD's personnel now numbers 25, with 5 new appointments in early 2006. VCAD plans to recruit 20-30 additional staff by the end of 2006. VCAD's head office is in Hanoi and it will open representative offices in HCMC and Da Nang (and other places as required).

A permanent Vietnam Competition Council ("VCC") has also now been officially established. Its founding members have been appointed by the Prime Minister on the proposal of the Minister of Trade.<sup>6</sup> 11 members<sup>7</sup> 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 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 met for the first time on 4 July 2006 and plans to issue operational regulations in August so that it can commence operation. A secretariat will be established to assist the work of the VCC.

3 The Competition Administration Department was established under Decree 29-2004-ND-CP of the Government dated 16 January 2004 on Functions, Duties, Powers and Organizational Structure of the Ministry of Trade. Consistent with the Government's administrative reform policy aimed at streamlining Vietnam's bureaucracy, as well as being the State administrative body for competition, this Department is also the State body for anti-dumping investigations, anti-subsidy investigations and administration of application of self-protective measures. In addition, it is responsible for consumer protection.

4 Whether responsibility for State administration of competition should be vested in the Ministry of Trade (under which is established a number of enterprises subject to the Competition Law) was intensely debated by National Assembly delegates. It appears to have been agreed to in order to allow timely promulgation of the Competition Law. A fully independent Competition Commission is a highly desirable long term goal, but appears ambitious in the Vietnamese political context.

5 The 6 divisions comprise: Restraint of Competition, Unfair Competition, Management of Competition, Anti-dumping, Consumer Protection, and International Co-operation.

6 VCC members must satisfy the following standards prescribed in the Law on Competition, including (a) having good ethics, being honest and objective, and having the spirit of protecting the socialist legal system; (b) having a bachelor degree in law or in economics or in finance; (c) having at least 9 or more years work experience in one of the sectors of law, economics or finance; and (d) having the ability to complete the tasks assigned.

7 The Competition Law provides for appointment of 11-15 members to the VCC.

The 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 (officially known as 'councils dealing with competition cases') to hold hearings into competition cases;
- To resolve complaints regarding competition cases concerning practices in restraint of competition.

As at the end of July 2006, Vietnam's competition authorities have been established but are not fully operational.<sup>8</sup> Of particular note, VCAD is not yet in a position to receive and process applications for exemptions under the Competition Law, nor even in a position to provide official interpretations of the Competition Law.

### Agreements in restraint of competition

The agreements in restraint of competition prohibited under the Competition Law appear to be based on those set out in Article 81.1 of the European Community Treaty. A striking difference between Vietnam's competition regime and that of the EU is that regulation of agreements in restraint of competition in Vietnam appears to be limited to horizontal agreements (ie agreements between competitors, often referred to as cartels), with vertical arrangements being regulated solely under the abuse of dominant market position provisions.

Under the Competition Law, the following 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. The application of a test based on market share presumes that market definition is a straightforward procedure. In practice, it is not. Decree 116 provides more detail on how to determine the 'relevant market' and 'market share' (see Chapter II, Sections 1 and 2), but how the competition authorities will interpret these concepts remains critical to the way in which the Competition Law will apply in practice.

*Price-fixing (direct or indirect) agreement:*<sup>9</sup>

- > 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 related 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

*Agreement to divide markets or sources of supply of goods and services:*

- > 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

8 The Japan International Co-operation Agency (JICA) has funded a project to assist VCAD enhance its capacity to enforce the Competition Law and implement competition policies (eg by conducting surveys to provide insights into competition in Vietnam in different economic sectors, by providing technical support to build a website on competition policies, by running a series of seminars on the competition law and policies at central and local levels with the participation of Japanese experts), which was planned to run from the end of 2005 for a year.

9 The italicized categories of agreement in restraint of competition are as stipulated in the Competition Law. The types of agreement within each italicized category are as stipulated in Decrees 116 and/or 120.

