

Vietnamese Merger Law: Missed Opportunities in Applying the Potential Competition Theory

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ABSTRACT

Potential competition theory is widely used all over the world. Notably, it plays a crucial role in merger regulation. In Vietnam, competition law is gradually moving towards an effects-based approach. However, this approach is applied inconsistently, with the law sometimes providing only minimal guidance or even staying silent altogether. It therefore remains a topical issue, leading to an ineffective mechanism to effectively catch mergers that could possibly impact competition. This article begins with a review of the potential competition theory, before examining merger control in other jurisdictions, particularly US antitrust law and enforcement, from which the potential competition theory supposedly stems and where it is effectively applied. The article then highlights certain aspects that Vietnam should explore in order to address existing problems and, more importantly, to implement a functional regime to mitigate the harmful effects of mergers. These recommendations include factors and proven methods applied to enhance the analytical framework for merger assessment.

Keywords :

potential, competition, merger, non-horizontal, Vietnam

1.Introduction

Competition Law No. 27/2004/QH11 was approved in the sixth session on December 3rd, 2004 and took effect from July 1st, 2005. This law regulates competition restricting acts, unfair competition acts, order and procedures for settling competition cases, measures to handle violations of competition legislation. During over ten years of the implementation, the Competition Law 2004 has revealed several shortcomings and drawbacks that need to be overcome. Some provisions are no longer adequate with reality and direction of economic development. New anti-competitive behaviors appeared which are not governed by the Law. Some of them occurred outside Vietnam territory but their effects have been on Vietnam. No legislation on competition handled this group of behaviors. These shortcomings directly have impacts on the effectiveness and efficiency of competition law implementation, the strictness of law and violation prevention.

Under this context, the Competition Law No. 23/2018/QH14 was enacted on June 12th, 2018 and took effect on July 1st, 2019, replacing the Law on Competition 2004 with changes that address the new market situation. There have been new subjects regulated under Vietnam Law on Competition 2018, evaluation of market power factors in competition instead of market share factors, and changes in organization of authority handling investigation and enforcing competition matters.

2.Literature review

2.1. Fundamentals of Competition

Competition is considered as an economic phenomenon, appearing and existing as an outstanding feature of market economy. It reflects the development capacity of the market. In the Glossary of Industrial organization economics and competition law published by the OECD, competition is defined as “A situation in a market in which firms or sellers independently strive for the patronage of buyers in order to achieve a particular business objective, e.g., profits, sales and/or market share. Competition in this context is often equated with rivalry. This rivalry may take place in terms of price, quality, service or combinations of these and other factors which customers may value. Competition is viewed as an important process by which firms are forced to become efficient and offer greater choice of products and services at lower prices. It gives rise to increased consumer welfare and locative efficiency. It includes the concept of “dynamic efficiency” by which firms engage in innovation and foster technological change and progress”. (OECD, 1993, p.23)

In the perspective of an entity of behavior, competition is a method of solution for conflict on potential benefits among enterprises, in which the consumers are determinant factors. In the scope of society, competition is an ultimate method of allocation on social sources and motivation of economy development. Competition is classified into different types:

Based on structure of enterprises, the level of enterprises concentration in the industry, economic sector, it is divided into perfect competition, monopoly and imperfect competition.

Perfect competition is the situation of market in which the price and volume of goods are defined by the supply and demand of goods. The players in the market must accept and follow the market price. In the perfect competition market, there are various buyers and sellers on one product. Any buyer or seller is too small in comparison with scope of market and cannot impact on the market price. While monopoly is the

situation of a market in which just one enterprise sells the product and no alternative or similar one (so called monopoly). This situation is totally contrary with perfect competition.

Imperfect competition is the situation of the market in the combination of two above mentioned situations of market. It includes monopolistic competition and oligopoly. The monopolistic competition is the situation of a market in which many sellers produce goods which are interchangeable. Each seller just controls the price of goods produced by them. Oligopoly is the situation of a market containing some sellers. Each seller is aware that the price of goods depends on both volume of goods and behaviors of competitors in that sector.

Based on objectives and nature of competition manner, they are divided into fair competition and unfair competition. Fair competition is a type of positive competition in which the enterprises competes each other by their capacities. The business behaviors comply with trade customs and ethnics. In contrary, the unfair competition is specific activities of an entity for competition purposes but unfairness. They are not always illegal but cause negative impacts to a particular enterprise or competitors in the market.

As the above analysis, competition is the rivalry among enterprises on prices, volume, services or combination of elements to enhance the position of enterprises in the market. Vigorous competition between firms is the lifeblood of strong and effective markets. It encourages firms to innovate by reducing slack, putting forward pressure on costs and providing incentives organization of production. As such, competition is a central driver for productivity growth in the economy, and international competition.

