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Chapter 4

Corporate governance and competition policy in Viet Nam

This chapter provides an overview of Viet Nam's corporate governance framework and its competition policy. The first section addresses ongoing reforms to the ownership and governance of state-owned enterprises, the rights of shareholders, disclosure and transparency rules, and the independence and effectiveness of boards. The second section reviews the institutional aspects of competition and the substantive provisions of the Competition Law.

Improving corporate governance in Viet Nam

Corporate governance concerns the structures framing the relationships among a company's executive management, board of directors, shareholders and stakeholders. From the perspective of modernising legal and regulatory frameworks for investment, effective corporate governance is important because it affects not only individual firm behaviour but also broader macroeconomic activity. For emerging market economies, improving corporate governance can serve several purposes, including reinforcing property rights, reducing transaction costs, and lowering the cost of capital, which together can improve investor confidence. The Asian financial crisis that began in 1997 acted as a significant catalyst for improving corporate governance frameworks in Asia with the aim of building well-functioning and stable financial markets.

Regulatory reforms over the past decade have reconfigured Viet Nam's corporate governance framework to encompass all firms, public and private, listed and non-listed, thereby marking a significant change in the investment landscape. Viet Nam's entry into the World Trade Organization in 2007 was preceded by an important restructuring that involved the passing of the *Law on Enterprises* and the *Law on Investment* in 2005 and the *Law on Securities* in 2006. This was followed by the issuance of a number of decrees, circulars and decisions to ensure implementation of the new framework, including the Corporate Governance Regulations of 2007 and Amendments of 2012. Several recently signed agreements will encourage further reforms of corporate governance, particularly of state-owned enterprises (SOEs), including the Trans-Pacific Partnership Agreement and the EU-Viet Nam Free Trade Agreement.

In late 2014, the National Assembly approved a number of new and amended laws, including a new *Law on Enterprises* which has established a comprehensive and ambitious framework governing firms. The Law clarifies provisions regarding independent board directors, raises the number of days for which shareholders must receive notice for annual general meetings and introduces e-voting. The perception is that the new regulation has helped to set the bar high for Vietnamese companies and to improve Viet Nam's ranking on a number of corporate governance assessments. Ensuring full compliance by individual firms will be the greatest challenge.

In spite of these improvements, the overall legal and regulatory corporate governance framework remains complex, with scattered inconsistencies and at times limited awareness by market participants. The equitisation of state-owned enterprises proceeded rapidly in the 1990s and early 2000s but has slowed down over the past decade. Many equitised SOEs have retained significant state ownership and have not attracted foreign investors. Total

assets of fully state-owned enterprises correspond to 80% of GDP according to the authorities. While listed SOEs have performed best among all SOEs, they appear to be more distressed than private listed companies.

The continued prominence of SOEs and the preferential treatment they receive in terms of access to finance calls into question the extent to which a level playing field, or "competitive neutrality" has been achieved. The quality of the ownership and governance of SOEs is of particular interest to foreign investors because it determines the attractiveness of these SOEs as either targets of direct investment or as partners in business transactions and joint ventures or strategic partnerships. Some SOEs have managed to successfully attract foreign investors by making a convincing push towards alignment with internationally-recognised standards of corporate governance.

The corporate governance framework in Viet Nam remains a work in progress, but the regulatory steps taken in the last few years to address (*i*) the organisation of the state ownership function of SOEs, (*ii*) the rights and equitable treatment of shareholders, (*iii*) the requirements for disclosure and transparency, and (*iv*) the functioning of boards of listed companies offer promise to domestic and foreign investors (Figure 4.4).[1] The reform of the corporate governance framework is ongoing and new regulations are expected to come into force soon. The *G20/OECD Principles of Corporate Governance* and the *OECD Guidelines on Corporate Governance of State-Owned Enterprises* are useful benchmarks for Vietnamese policymakers as they continue to develop and measure progress in developing their corporate governance frameworks.

Policy recommendations

- *Clarify and ensure effective separation between the state ownership function and regulation.* A clear separation is a “fundamental prerequisite” for ensuring a level-playing field with the private sector and for avoiding competitive distortions. Clear laws and regulations should be developed to protect the independence of regulators, especially vis-à-vis line ministers. Nominal independence is not enough, as the operational independence might be jeopardised by a narrowly based fee structure, for example, or by a lack of control over one’s budget. Appropriate financial and human resources should be provided to allow regulators to function adequately with the right level of operational independence. The government should move ahead with its decision to create a professional agency to lead the state ownership function with the aim of separating state ownership and regulation. Its legal

framework as well as the guidance for its organisation and operation should be released as soon as the agency is established.