<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"> <li>&gt; Agreement to stop or reduce the quantity/volume of production, purchase or sale of goods/services in the relevant market as compared to previously</li> <li>&gt; 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</li> </ul>
<p><i>Agreement to restrain technical or technological development or restrain investment:</i></p> <ul style="list-style-type: none"> <li>&gt; Agreement to purchase an invention, utility solution or industrial design in order to destroy it or keep it from being used</li> <li>&gt; Agreement not to provide additional capital for expansion of production, for improvement of quality of goods and services, or for other development and expansion</li> </ul>
<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"> <li>&gt; 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"> <li>- 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</li> <li>- restrictions on locations for re-sale of goods (except goods subject to conditions on or restricted from circulation)</li> <li>- restrictions on customers which may purchase goods for re-sale (except goods subject to conditions on or restricted from circulation)</li> <li>- restrictions on form and quantity of goods which may be supplied</li> </ul> </li> <li>&gt; 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</li> </ul>

Exemptions are available if a prohibited agreement above satisfies any of six very broad criteria (eg increase in business efficiency) where the economic benefits to consumers outweigh the restriction on competition. Again, the exemption criteria under the Competition Law appear to be based on Article 81.3 of the European Community Treaty. Decree 116 provides no additional guidance on the grounds for exemption. Of note, there is no explicit exemption for intracorporate agreements under Vietnamese competition law.

Exemptions are decided by the Minister of Trade, upon recommendation by VCAD. A prohibited agreement may be performed only after an exemption has been obtained and only for the duration prescribed in it.

The following agreements in restraint of competition (boycotts and tender collusion) are strictly prohibited under the Competition Law. No exemptions are available.

<p><i>Agreement which prevents, impedes or does not allow other enterprises to participate in a market or to develop business:</i></p> <ul style="list-style-type: none"> <li>&gt; Agreement not to trade with enterprises not being parties to agreement</li> <li>&gt; 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</li> <li>&gt; 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;</li> <li>&gt; 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</li> <li>&gt; 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</li> </ul>
<p><i>Agreement which excludes from a market other enterprises not being parties to the agreement:</i></p> <ul style="list-style-type: none"> <li>&gt; 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</li> <li>&gt; 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</li> </ul>

*Collusion to allow one or more parties to win a tender for supply of goods or services:*

- > 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
- > Other practices which are prohibited by law.

### 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 statutory exemptions are available. Of note, there is no explicit exemption for intracorporate arrangements. Whether such or arrangements will be exempted in practice is not known.

The abuses of dominant market position prohibited under the Competition Law appear to be based on those set out in Article 82 of the European Community Treaty. Prohibited abuses of dominant market position comprise:<sup>10</sup>

- > *Selling goods or providing services below total prime cost of the goods aimed at excluding competitors* (commonly known as predatory pricing)
- > *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)
- > *Restraining production or distribution of goods and services, limiting the market, or impeding technical or technological development, thereby causing loss to customers:*
  - 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 to satisfy conditions set by purchaser, which conditions are both reasonable and consistent with normal commercial practice)
  - 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
- > *Applying different commercial conditions to the same transactions aimed at creating inequality in competition* (commonly known as discrimination in trading conditions):
  - 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
- > *Imposing on other enterprises conditions precedent prior to signing contract for purchase/sale of goods or services:*
  - 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 prohibited/conditional goods, as above)

<sup>10</sup> The italicized practices in abuse of dominant market position are stipulated in the Competition Law. The types of practice within each italicized category are stipulated in Decrees 116 and/or 120.

- restrictions on form and quantity of goods which may be supplied
- > *Forcing other enterprises to accept obligations which are not related in a direct way to the subject matter of the contract:*
  - 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
- > *Preventing market participation by new competitors by:*
  - requiring one's customers not to trade with a new competitor
  - threatening or coercing distributors and retail sales outlets 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)

Prohibited abuses of monopoly position include those abuses and also imposing disadvantageous conditions on customers and changing or rescinding unilaterally a contract without legitimate reason.