Competition is always the motivation to develop production and business, and also the economic development force of each country. Fair and legal competition takes a positive effect to make the quality of goods and services better, to lower prices of goods, and to benefit consumers. It gives them the confidence in the good operation of a strong market and in the competitive process. Trade transactions therefore will increase, thereby promote economic growth. Competition supports the process of accumulating, concentrating resources, capital and other factors of production, so makes the society eligible to carry out large-scale projects. Competition forces enterprises to reform and operate effectively in order to survive. The rule of elimination in the competition process creates opportunities for strong and highly competitive business entities to enhance their competitive advantages to develop.

Fair competition will establish a self-adjusting mechanism leading to a relative equilibrium of market power as well as of supply and demand in the market. Therefore, new inventions, new achievements of science and technology will stimulate enterprises to compete more aggressively to find opportunities to increase profits, while bringing better value of goods and services to consumers. Therefore, basically, there exist only enterprises that are strong or at least can maintain their own existence.

Competition is always the motivation of economic growth, but the consequences can always occur, for example resources are overexploited (leading to rapid depletion), environmental pollution, increasing rich - poor gap among the social classes, etc. Intense competition will cause excessive accumulation of market resources, which can lead to the emergence of entities that can dominate the market, even can gain monopoly position in the market of determined goods and services.

The impact of competition is also revealed in many other ways: excessive competition may lead enterprises to destroy others, to waste resources, and market is manipulated by entities that have market power. Not only consumers' loss caused by monopoly but also the bankruptcy of a series of weak and small businesses lead to huge socio-economic consequences.

Competition also brings certain negative aspects in the segmentation of enterprises. The dominant and potential enterprises will win in any competition, while the weak and incompetent enterprises are difficult to survive. Competition can also extend the rich–poor, strong-weak gap. Workers may be unemployed due to continued technological innovation (which does not require much labor), or due to bankruptcy of enterprises. This creates a dilemma in the development and implementation of socio-economic policies of each country. In particular, the competition relies on deceptive tactics to create competitive advantages can cause damage to market participants, causing many negative consequences to consumers and society.

2.2 Fundamentals of Competition Law

The primary purpose of competition law is to remedy some of the situation in which the free market system breaks down (Sandra Marco Colino, 2011). Competition law has grown enormously, especially since the 1990s. With an increasing number of countries that have undertaken economic reforms and embraced the market economy, many of them have also introduced competition law to promote competition and process in their markets. Thus, there has been increasing reliance on competition policy and law to address market failures and distortions in the form of anti-competitive practices, abuse of dominance. There is an increasing tendency of competition laws introduced by the countries in the world.

In common understanding, competition law includes all regulations issued by the state and has direct impacts on business activities and market structure. It composes of two main groups of legal documents:

- The first one includes all documents to promote competition in the market, namely regulations on market entry, diversification of economic components in the market, freedom of trade. This group of regulations is very important, including Law on Enterprises, Law on Investment, etc. and other industrial regulations, namely Law on Telecommunication, Law on Insurance business, Law on Credit institutions, Law on Electricity, etc.
- The second one includes legal institutions enacted to control and prevent anti- competitive behaviors, unfair competition and overdue state interference into the law of market. Many countries adopted a separate legal document to control this group of activities (it is so called Competition Law, Antitrust Law, Fair Trade Law, etc.).

Competition law is a part of economic law, so it has a close relationship with economic activities, business entities and its development is in accordance with the level of economic development. Competition law is also based on the competition regime in an economy. On the other hand, competition law always aims to ensure the openness of the market, the freedom of competition, and encourages competition among entities in the market. Therefore, competition law has the following characteristics:

- The flexibility: Competition laws are designed to be flexible in order to adapt to the adjustment of competitive acts of business entities that are very diverse and complicated. Flexibility makes many behaviors

(especially in anti-competition restriction laws) under a form “prohibitable”. It means business entities can be exempted from prohibited conduct if they provide a justifiable reason. Therefore, when applying the law, the authorities are often very flexible, takes into account the interests of all parties in each specific case in order to encourage competition and to prevent illegal competition behaviors as well.

- Competition laws are closely related to the economy and must conform to economic standards. Therefore, when applying the competition legislation to specific cases, people basically often use the economic approach.
- Competition law has the characteristics of both public law and private law, which implies economicrelated issues of many important legal fields such as civil, commercial, administrative, etc.
- Therefore, competition law does not have its own sanctions. When applying this law, people have to use sanctions of some other legal fields such as civil sanctions (applied to unfair competition acts, mainly compensation for damages, forced termination of violations, etc.) or administrative sanctions that are mostly monetary fines (applied to competition restriction acts, abuse of market dominant position, economic concentration).
- Different from other legal fields, in addition to the provisions on competition activities, the competition law also has the provisions on jurisdiction and proceedings of litigation. Competition litigation power is prescribed to clearly define power of individuals and organizations conducting competition legal proceedings. Competition litigation proceedings do not only include activities related to the handling of breaches, but also activities related to procedures of registration, notification, or request for exemption of competition entities.