- *Develop and disclose a state ownership policy.* The ownership policy should define clearly the overall rationale for state ownership and should be published and made public, clarifying the main objectives to which this rationale gives rise. Most importantly, the ownership policy should define how the state should behave as an owner. Clear and published ownership policies provide a framework for prioritising SOE objectives and are instrumental in limiting the dual pitfalls of passive ownership or excessive intervention in SOE management.

- *Consider means to reinforce the governance of SOEs, including state-owned corporate groups*. The diversification of ownership of wholly-state owned enterprises government can be one means of facilitating the promotion of internationally-recognised governance practices. Specific quantitative targets for state capital divestment should be aligned with the government's state ownership policy.[2] The roles and responsibilities of agencies in setting the equitisation roadmap and policy for state capital divestment should be clarified.

- *Reinforce provisions protecting the rights of minority shareholders.* The protection of minority interests is a cornerstone to develop the capital market. An effective system is needed to protect effectively and conveniently against abuses by majority shareholders, such as related-party transactions. This is crucial for Viet Nam to be credible in ensuring an equitable treatment of all shareholders and, as much as possible, equal access to corporate information.

- *Reinforce minority shareholders' capacity to obtain effective redress for the violation of their rights.* Even if an appropriate legal and regulatory framework is in place with regards to the protection of minority shareholders, effective and timely enforcement is often lagging in Viet Nam. To improve implementation and enforcement of minority shareholders rights, a priority should be to further reinforce the capacity of relevant regulators such as the State Securities Commission (SSC).

- *Enhance the quality of disclosure and ensure that it is made in a timely manner.* The authorities should promote the adoption of emerging good practices for non-financial disclosure, in both Vietnamese and English. Full convergence with international standards and practices for accounting and audit should be sought.

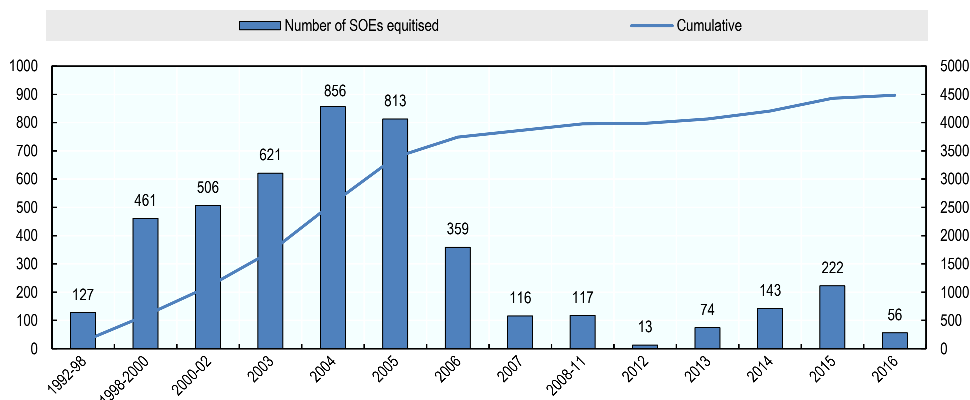
The implementation and monitoring of audit and accounting standards should be overseen by bodies independent of the profession. Managers, board members, and controlling shareholders should disclose structures that give insiders control disproportionate to their equity ownership.

- *Increase the independence of boards and improve the transparency of the nomination process*. One of the most effective tools to protect minority shareholders remains the election of independent directors. In some cases, the public perception in Viet Nam is that independent directors are not independent-minded and that there is political interference in the nomination process. Minority shareholders should be able to exert influence on their election through the possibility of nominating candidates through e-voting. The board nomination process should include full disclosure about prospective board members, including their qualifications, with emphasis on the selection of qualified candidates.

Developing a framework for corporate governance in Viet Nam

Early Vietnamese reforms substantially diminished the economy's primarily state-directed foundation. Between 1991 and 2015, the number of wholly state-owned enterprises was reduced from 12 000 to slightly more than 700, largely through equitisation, mergers, closures and sell-offs.[3] A notable element of the restructuring involved a broadening of ownership through equitisation (*i.e.* the conversion of SOEs into joint stock companies).[4] After significant progress in the late 1990s and early 2000s, the pace of equitisation slowed between 2005 and 2012 (Figure 4.1).