In the case of an individual enterprise, the Competition Law adopts a 'substantial restraint of competition' test as well as a test based on market share to determine market dominance. 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. Decree 116 provides more detail on how to determine the 'relevant market' and 'market share' (see Chapter II, Sections 1 and 2) and the 'capability to substantially restrain competition' (see Chapter II, Section 4), but how the competition authorities will interpret these concepts is critical.<sup>11</sup>

To determine whether a group of enterprises is in a dominant market position, the test is based on market share alone. The following groups 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.

The phrase "act together" implies that only parallel abuses carried out by all members of a dominant group are prohibited; and that individual abuses of one member of a dominant group will not be prohibited unless that member is individually dominant. An agreement or communication between the members of a dominant group is not necessary; parallel conduct by members of a dominant group is sufficient.

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 if it is a single seller.

Of note, State owned monopolies are subject to the Competition Law's prohibitions on abuse of their monopoly position. However, the extent to which such prohibitions apply is qualified by the right of the State (enshrined in the Competition Law) to "control" SOEs (and any other enterprises) in State monopoly sectors in the following ways:

- Deciding selling or purchase prices of goods and services in State monopoly sectors;

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11 Of note, a Guideline on Vertical Restraints has been issued under article 81 of the European Community Treaty, providing a block exemption for vertical exclusive dealing agreements if the market share of the seller is less than 30% and the agreement does not contain any "hard-core restrictions", such as resale price maintenance and exclusive distribution (see Official Journal of European Communities, L 336, 29/12/1999 and Official Journal of European Communities, C291, 13/10/2000 on "Vertical Guidelines"). Whether Vietnam will follow the European Community's approach in its application of Vietnam's Competition Law to vertical arrangements is unknown.

- Deciding quantities, volumes, prices and market scope of goods and services produced or supplied in State monopoly sectors.

So a SOE or other enterprise in a dominant or monopoly position may fix an otherwise unfair price (a prohibited abuse) for goods or services in a State monopoly sector if so directed by the State; or a SOE or other enterprise in a dominant or monopoly position may restrain production of goods even if it causes loss to customers (a prohibited abuse) if it is operating in a State monopoly sector and is directed to do so by the State.

Similarly, the extent to which SOEs and any other enterprises engaging in production or supply of public utility products or services are subject to the prohibitions on abuse of dominant market or monopoly position is qualified by the right of the State to "control" those enterprises by placing orders, assigning plans or conducting tendering in accordance with prices and fees stipulated by the State.

When conducting business activities outside a State monopoly or public utility sector, the prohibitions on abuse of dominant market or monopoly position apply without qualification.

### Economic concentrations

Mergers, consolidations, acquisitions, and joint ventures and other (undefined) forms of economic concentration are regulated under the Competition Law.

Any economic concentration in which the participating parties have a combined market share above 50% is prohibited 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. At this notification stage, VCAD is not entitled to exercise any *discretion* - its role is simply to confirm how the proposed economic concentration may proceed under the Competition Law.

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 is issued. Eg foreign investment licensing procedures for approval of a merger of 2 FIEs having over 50% combined market share may be conducted *only after* an exemption under the Competition Law has been obtained; foreign investment licensing procedures for approval of a joint venture between a foreign investor and a Vietnamese enterprise having (say) 35% market share may be conducted *only after* written confirmation under the Competition Law has been obtained.

Where the participating parties have a combined market share of less than 30%, or if the economic concentration results in a SME, there are no exemption or notification requirements.

Mergers, consolidations and joint ventures of existing FIEs are clearly subject to the Competition Law. The Competition Law's applicability to "overseas enterprises operating in Vietnam" broadens the range of economic concentrations regulated under the Law. The exact breadth of the range is still not clear (as noted earlier), but may include, eg:

- New joint ventures between a Vietnamese enterprise and an existing foreign investor;
- Acquisitions by an existing foreign investor of a controlling interest in an existing FIE (its own FIE or another FIE).