Thus, in summary, competition law is a field of economic law including the synthesis of legislation governing competition behaviors between competition entities in the market and of litigation, proceedings.

Unfair competition prohibition legislation is established to ensure the trade is fair and is not negatively affected by bad competition acts and by behaviors that violate business ethical standards. The unfairness of competition behaviors depends on many factors of market relations and is basically adjusted according to the general principles of civil law (private law). Law against unfair competition only intervenes activities/violations in that there is a complaint from person with related rights and interests. The sanctions are mostly forcing to stop the behavior and paying compensation for damages caused.

Provisions on competition restriction acts

With the development of the economy and the growth of economic entities, large amounts of enterprises with significant market power and even monopoly have emerged. This leads to an objective need that the state needs to promulgate regulations to restrict and control the manipulation of monopoly. These are the premises for the birth of anti-competition restriction laws.

Normally, except regulations about competition litigation, anti-competition restriction laws include three contents as following:

- Prohibitions against the “restraint of competition” comprising prohibitions against anti-competitive agreements (Cartel)
- Prohibitions against abuse of dominance, abuse of monopoly (Unilateral conducts)
- Control of economic concentration

Anti-competition restriction laws of all countries have the purpose of protecting freedom of competition as well as protecting market structure and correlation. Therefore, it bears many characteristics of administrative law. Because in general, level and range of competition restriction acts are more serious than unfair competition acts, anti-competition restriction laws often have more strict solutions, timelier and more specific measures - economic administrative sanctions. Sanctions applied to breaches can be suspension of

the acts, declaration of invalid agreements, restructuring of firms, fines, etc. However, anti-competition restriction laws are flexible, they will not be applied to all cases that have competition restriction signals but are only applied to such acts that are qualitative or quantitative about the level of violations or that have unreasonable behaviors. In addition, there are many exceptions for competition restriction that can be exempted for good economic reasons. Since this law protects free competition as well as structure and correlation of market, it is necessary to consider and pay attention to the benefits of stakeholders in the competition relationship.

Provisions on competition jurisdiction and litigation

Different from other legal fields, competition law regulates competition litigation proceedings of organizations as well as individuals conducting and participating in competition litigation proceedings. This content is mentioned directly in the competition law. This is a specific kind of administrative - economic procedure, so its content can only be consistent with provisions built in the entire competition law.

Competition litigation includes not only the order of competition handling procedures but also the procedures conducted for exemption as well as for registration. According to specific regulations, measures to handle and impose administrative sanctions on violations of competition law are concretized and more appropriate for the competition field.

3. Evolution of competition law in Vietnam

3.1. Before the promulgation of the Competition Law 2004

Before the renovation of the economic management mechanism (1987), the Vietnam economy operated under a central planning model, in this context, all activities of the economy were conducted according to the plan and the central order. The legal form of business relations is not contractual but a state-mandated plan. Therefore, there is no environment for business activities and there is no competition between economic entities.

After 1987, implementing the renovation policy of economic management, the state has gradually built institutions and developed a market economy in order to release production capacity and competitiveness of entities in the economy. Besides, the legal system is also constantly being improved to create an appropriate legal basis for economic activities. The strong development of the economy under the market mechanism requires the legal system to develop accordingly. Therefore, regulations related to competition were issued and initially regulated certain aspects of competition activities. In general, regulations related to competition can be divided as follows:

Firstly, there are principal regulations:

The 1992 Constitution (amended in 2013) stipulated the most basic principles for the operation of the economy, such as affirming the existence of a multi- component commodity economy according to the market mechanism (Article 15); recognition of the principle of business freedom (Article 57); the right of economic entities in all economic sectors to be equally treated by the law (Article 22); the state protection

to legal capital and assets ownership of individuals and organizations (Articles 22, 23 and 58); protection to the legitimate rights and interests of consumers (Article 28).

For the first time, the basic operating principles of a market economy have been recognized and confirmed by Vietnamese laws through constitutional principles, especially business freedom. Recognizing business freedom means that the law also recognizes and guarantees the right to legally and fairly compete with business entities.

In addition, the 1992 Constitution also regulated the handling of illegal business acts (these practices also include unfair competition acts), thereby the state protected legitimate rights and interests of producers and consumers (Article 28).

The Civil Code 1995 laid down the basic principles of civil transactions, which are also important legal bases for the development of anti-unfair competition regulations. This was specially reflected in the principles: the principle of respect for morality, good traditions (Article 4); principles of freedom, voluntary commitment, agreement (Article 7); principle of equality (Article 8); principle of goodwill and honesty (Article 9). Business entities were free to contract, but must abide by the following principles: freedom to enter into a contract but not contrary to law and social ethics; voluntariness, equality, goodwill, cooperation, honesty and integrity (Article 395). In production and business activities, if business entities cause damage to other persons, they must pay compensations (Article 609).