Figure 4.1. **Progress of equitisation, 1992-2016**



Source: MoF, NSCERD and CIEM, 2016

Box 4.1. **The G20/OECD Principles of Corporate Governance and OECD Guidelines on Corporate Governance of State-Owned Enterprises**

Good corporate governance is not an end in itself. It is a means to create market confidence and business integrity, which in turn is essential for companies that need access to equity capital for long term investment. Access to equity capital is particularly important for future oriented growth companies and to balance any increase in leveraging. The G20/OECD Principles of Corporate Governance (the *Principles*) therefore support investment as a powerful driver of growth.

The *Principles* were originally developed by the OECD in 1999 and updated in 2004 and 2015. The latest review was carried out under the auspices of the OECD Corporate Governance Committee with all G20 countries invited to participate in the review on an equal footing with the OECD Member countries. The *Principles* provide guidance through recommendations and annotations across six chapters:

- *I) Ensuring the basis for an effective corporate governance framework*
- *II) The rights and equitable treatment of shareholders and key ownership functions*
- *III) Institutional investors, stock markets and other intermediaries*
- *IV) The role of stakeholders in corporate governance*
- *V) Disclosure and transparency*
- *VI) The responsibilities of the board*

Importantly, the *Principles* have a proven record as the international reference point and as an effective tool for implementation. They have been adopted as one of the Financial Stability Board’s (FSB) Key Standards for Sound Financial Systems serving FSB, G20 and OECD members. They have also been used by the World Bank Group in more than 60 country reviews worldwide. They serve as the basis for the Guidelines on corporate governance of banks issued by the Basel Committee on Banking Supervision, the OECD Guidelines on Insurer and Pension Fund Governance and as a reference for reform in individual countries.

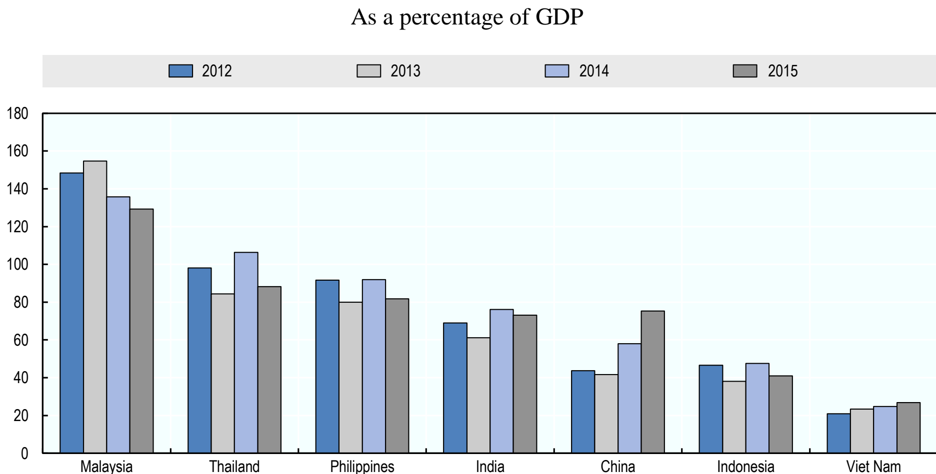
Complementing the *Principles*, the *OECD Guidelines on Corporate Governance of State-Owned Enterprises* (the *Guidelines*) are recommendations to governments on how to ensure that SOEs operate efficiently, transparently and in an accountable manner. They are the internationally agreed standard for how governments should exercise the state ownership function to avoid the pitfalls of both passive ownership and excessive state intervention. The Guidelines were first developed in 2005 and have been updated in 2015 to reflect a decade of experience with their implementation and address new issues that have arisen concerning SOEs in the domestic and international context.

Most equitised SOEs aim to become listed on one of Viet Nam's two stock exchanges, with their shares transferred under the guidance of the State Capital Investment Corporation (SCIC)/Ministry of Finance.[5] As of end-2015, there were nearly 700 companies listed on the Ho Chi Minh Stock Exchange and the Hanoi Stock Exchange, about 450 of which are equitised SOEs.[6] Nevertheless, compared to regional peers, Viet Nam continues to lag in terms of the relative size of the capital market (Figure 4.2).

In some cases, the equitisation and listing of SOEs has faced challenges. Because equitisation and listing are conducted in two separate steps in Viet Nam, a number of SOEs – reluctant to adhere to greater disclosure requirements – have been equitised without listing on a stock exchange. As described further in the next section, it is also important to note that many equitised SOEs have retained significant levels of state ownership.