## Unfair competitive practices

In order to protect consumers and to ensure competitors can compete freely, the following unfair competitive practices are prohibited:

<p><b>Band 1:</b></p> <p><i>Misleading instructions:</i></p> <ul style="list-style-type: none"> <li>&gt; 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</li> <li>&gt; Conducting business in goods/services which use misleading instructions</li> </ul> <p><i>Infringing business secrets:</i></p> <ul style="list-style-type: none"> <li>&gt; Accessing or collecting information constituting business secrets by countering the security measures taken by the lawful owner of such business secrets</li> <li>&gt; Disclosing or using information constituting business secrets without permission from the lawful owner of such business secrets</li> <li>&gt; Breaching a confidentiality contract or cheating/abusing the confidence of a person under a confidentiality obligation, aimed at accessing, collecting or disclosing business secrets</li> <li>&gt; 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</li> </ul> <p><i>Coercion in business:</i></p> <ul style="list-style-type: none"> <li>&gt; 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</li> </ul> <p><i>Disruption of competitors' businesses:</i></p> <ul style="list-style-type: none"> <li>&gt; Disrupting the lawful business activities of another enterprise by any direct or indirect act which hinders or interrupts the business activities of another enterprise</li> </ul> <p><i>Defamation:</i></p> <ul style="list-style-type: none"> <li>&gt; Any indirect act of providing false information which adversely impacts upon the reputation, financial status or business activities of another enterprise</li> </ul>
<p><b>Band 2:</b></p> <p><i>Advertisement aimed at unfair competition:</i></p> <ul style="list-style-type: none"> <li>&gt; Comparing directly ones own goods and services with those of the same type of another enterprise</li> <li>&gt; Imitating another advertising product in order to mislead customers</li> <li>&gt; 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</li> </ul> <p><i>Promotion aimed at unfair competition:</i></p> <ul style="list-style-type: none"> <li>&gt; Conducting promotion with false information about prizes</li> <li>&gt; Conducting promotion which is dishonest or misleading about goods and services in order to deceive customers</li> <li>&gt; Discriminating between similar customers in different promotion areas within the same promotional campaign</li> <li>&gt; 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</li> </ul> <p><i>Discrimination by an association:</i></p> <ul style="list-style-type: none"> <li>&gt; 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</li> <li>&gt; Unreasonably restricting the business activities or other activities involving a business objective of a member enterprise</li> </ul>
<p><b>Band 3:</b></p> <p><i>Illegal multi-level selling (more commonly known as pyramid selling)</i></p>

## Competition legal proceedings

### > Who can commence proceedings?

Competitive practices may be investigated by VCAD on its own initiative, as well as upon receipt of a complaint. Any organization or individual believing their rights and interests have been infringed by a breach of the Competition Law (eg a company that considers the practices of a competitor are in breach of the Law) has the right to lodge a complaint with VCAD. The limitation period for commencement of investigation is 2 years from the date on which the alleged breach of the Competition Law occurred.

A complaint file must include evidence of the competitive practice which is complained of. The complainant is responsible for the truthfulness of any evidence provided. VCAD will return a complaint file to the complainant if the limitation period has expired, if the case is beyond VCAD's investigative authority, or if the file is not complete (or supplemented within the deadline). A complainant may appeal against the return of a complaint within 5 days of the return; and the Minister of Trade must decide the appeal within 7 days of the appeal. If a complaint is accepted, fees are payable within 15 days in provision for costs of proceedings. Fees will be refunded to a successful complainant, as costs will be payable by the offender. Upon payment of fees, VCAD will commence competition legal proceedings based on the complaint. Any organization or individual making a false complaint which harms the reputation of the entity complained about will be dealt with in accordance with law.