The Commercial Law 1997 which directly regulated trade activities in Vietnam, for the first time stipulated the principles of competition in trade. The law asserted: "Traders are legally competitive in commercial activities" (Clause 1, Article 8). Next, Clauses 1 and 2, Article 9 stipulated: "Traders are obliged to provide honest and sufficient information about the goods and services that they provide, must ensure the legality of the goods sold". The Commercial Law has taken a closer, more direct approach to regulate competition when addressing and prohibiting unfair competition practices such as: speculation to manipulate the market; dumping to compete; vilifying other traders; discouraging, inducing, bribing, threatening employees, or customers of other traders; infringing on trademarks or other rights of industrial property of other traders; raising prices, forcing prices to cause damage to producers and consumers; deceiving customers, causing confusion to customers; selling counterfeit goods; selling goods of inferior quality or at variance with the registered goods; deceptive advertising; illegal promotions and other illegal competition acts, etc. (Clause 2, Article 8 and Clause 3, Article 9).

The Criminal Code 1999 (amended in 2017) also provided criminal liability regulations for entities conducting acts of unfair competition such as manufacturing and trading fake goods (Articles 156, 157, 159); speculation (Article 160), deceiving customers (Article 162); deceptive advertising (Article 168); infringing upon industrial property rights (Article 171), if these acts caused serious consequences or have been administratively sanctioned, or have been convicted for such crimes but committed recidivism.

As can be seen, the legal clues regulating competition relations at different levels have initially been built, from the constitution to legal documents on civil, economic, commercial and administrative and even criminal major. This confirms the consistent policy of the state in formulating competition law and competition regime for Vietnam economy. Those are important prerequisites for the issuance of legal documents on competition in the future.

Secondly, there are the regulations governing competition in some specific areas:

Before the issuance of competition law, there was no independent document governing competition, but regulations on unfair competition and competition restriction appeared scattered in some different legal documents regulating some specific fields. For example:

- In the advertising field

The acts of unfair competition in the field of advertising have been governed by many provisions in different legal documents. For example, reporting false information, distorting or slandering in an attempt to insult the honor of others (Clause 4, Article 10, Press Law 1990, last amended in 2016); comparison advertisement confusing customers, advertising dishonestly, untruthfully, causing damage to the interests of others, etc. (Articles 9 and 192, Commercial Law 1997; Article 7, Ordinance on Protection consumer rights on April 27th,

2000 – currently out of date and Article 6, Decree No. 194/1994/NĐ-CP on advertising activities on December 31st, 1994). Although the above regulations on advertising have listed a number of unfair competition acts in advertising, they have not identified appropriate sanctions and legal consequences for each violation.

The Advertising Ordinance No. 39/2001/PL-UBTVQH10 dated November 16th, 2001 (currently out of date) and Decree No. 24/2003/NĐ-CP of March 13th, 2003 detailing the implementation of the advertising ordinance enacted to further improve this legislation. The above-said Ordinance and Decree stipulated more specifically the rights and obligations of advertisers and advertising service dealers to protect their legitimate rights and the interests of consumers.

- In the field of industrial property rights protection:

The Decree No. 12/1999/NĐ-CP of the government dated March 6th, 1994 on sanctioning administrative violations in the field of industry had a lot of provisions on the handling of violations during the process of establishing, exercising and protecting industrial property rights (from Article 5 to Article 9). Among these violations, many acts can be considered as unfair competition acts such as establishing, exercising industrial property rights to dominate the market in an illegal way, eliminating industrial property objects, restricting or reducing the scope of protection of industrial property rights of other entities, taking advantage of or lowering the commercial reputation of other business establishments (Clause 1, Article 5). Although the issuance of this Decree is aimed to handle administrative violations in the field of industrial property protection and state management, to a certain extent, unfair competition act and its legal consequences has been mentioned in this document.

- In the field of bidding:

Bidding is a common activity in the market economy and is also in a fierce competition. There are many unhealthy signs through collusion, bribery and fraud, etc. when submitting and examining bids. A number of healthy competition regulations in this area have been initially established. Regulations on bidding in the Commercial Law 1997, and together with the Decree No. 88/1999/NĐ-CP of the government on September 1st, 1999 (replaced by Law on Bidding 2005) are important legal bases regulating bidding activities. The objective of the bidding activity is to implement competition, fairness and transparency in the process of contractor selection and the fight against unfair competition acts is an essential task that has initially been cared for when developing the legal framework governing this activity.