Figure 4.2. **Market capitalisation of listed domestic companies**

As a percentage of GDP



Source: World Bank, 2016

To improve the governance of both state-owned firms and listed firms, the government has in recent years developed the legal and regulatory framework. Significant elements include the *Law on Enterprises* (first in 1999, then 2005, and most recently in 2014), the *Law on Securities* (first in 2006, and revised in 2010) as well as Decree 81 on SOE information disclosure and Circular 155 on disclosure of information in the securities market (Table 4.1). The *Law on Enterprises*, for example, has established a uniform legal framework, establishing *de jure* equality among enterprises of all economic sectors (OECD, 2016).

Table 4.1. **Main laws and regulations relating to corporate governance in Viet Nam**

Name	Effective	Purpose	Notes
Law on Enterprises of 2014 (No. 68/2014/Qh13)	1 July 2015	Company Law	Replaced Law on Enterprises of 2005
Law on Management and Use of State Capital Invested in Enterprises of 2014	1 July 2015	Organising the management of state capital and investment in SOEs and enterprises with state shares	-
Circular 155/2015/TT-BTC by Ministry of Finance	1 January 2016	Guidance on the disclosure of information on the securities market	Replaced Circular 52/2012/TT-BTC
Decree 116/2015/ND-CP	11 November 2015	Revision of some articles of Decree 59/2011/ND-CP	-
Decree 81/2015/ND-CP	5 November 2015	Information disclosure of state-owned enterprises	-
Decree 87/2015/ND-CP	1 December 2015	Monitoring state capital invested in enterprises; Disclosure of operation performance and financial information of SOEs	Replaced Decree 61/2013/ND-CP
Decree 19/2014/ND-CP	29 April 2014	Issuing the sample charter of one-member limited liability companies owned by the state	-
Decree 189/2013/ND-CP	11 November 2015	Revision of some articles of Decree 59/2011/ND-CP	-
Decree 151/2013/ND-CP	20 December 2013	Functions, tasks and operation mechanisms of the State Capital Investment Corporation	-
Decree 59/2011/ND-CP	5 September 2011	Transformation of wholly state-owned enterprises into joint-stock companies	Replaced Decree 109/2007/ND-CP
Law on Securities of 2010	1 July 2011	Law governing securities offering, listing, transaction, trading, and securities market	Replaced Law on Securities of 2006
Listing rules of the Ho Chi Minh and Hanoi stock exchanges	2000 and 2005	Rules governing the issuance of and trading in equity and debts securities of listed companies	-

Source: OECD research

A significant obstacle remains that, as a result of regular changes in the regulatory landscape, awareness by market participants of the corporate governance framework is sometimes limited. In addition to the various regulations, the State Securities Commission (SSC) and the stock exchanges have collaborated on a number of voluntary initiatives to promote better corporate governance of listed firms, including the Viet Nam Annual Report

Awards, the Viet Nam Corporate Governance Scorecard and the ASEAN Corporate Governance Scorecard.[7]

Though the corporate governance framework has become more comprehensive recently, some important gaps remain. Most importantly, good corporate governance requires not only an adequate legal and regulatory framework, but effective enforcement to ensure that the rules are respected. At the moment, the SSC has a number of enforcement powers over publicly listed companies, including the ability to fine and suspend or remove licences. Yet the SSC is constrained by its inability to initiate civil actions in court or collect damages on behalf of shareholders. Staff resources are another constraint. As of June 2016, the SSC had 399 staff, including 19 in public companies supervision, 31 in inspection and 31 in market surveillance.

Restructuring the ownership and governance of SOEs

An assessment of the investment climate in Viet Nam necessarily includes an evaluation of SOE sector reforms. SOEs in Viet Nam account for about one-third of GDP, and after over 20 years since the equitisation process began, the state retains a majority stake in more than 3 000 SOEs (IBRD/World Bank, 2016). Equitisation and state divestment have been a priority in recent years. Between 2011 and September 2016, 537 SOEs were equitised with a total enterprise value of VND 789.9 trillion (USD 35 billion), of which the real value of state capital was VND 210.7 trillion (USD 9.3 billion). During this same period, state business groups and general corporations divested nearly VND 11.520 trillion (USD 510 million) and the SCIC divested approximately VND 4.3 trillion (USD 190 million). This divestment process has resulted in an increase of the involvement of private investors in equitised enterprises, which has encouraged the application of internationally-recognised corporate governance practices.