### > Competition investigations

First, a preliminary investigation of the competitive practice is conducted. Then, if the preliminary investigation indicates the existence of an offence, an official investigation will be conducted.

During the investigation stage, the head of VCAD may impose administrative preventive measures (such as temporary detention of persons and material evidence, searches) either on his/her own initiative, on the recommendation of the investigator or at the request of the complainant. Where a complainant requests such measures, a security deposit is payable.

If indications of a criminal offence are identified during competition investigations, the matter will be referred for criminal investigation. If there are no grounds for criminal prosecution, the case will be returned to VCAD and the official investigation will be resumed.

### > Competition offences and penalties

After official investigation, if an unfair competitive practice is proved, the head of VCAD will make a decision on dealing with the case. A fine must be imposed. There are 3 bands of fines, as prescribed in Decree 120: Band 1 is subject to VND5-10 million fine; Band 2 is subject to VND15-25 million fine; Band 3 is subject to VND50-70 million fine. Depending on the seriousness of the offence, additional sanctions, such as confiscation of the facilities used to commit the offence, public retraction, may be imposed. Other authorized bodies may impose penalties for unfair competitive practices relating to intellectual property.

After official investigation, if a prohibited practice in restraint of competition is proved, the case is transferred to the VCC and a case-specific panel will be established to consider whether an investigative hearing is required. All concerned parties are entitled to present arguments at a hearing. During the hearing stage, either on his/her own initiative, on the recommendation of the panel chairman or at the request of the complainant, the VCC chairman may impose administrative preventive measures. The sanctions and penalties for a breach of the Competition Law's provisions on practices in restraint of competition are very severe and based on a % of the total turnover for the preceding financial year. A fine must be imposed. For a 'first-level' offence, fines of up to 5% may be imposed. For a 'second-level' offence (eg where the relevant goods are food), fines of 5% to 10% may be imposed. Depending on the seriousness of the offence, additional sanctions may also be imposed, such as contract amendment, corporate restructure or divestiture.

Compensation may also be payable by a party in breach of the Competition Law where such breach causes loss to the interests of the State, an individual or an organization.

A warning or fine may be imposed on individuals committing 'other acts in breach of the laws on competition', such as failure to supply information upon request by the competition authorities or disruption of a competition investigation (see Decree 120, Chapter II, Section 5 for details).

> Which entities are subject to penalties for competition offences?

Penalties are imposed on each enterprise participating in an offence. The maximum penalties 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, during investigations into the competitive conduct of an enterprise and while an enterprise's competition case is being dealt with, officers and employees may be subject to administrative preventive measures (such as temporary detention and searches of persons, see Decree 116, Chapter III, Section 7 for details). Also, officers and employees may be prosecuted personally if any individual criminal conduct is identified. Further, it appears that officers and employees may be liable personally for any individual 'acts in breach of the laws on competition'.

> Competition decisions - complaints and appeals

Any concerned party disagreeing with a part or all of a decision on dealing with a competition case (or a decision on exemption) 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, complaints are lodged with VCAD and resolved by the Minister of Trade. In the case of decisions dealing with practices in restraint of competition, 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.

Any concerned party disagreeing with a part or the whole of a decision resolving a complaint has the right to institute administrative proceedings at the provincial-level people's court. This right of appeal was a late but welcome feature in the Competition Law.

**Where to from here?**

How many issues arising under the Competition Law (some of which have been noted above) will be resolved depends on how the competition authorities interpret the Competition Law and apply it in practice - this will remain unknown until the competition authorities are in a position to provide official interpretations and until a number of precedent cases have been decided. Of comfort, decisions on exemptions under the Competition Law are required to be publicized and competition hearings are generally to be open to the public - transparency will be one of the keys to an effective competition law regime in Vietnam. Businesses need to keep watch for developments and details of how Vietnam's new competition law regime will impact on their market practices - we look forward to keeping you informed.