- In controlling prices of goods and services:

In the competitive activities of enterprises, price competition is one of the basic means of competition and has the best effect on customers. The use of price strategy to compete has appeared since Vietnam's economy changed to a market mechanism. However, until 2005, price competition acts were only mentioned indirectly in regulations related to price control of state, or in regulations on administrative sanctions in some areas. Although these regulations do not directly regulate price competition, the provision of administrative sanctions (mainly fines) for violators can be considered as a basis initial legislation to govern unfair competition practices on prices.

Thirdly, the acts of unfair competition were initially regulated by law.

As mentioned above, although particular legal documents have not yet been developed, in some civil, commercial, administrative and even criminal documents, some regulations regulating competition or directly related to competition have been amended in order to ensure a healthy business environment, to protect the interests of the state, of business entities and of consumers. These regulations have a certain enforcement effect, initially regulating competitive business activities, especially the provisions of Administrative Law and Criminal Code in handling acts of counterfeiting, trading in fake goods, infringing upon industrial property rights, making counterfeit goods, advertising frauds, etc. Many cases of counterfeiting have been handled by administrative law and criminal law, many administrative fines have been imposed on businesses that advertised untruthfully, disrupted the business activities of other enterprises, etc. Therefore, acts of unfair competition have been initially regulated and handled by law.

Thus, before the Competition Law 2004, the transformation of the economy to market mechanism changed the viewpoint and awareness of Vietnam about economic competition as well as the need of regulating competition activities by law. The state has also taken the first steps in controlling competition acts by the law in some business fields.

3.2. The promulgation of the Competition Law 2004

The strong development of the economy under the market mechanism requires the legal system to develop accordingly. Under this context, Competition Law No. 27/2004/QH11 (Competition Law 2004) was passed by the 11th National Assembly on December 3rd, 2004 at its 6th Session and came into effect from July 1st, 2005.

The birth of the Competition Law 2004 is an important milestone in the process of creating a consistent legal framework regulating competition activities of enterprises in the market.

After the Competition Law 2004 was passed, the government also issued a number of documents guiding its implementation as follows:

- Decree No. 110/2005/NĐ-CP on August 24th, 2005, on management of multi-level sale of goods (Decree 110);
- Decree No. 116/2005/NĐ-CP on August 24th, 2005, on detailing the implementation of a number of articles of the Competition Law (Decree 116);
- Decree No. 120/2005/NĐ-CP on September 30th, 2005, on dealing with breaches in the competition sector (Decree 120);

- Decree No. 05/2006/NĐ-CP dated on January 9th, 2006 on establishment, functions, duties, powers and organizational structure of Vietnam Competition Council;
- Decree No. 06/2006/NĐ-CP dated January 9th, 2006 on functions, duties, powers and organizational structure of Vietnam Competition Administration department;

From basic principles in Constitution, Civil Code, Commercial Law, Criminal Code and some provisions on unfair competition and competition restriction in some specific laws, regulations that regulated almost competition activities were detailed in the Competition Law and guiding documents. Overview of the Law and decrees guiding competition law enforcement can be summarized as follows:

Scope of regulations

The Competition Law prescribed acts of restraint of competition, acts of unfair competition, the order and procedures for settling competition cases, and measures for handling violations of competition law.

Objects of application

The Competition Law was applied to business organizations, individuals and professional associations operating in Vietnam. Thus, the Competition Law did not exclude any specific type of enterprise, but limited the scope of activities only within Vietnam territory.

Anti-competitive agreement

Regarding to anti-competitive agreement acts, Article 8 of the Competition Law stipulated 8 kinds of acts, including: (1) agreement to directly or indirectly fix prices of goods and services; (2) dividing consumer markets, supply of goods and services; (3) restricting or controlling the quantity and volume of production, purchase and sale of goods and services; (4) limiting technical and technological development, limiting investment; (5) imposing conditions for signing contracts of purchase and sale of goods or services on other enterprises or forcing them to accept obligations not directly related to the subjects of the contract; (6) preventing, restraining, not allowing other enterprises to enter the market or to develop their businesses; (7) removing from the market enterprises that are not parties of the agreement; (8) colluding in order that one or some of the parties of the agreement will win tenders for the supply of goods or services. Based on the provisions of the Competition Law (Article 8) and Decree 116 (Articles 14 to 21), listed anti- competitive agreement acts were clarified with detailed descriptions of the content and form of this kind of deal.

Regarding to prohibition regulation, the Competition Law absolutely prohibited (with no exemptions) from preventing, restraining other enterprises from entering the market or to develop their businesses; from removing enterprises that are not parties of the agreement and from colluding for tenders. The remaining anti-competitive agreements are only prohibited when the parties of the agreement have a combined market share of 30% or more. At the same time, these anti-competitive agreements are exempted for a limited period of time if they act to lower costs and to benefit consumers, such as rationalizing the organizational structure, business model, improving business efficiency, promoting technical and technological advances, improving the quality of goods and services, promoting consistently application of quality standards and technical norms of the product category, unifying business, delivery and payment conditions, enhancing the competitiveness of small and medium-sized enterprises, and of Vietnamese enterprises in the international market.