However, the continued presence of a large SOE sector is relevant to the investment climate in at least two important respects. First, considering the economic weight of SOEs, it is important to assess whether an economic climate of “competitive neutrality” has been established. This implies a business climate that provides for a level playing field, where no domestic or foreign entity, operating in a mixed market where both state and private actors are present (or could be present), is subject to undue competitive advantages or disadvantages. In the case of an uneven playing field, there is a risk that would-be investors are crowded out by less efficient competitors. Vietnamese SOEs are frequently able to borrow from commercial banks on easy terms and SOEs are among the few firms that are able to borrow from the Viet Nam Development Bank. Moreover, these credits require little or

no disclosure by the borrower and are largely unsupervised by the relevant financial sector enforcement agencies (OECD, 2016). As a result, the size of non-performing loans in SOEs is basically unknown. Anecdotal evidence points to a number of cases of poor SOE performance and their potential impact on the Vietnamese economy. In 2010, for example, in a well-known case, the shipbuilder Vinashin defaulted on a foreign loan, triggering a downgrade of Viet Nam's sovereign debt.

Second, the quality of the ownership and governance of SOEs is of interest to foreign investors because it determines their attractiveness as either targets of direct investment or as partners in business transactions and joint ventures or strategic partnerships. Approximately 54% of SOEs in Viet Nam are managed by local governments, 27% by line ministries and 19% by state economic groups. The State Capital and Investment Corporation, meanwhile, has taken stakes in a number of equitised SOEs (Box 4.2). Overall, reform measures to encourage a more transparent and consistently implemented state ownership policy and clarify the role of the state as an owner would be welcome. It would be central in reducing inefficiencies and allowing potential investors to make well-informed decisions.

Box 4.2. **The State Capital Investment Corporation**

The Vietnamese government in 2005 established the State Capital Investment Corporation (SCIC), whose role is to represent the state's shareholdings in the enterprises, in other words, to centralise or integrate the ownership function and clearly separate it from (other) regulatory and policy functions carried out by line ministries. The SCIC commenced it operations on 1 August 2006. It is a special economic organisation of the state whose functions and responsibilities are mandated by law. It is entirely owned by the state and is chaired by the former Chief of Office at the Ministry of Finance. It is organised as a financial holding company. The SCIC receives and represents state equity ownership in enterprises where the state owns shares.

The objectives of the SCIC are to speed up the SOE equitisation and reform process, to split regulatory functions from commercial functions, to enhance effectiveness of the management and investment of state assets and capital, and to promote the introduction of good practices of corporate governance. The SCIC had at one point stakes in about 1 000 companies. The number has been reduced substantially through the implementation of a divestment strategy, and as of end-2016 the SCIC held stakes in about 150 companies.

Among the difficulties that SOEs in Viet Nam face in attracting foreign investment are reputational challenges. Since a number of high-profile corruption cases became public, investors have not been shy to voice their fears of embezzlement or inefficiencies related to corporate graft. In

December 2013, in a highly-publicised case, the former Chairman and Director General of Vietnam National Shipping Lines (Vinalines) were put on trial for allegedly embezzling VND 2 billion. While such cases have weighed on the reputation of the Vietnamese state-owned sector, some SOEs have managed to successfully attract foreign investors by making a convincing push towards alignment with internationally-recognised standards of corporate governance. The dairy producer Vinamilk, for instance, which regularly publishes annual reports and financial information on its website in English and Vietnamese, has attracted a number of foreign strategic and institutional investors.

The recently updated legal framework governing enterprises indicates that Vietnamese policymakers recognise the need to improve the accountability and performance of SOEs. Since 2011, the government has demonstrated its intention of revitalising the restructuring of SOEs in its recently-terminated Socio-Economic Development Plan (SEDP) for 2011-15 as well as in Decision 929/QD-TTg, 17/7/2012 and Decision 707/QDD-TTg, 25/5/2017 that approve the SOE restructuring plan respectively for 2011-15 and 2016-20. Under these plans, the government set a target of equitising 531 SOEs in 2011–15. As of the end of December 2015, 478 out of the targeted SOEs had been equitised (or 93% of the targeted SOEs). Many equitisations, it should be noted, have been slow to involve the sale of large stakes. The equitisation of Vietnam Airlines in November 2014, for example, initially involved offering only a 4.3% stake until an agreement was reached in June 2016 for ANA Holdings, a Japanese firm, to take an 8.8% stake. The slow nature of the equitisation process is acknowledged in the SEDP for 2016-20. Amid slow progress, the government retains its ultimate plan that only enterprises that are considered to be of strategic importance (*e.g.* energy, national security) will retain full state ownership.

During the 12th Party National Congress, the Vietnamese government proposed to establish a professional agency to oversee the management of state invested capital. In June 2017, Resolution No.12-NQ/TW has formalised the establishment of such agency by the end of 2018. The purpose of this agency would be to separate the state ownership function from the state's regulatory role in order to level the playing field between SOEs and private enterprises. This would be in accordance with market principles and international agreements signed by the Vietnamese government. In addition, the regulatory framework governing the financial mechanism of SOEs has been improved with the aim of enhancing the governance of SOEs in accordance with Decree no. 91/2015/ND-CP relating to government capital investment in enterprises as well as Decree no. 87/2015-ND-CP relating to the supervision of government capital, efficiency evaluation and the publication of financial information. In 2016, the Prime Minister also issued Decision

No.58/2016QD-TTg on the criteria for classification of SOEs and proposed the list of SOEs to be rearranged over 2016-20.

Recent international agreements aim to promote further corporate governance reforms

As part of ASEAN, the Vietnamese authorities have agreed to improve corporate governance standards with the aim of facilitating the freer flow of capital. Under the ASEAN Economic Community (AEC) Blueprint, the five core elements to establish a single market and production base include: (i) free flow of goods, (ii) free flow of services, (iii) free flow of investment, (iv) freer flow of capital, and (v) free flow of skilled labour. One of the actions described to facilitate the freer flow of capital is to "achieve greater harmonisation in capital market standards in ASEAN in the areas of offering rules for debt securities, disclosure requirements and distribution rules." With the aim of supporting the implementation of these aims, the ASEAN Capital Market Forum was set up to focus on harmonisation of capital market rules and regulations.

Beyond Southeast Asia, the Vietnamese authorities recently have concluded a notable free trade agreement with the 28 member states of the European Union (concluded on 2 December 2015). The EU-Viet Nam FTA is, according to the European Commission, "the most ambitious and comprehensive FTA that the EU has ever concluded with a developing country." It includes commitments that the signatories will endeavour to ensure that enterprises observe internationally-recognised standards of corporate governance.

Chapter 10 of the EU-Viet Nam FTA on "State-owned Enterprises, Enterprises Granted Special Rights or Privileges and Monopolies" also refers to internationally-recognised corporate governance and competition standards. The signatories commit to ensuring the enforcement of laws and regulations in a consistent and non-discriminatory manner, and to ensuring that SOEs act in accordance with commercial considerations in their purchases or sales of goods or services. Importantly, Article 6 on Transparency includes that a Party which has reasonable reason to believe that its interests are being adversely affected by the commercial activities of an SOE may request in written form that SOE to supply information about its operations related to (a) the ownership and the voting structure of the enterprise, (b) a description of any special shares or special voting, (c) the organisational structure of the enterprise, (d) a description of which government departments or public bodies regulate and/or monitor the enterprise, (e) annual revenue or total assets, and (f) exemptions, non-conforming measures, and immunities.

Regulatory improvements to the rights of shareholders

According to the *G20/OECD Principles of Corporate Governance*, the corporate governance framework should protect and facilitate the exercise of shareholders' rights and ensure the equitable treatment of all shareholders, including minority and foreign shareholders. Shareholders' rights to influence the corporation centre on certain fundamental issues, such as the election of board members, amendments to the company's organic documents, approval of extraordinary transactions, and other basic issues as specified in company law and internal company statutes. Shareholders should have the opportunity to obtain effective redress for violation of their rights.

For Viet Nam, the establishment of a framework for the rights of shareholders benefitted from recent changes with the amendments to the Corporate Governance Regulations (*e.g*. the timely disclosure of documents and materials in English), and the revised *Law on Enterprises* 2014. The new law, meanwhile, introduces e-voting, raises the number of days for which shareholders must receive notice for annual general meetings, and reduces the required quorum for a general shareholder meeting (Table 4.2). These regulations set the bar high for Vietnamese companies, which has helped to improve Viet Nam's ranking on a number of corporate governance assessments. Ensuring compliance by individual firms will be the greatest challenge.

The *ASEAN Corporate Governance Scorecard* takes note of these recent improvements to the corporate governance framework regarding the rights of shareholders. It determines that the Corporate Governance Regulations of 2015 and the *Law on Enterprises* of 2014 have significantly improved the procedures and institutions that allow shareholders to participate in significant decisions of the company at a reasonable cost.

These regulatory changes, which improve access to information and the ability of shareholders to influence company decisions, constitute important developments in strengthening shareholder rights. As a large degree of shareholder rights are exercised through the general shareholders meetings, shareholders need to be assured that they will be properly updated on when the meetings are organised and have access to the relevant material on a timely basis. This revised legal framework puts Viet Nam firmly on par with many jurisdictions. Nevertheless, more time is needed before an assessment of the implementation of these practices at the company level can be made.