Abuse of market dominance and monopoly position

The Competition Law distinguishes enterprises with dominant position and enterprises with monopoly position in the market, whereby:

- An enterprise is considered to have a dominant market position if it has a market share of 30% or more in the relevant market or is likely to cause significant competition restriction. A group of enterprises is considered to have a dominant position in the market if they act together to restrict competition and fall into one of the following cases: two enterprises with a total market share of 50% or more in the relevant market; three enterprises with a total market share of 65% or more in the relevant market; four enterprises with a total market share of 75% or more in the relevant market.
- An enterprise is considered to have a monopoly position if there is no other enterprise competing on goods and services that it trades in the relevant market.

Article 13 of the Vietnam Competition Law lists 06 acts of "abusing dominant position" and Article 14 regulates two additional acts (in addition to 06 acts prescribed in Article 13) "abusing monopoly position". Based on these regulations, Decree No. 116/2005/ND-CP details the acts of "abusing dominant position" and "abusing monopoly position", thereby describing concretely the manifestations of each act considered "abusive".

Regarding to prohibition regulations, the Competition Law prohibits all acts of abusing dominant market position and abusing monopoly position without considering exemption.

Economic concentration

Economic concentration is an act of an enterprise that includes: (i) merger of an enterprise; (ii) business consolidation; (iii) business acquisition; (iv) joint venture between businesses; and (v) other economic concentration acts as required by law.

Prohibited cases of economic concentration: Prohibiting economic concentration acts if the combined market share of enterprises participating in economic concentration accounts for more than 50% of the relevant market, except cases of exemption or case of enterprises that is still small or medium enterprises (evaluated by the law) after economic concentration.

Prohibited economic concentration acts will be exempted if one or more parties of the economic concentration have risk of dissolution or falling into bankruptcy; or if economic concentration encourages to expand exports or to contribute to socio- economic development, technical and technological improvement.

Regarding to notification of economic concentration, if combined market share of enterprise participating in an economic concentration is from 30% to 50% in the relevant market, their legal representatives must notify the competition authority before conducting economic concentration; in case the combined market share is lower than 30% in the relevant market or the case after conducting economic concentration, the enterprise is still small or medium-sized enterprises (as prescribed by law), notification is not required.

Unfair competition

In the majority of countries, unfair competition practices are governed by trade laws or laws on protection of consumers' rights. However, Vietnam Competition Law on 2004 (Article 39) has included provision regulating unfair competition acts such as: misleading indications, infringing business secrets, coercing business, defaming another enterprise, disrupting business activities of other enterprises, advertising for unfair competition, unfairly promoting, discriminating between associations and illicitly selling in multi-level, etc.

Competition authority

In 2004, Vietnam adopted a comprehensive competition law and established two competition authorities – the

Vietnam Competition Administrative Department (VCAD) which was renamed the Vietnamese Competition Authority (VCA, which has been structured since August 2017 to be the Vietnam Competition and Consumer Authority – VCCA) and the Vietnamese Competition Council (VCC).

Vietnam Competition and Consumer Authority (VCCA)

The VCCA is the competition administration department under the MoIT, having duties and powers to control the economic concentration process, to receive applications for exemption, to propose the Trade Minister to decide or to submit to Prime Minister for decision, to investigate competition cases relating to competition restriction acts and unfair competition acts, to handle and to sanction the said violations (Article 49). The head of the Competition Authority is appointed and dismissed by the Prime Minister at the proposal of the Trade Minister. (Ministry of Trade, together with Ministry of Industry, was merged on July, 2007 to be Ministry of Industry and Trade as today).

Competition Council

Competition Council is established by the government, with eleven to fifteen members appointed and dismissed by the Prime Minister at the proposal of the Trade Minister. The Competition Council has duties to organize the handling and settling complaints relating to competition restriction cases.

The Competition Council president is appointed and dismissed by the Prime Minister among the members of the Competition Council at the proposal of the Trade Minister. When settling a specific competition case, the Competition Council president shall set up an according handling council, which consists of at least five members, including the Chairman. Based on the case file transferred by the Competition Authority, the competition handling council will hold a hearing and make decision on voting mechanism.

Competition litigation process

Competition litigation process is an activity of agencies, organizations and individuals according to the order and procedures for settling and handling competition cases detailed in the Competition Law and its subordinate documents. The litigation process is divided into three main stages:

- Investigation of competition cases

The investigation phase may be conducted based on the complaint file which has been gathered or initiated by the VCA. Investigation of a competition case is conducted in two steps, including preliminary investigation and formal investigation. After finishing the investigation, the competition authority is responsible for completing the investigation report and case file to prepare for the next phase of handling the case.