Table 4.2. **Recent regulatory changes to the rights of shareholders**

Regulation	Relevant details
Corporate Governance Regulations	Companies should provide timely disclosure of documents and materials in English.
	Companies must disclose voting and voting tabulation procedures before and after a general shareholder meeting.
Law on Enterprises 2014	Shareholders must receive notice for annual general meetings ten days prior to the event, up from seven days in the previous regulation.
	The introduction of e-voting enables absent shareholders to vote for or against resolutions equivalent to shareholders who are present at general shareholder meetings.
	Required quorum for a general shareholder meeting of a joint-stock company for the first and second attempts reduced to 51% and 33%, respectively.

Source: OECD research.

Increasing disclosure and transparency

Directly tied to the rights and equitable treatment of shareholders is the need for high levels of corporate transparency, irrespective of whether the state retains a significant degree of ownership. To accurately evaluate existing and potential risks, investors need access to information detailing corporate decision making processes, monthly or yearly performance statistics, and potential sources of conflicts of interest. The corporate governance framework should ensure that timely and accurate disclosure is made on all material matters regarding the corporation, including the financial situation, performance, ownership and governance of the company.

The framework of laws, circulars and decrees that together set the standards for public companies to provide for timely, reliable and relevant disclosure in Viet Nam is multi-layered. It is becoming increasingly detailed, but awareness by market players remains low, and some recent regulatory and legislative initiatives may have made this even more challenging. Several standards, from separate laws and regulations appear to overlap with one another. For example, the Department of Accounting and Auditing Policy of the Ministry of Finance has formed standards of accounting and financial/non-financial disclosure through the use of the Vietnamese Accounting Standards Board. The board's authority is supported by the *Accounting Law* of 2003, which established the legal precedent for both public and private sectors. While the board issues the Vietnamese Accounting Standards (VAS), additional mandatory implementation guidance can come in the form of "circulars".

There is also complexity stemming from the fact that under the current structure, some Vietnamese companies prepare financial statements in line with International Financial Reporting Standards (IFRS), in the interest of reporting to foreign investors. In fact, the Ministry of Finance has announced that all listed and public firms will be expected to adopt IFRS by 2020. Those IFRS financial statements are supplementary financial statements published in addition to – not instead of – statements prepared using the national accounting standards, the VAS. In its efforts to enhance comparability and improve transparency, the government has stated that it aims to align its accounting and auditing standards with IFRS. Whether the alignment with IFRS can be fully implemented in the near future remains unclear as its implementation may be hindered by capacity constraints. In a push in this direction, the current system for accounting will soon be overhauled as the Ministry of Finance, on 20 November 2015, issued *Accounting Law* 2015, which will supersede the 2003 version, and will come into effective on 1 January 2017.

Important developments over the last few years – particularly those detailed in the *Law on Enterprises* of 2014, the Corporate Governance Regulations of 2015, Circular 155/2015/TT-BTC and Decree 81/2015/NĐ-CP – have made significant upgrades to the standards for information disclosure.[8] Circular 155/2015/TT-BTC, for example, which regulates the public disclosure of information on the securities market, introduces a rigorous list of 18 disclosure items that a public company must disclose within 24 hours of certain events occurring. A public company must, in one example, not only report any material change adverse to its business but also confirm or deny that that event has had an impact on the price of the securities of the company (Asia Counsel, 2015). While the Corporate Governance Regulations prioritised publications in English to expand access to foreign investors, Circular 155/2015/TT-BTC requires annual and management reports to be in both English and Vietnamese.

From the viewpoint of investors, what remains to be seen is if these different standards will be understood and implemented. The most recently revised standards impose stricter and more thorough requirements for disclosure and transparency, including requirements for financial and operating results, remuneration polices, and related party transactions (Table 4.3).