- Handling competition cases

Based on the investigation report and the documents, evidence gathered in the cases file, based on related provisions, the competent authority is responsible for researching, evaluating and making decision to handle competition cases. In unfair competition cases, the power to handle cases belongs to the Head of the Competition Authority; in competition restriction cases, the Competition Council (in particular, the council handling the case) has this competence.

- Claims, lawsuits against decisions on settlement of a competition case

In case the parties do not agree with all or a part of the contents of the decision on settlement of competition case, they have the right to appeal to the Competition Council (for competition restriction cases) or to the Minister of Industry and Trade (for unfair competition cases)

Within 30 days after receiving the complaint dossier, the Competition Council or the Minister of Industry and Trade shall settle the complaint according to competence; In specially complicated cases, the settling time limit may be extended, but no longer than 30 days.

In case the parties still disagree with the decision of resolving the complaint, they may initiate administrative lawsuits against a part of or the whole complaint settlement decision to the competent provincial People's Court.

In fact, after more than 10 years of implementation, the Competition Law 2004 reveals some key problems as follows:

- The substantive provisions of the law are flawed in that none of the prohibitions are based on the conventional best practice standards concerning mergers, abuse of dominance or anti-competitive agreements;
- Most „hard core“ cartels are subject to inappropriate and difficult to establish market share requirements;
- The provisions of the Competition Law 2004 are not consistent with provisions relating to competition in specific laws;
- The VCC (currently VCCA) is hampered in its ability to detect and investigate matters because it cannot offer immunity or leniency and its dawn raid powers can only be used after the accused has already been informed of the investigation;
- The level of resourcing for investigations within the VCCA is exceedingly low (i.e. 11 front line investigators who tend to be lost to the agency once their level of experience becomes marketable to private sector law firms);
- The VCCA's resources are, to a significant extent, diverted to the enforcement of unfair competition laws that should primarily be commercial disputes between businesses;
- Decree 116 binds the VCCA hands so tightly that many cases that are harmful to competition cannot be appropriately investigated and in other cases investigators must undertake challenging tasks that are a distraction from the central harm at issue;
- It is not apparent that private parties can necessarily use Article 584 of the Civil Code (that stipulates grounds giving rise to liability to compensate for loss and damage) in the way its equivalent in other civil law countries can be used for the private enforcement of competition law and the ancillary provisions such as a right to discovery appear to be lacking. (OECD, 2018, p.67) 3.3. The promulgation of the Competition Law 2018

Therefore, to overcome the shortcomings of the Competition Law 2004, to improve the effectiveness and efficiency of competition policies and laws, to meet the requirements of economic integration and to be consistent with Vietnam's international commitments; in order to improve the competition law in accordance with the newly amended, supplemented or newly promulgated relevant laws; in response to meet the government's reform of administrative procedures, a revision of the Competition Law 2004 was needed.

On June 12th, 2018, at the 5th Session, the 14th National Assembly passed the Competition Law No. 23/2018/QH14, effective from July 1st, 2019. The Competition Law 2018 includes 10 chapters with 118 articles, specifically as follows:

- Chapter I: General provisions, including 8 articles (from Article 1 to Article 8), provide scope of regulation, object of application, explain the words and how to apply competition law, stipulate rights and principles of business competition, provide state policies on competition, state management responsibilities on competition and prohibited acts related to competition.
- Chapter II: Relevant markets and market share, including 2 articles (Articles 9 and 10), define relevant markets, market share and combined market share.
- Chapter III: Anti-competitive agreements, including 13 articles (from Article 11 to Article 23), regulate anti-competitive agreements; prohibited competition restriction agreements; assess the impact or the ability to cause significant anti- competitive effects of the anti-competitive agreement; provide exemption for some kinds of prohibited anti-competitive agreements; submit exemption application dossier for prohibited competition restriction agreement; accept exemption application dossiers for prohibited competition restriction agreements; request to supplement information, documents to request exemption for prohibited competition restriction agreement; consult in the process of reviewing applications for exemption for prohibited competition restriction agreements; withdraw the application for exemption for prohibited competition restriction agreements; provide competence and time limit for making decisions on exemption; make decisions on exemption for prohibited competition restriction agreements; implement anti-competitive agreements for cases of exemption; annul the decision on exemption for prohibited anti-competitive agreements.
- Chapter IV: Abuse of market dominant position, abuse of monopoly position, including 5 articles (from Article 24 to Article 28), regulate enterprises, groups of enterprises having dominant market position and enterprises having monopoly positions; identify significant market power, prohibited acts for abuse of dominant market position, abuse of monopoly position; control enterprises operating in state monopolies.
- Chapter V: Economic concentration, including 16 articles (from Article 29 to Article 44), provide forms of economic concentration, prohibited economic concentration acts; assess the impact or the ability to have significant anti-competitive effects of economic concentration acts; assess the positive effects of economic concentration; regulate economic concentration notice, economic concentration notification dossier, receiving dossiers of notices of economic concentration, preliminary assessment and official assessment of economic concentration; require additional information on economic concentration, consultations in the process of appraising economic concentration; provide responsibility of related agencies, organizations and individuals for providing information and documents; stipulate how to make decisions on economic concentration, to determine conditional economic concentration, to implement economic concentration regulations; and list acts of violating regulations on economic concentration.
- Chapter VI: Unfair competition acts, with one article (Article 45), regulates prohibited unfair competition acts.
- Chapter VII: The National Competition Commission, consisting 8 articles (from Article 46 to Article 53), provide provisions about the National Competition Commission; President of National Competition Commission; members of National Competition Commission; qualifications of members of the National Competition Commission; Competition Investigation Agency; Head of Competition Investigation Agency; investigators of competition cases and their qualifications.

- Chapter VIII: Competition legal proceedings, this chapter has 7 sections, 56 articles, including:

Section 1: General provisions, including 4 articles (from Article 54 to Article 57), provide rules of competition legal proceedings; the language and script used in competition legal proceedings; evidence; responsibility for collaborating with and supporting the National Competition Commission.

Section 2: Competition presiding agencies and competition presiding officers, including 8 articles (from Article 58 to Article 65), provide regulations on competition presiding agencies, competition presiding officers; duties and powers of the President of the National Competition Commission; duties and powers of anti-competitive settlement council and its chairperson and members, of the Head of Competition Investigation Agency, of investigators when conducting competition legal proceedings; duties and powers of hearing clerks and replacement of competition presiding officers.

Section 3: Participants in competition legal proceedings, including 9 articles (from Article 66 to Article 74), provide regulations on participants of competition legal proceedings; rights and obligations of complainants, respondents and investigated parties; protectors of legitimate rights and interests of the complainant, respondent, investigated party, persons with related interests and obligations; witnesses; expert witnesses; interpreters; persons with relevant rights and obligations; provide provisions on refusing expertise, interpretation or requesting replacement of expert witnesses or interpreters and on deciding replacement of expert witnesses or interpreters.

Section 4: Procedures for investigation and settlement of competition cases, including 21 articles (from Article 75 to Article 95), stipulate provisions on providing information about violations; receipt, verification and evaluation of these information; complaints against competition cases; receipt and verification of complaint dossiers; return of complaint dossiers; competition investigation decisions; competition investigation time limit; application of measures to prevent and guarantee imposition of sanctions against administrative violations in investigation and settlement of competition cases; provisions on taking testimonies, summoning witnesses during investigation, transferring competition dossiers showing criminal signs, suspending, re-establishing, reporting investigations; regulate settlement of economic concentration violations; settlement of an unfair competition case, of an anti-competitive case; suspension of competition case settlement; hearings; settlement decision and effect of settlement decision.

Section 5: Handling of complaints against settlement decisions, including 8 articles (from Article 96 to Article 103), provide provisions on complaints against settlement decisions; complaint letter against settlement decisions; process of complaints against settlement decisions; consequences of complaints against settlement decisions; handling of complaints against settlement decisions; decisions of complaints against settlement decisions; validity of complaint handling decisions; initiation of a lawsuit against complaint handling decisions.

Section 6: Announcement of decisions of the National Competition Commission, including 4 articles (from Article 104 to Article 107), stipulate decisions to be announced; contents not to be disclosed; posting of contents to be announced; announcement and publication of annual performance reports of the National Competition Commission.

Section 7: International cooperation in the competition legal proceedings, including 2 articles (Article 108 and Article 109), provide regulations on international cooperation and principles of international cooperation in competition legal proceedings.

- Chapter IX. Sanctions against violations of competition law, including 6 articles (from Article 110 to Article 115), provide regulations on rules and forms of sanctions against violations and remedial

measures for violations of competition law; fines imposed on violations of competition law; leniency policy; power and forms of sanctions against violations of competition law; enforcement of settlement decisions and of complaint handling decisions.

- Chapter X. Implementing provisions, including 3 articles (from Article 116 to Article 118), stipulate amendment and annulment of provisions of other laws; entry in force of the competition law and transitional regulations.

On March 24th, 2020, the according subordinate legal document – the Decree No. 35/2020/ND-CP (Decree 35) is promulgated and will entry into force on May 15th, 2020. The Decree includes 7 chapters with 30 articles, clarifying some provisions on relevant market and market share; significant competition restraining impact of anti-competitive agreements; significant market power; economic concentration and competition legal proceedings.

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