Table 4.3. **Selected disclosure requirements for Vietnamese companies**

Disclosure requirements	Regulation	Relevant details
Financial and operating results	Circular 155/2015/TT-BTC (effective from January 2016)	"The deadline for disclosure of the annual report is 20 days since publication of the audited annual financial statements but no later than 120 days since the year end date."
-	Decree 81/ 2015/ND-CP (effective from November 2015)	"Governs the contents, orders, procedures, and responsibilities for information disclosure of state-owned enterprises."
Major share ownership and voting rights	Disclosure Rule 2012 (Circular 52), Article 26	"Organizations, individuals or a group of relevant people holding 5% or above of voting stocks of a public company, investors holding 5% or above of fund certificates of a closed public funds or withdrawing from being major shareholders/investors holding 5% or above of fund certificates of a closed public funds must report on ownership to public companies/fund management companies, SCC and SE."
Remuneration polices	Corporate Governance Regulations, Amendment 2012 (Circular 121), Article 16	"The remuneration of the board of management shall be annually approved and announced by the general meeting of shareholders in accordance with regulations."
Related party transactions	Law of Enterprises 2014	The 2014 revision provides that the Chairman, CEO, legal representative, Supervisory Board members and other management personnel must notify the company if he/she owns interest in other companies and if their related persons hold 10% or more in other companies.
Foreseeable risk factors	Circular 155/2015/TT-BTC (effective from 1 January 2016)	Includes a list of 18 disclosure items that a public company must disclose within 24 hours of the event occurring. As an example, a public company must disclose any material adverse change to its business.
Governance structures and policies	Corporate Governance Handbook	In partnership with the State Capital Investment Corporation (SCIC), the Hanoi Stock Exchange developed a Corporate Governance Handbook in September 2014, which is structured around the G20/OECD Principles of Corporate Governance.
Financial and operating results	Circular 155 (effective from January 2015)	"The deadline for disclosure of the annual report is 20 days since publication of the audited annual financial statements but no later than 120 days since the year end date."
-	Decree 81 (effective from November 2015)	"Governs the contents, orders, procedures, and responsibilities for information disclosure of state-owned enterprises."

Source: OECD research.

Bolstering the independence and effectiveness of boards

In the past two decades, as a number of emerging market economies have made progress towards adopting fundamental principles of good corporate governance, ensuring well-functioning and independent boards of directors has been a significant challenge. Legally mandating the introduction of boards is a welcome development but is often inadequate for ensuring their independence and effectiveness. According to the *G20/OECD Principles of Corporate Governance*, key responsibilities of the board include guiding corporate strategy, monitoring managerial performance and achieving an adequate return for shareholders, while preventing conflicts of interest and balancing competing demands on the corporation.

Vietnamese boards – or "boards of management" (Hội đồng quản trị) as they are known – have been tasked with the functions that should nominally give confidence to foreign and domestic investors that the requisite layers of oversight are in place. The *Law on Enterprises* of 2014 has greatly expanded the existing framework related to boards. Some important amendments include the introduction of the concept of independent board directors and the ability for firms to choose between a one-tier and two-tier board system. The 2014 *ASEAN Corporate Governance Scorecard* highlights the positive changes to the mechanisms that are meant to enhance the composition and responsibilities of boards in Viet Nam.

One of the more ambitious changes in the *Law on Enterprises* of 2014 is to allow joint-stock companies to set up an audit committee of the board of directors as an alternative to a supervisory board ("Ban kiem soat"). If this option is adopted, the Law requires joint-stock companies to have at least 20% independent directors.[9] Although the regulations have set high standards for listed companies, the main challenge now is implementation. Vietnamese companies continue to face challenges in finding independent directors with adequate management skills and experience to fulfil these requirements.

It is well known that one of the greatest risks associated with corporate governance, for both publicly and privately held firms, is that boards become "ineffective rubber-stamps", which are then controlled by the management of the company. A common concern to outside observers has been that even though the new legislation is on par with international standards, this legislation may not be enforced adequately. With a regulatory definitions for the term "independence" and ambitious benchmarks for boards in place, the framework regarding boards in Viet Nam has improved significantly. The next step now is to embed these changes in practice at the company level.

Table 4.4. **Assessment of corporate governance in Viet Nam**

Chapters of the OECD Principles of Corporate Governance (now "G20/OECD Principles")	2006	2013	
	Viet Nam	Viet Nam	Selected Asia*
The Corporate Governance Framework	41	60	71
Shareholder Rights and Ownership	53	74	76
Equitable Treatment of Shareholders	35	67	71
Equitable Treatment of Stakeholders	48	55	70
Disclosure and Transparency	48	52	71
Responsibilities of the Board	43	52	69

Note: 95% = fully implemented, 75-95 = broadly implemented, 35-75 = partially implemented, less than 35% = not implemented

*: includes Indonesia, India, Malaysia, Thailand, Philippines and Viet Nam.

Source: Report on the Observance of Standards and Codes (ROSC), World Bank, 2013.

Competition policy

A competitive environment is essential for a dynamic business environment in which firms invest (OECD, 2015). Creating and maintaining this environment requires a sound and well-structured competition law, as well as competition authorities that are adequately equipped with suitable, skilled resources, free from political interference and that enforce the law. A sound competition regime requires that firms know the rules of the game and respect them and that those rules are applied equally to all firms – private, state-owned, foreign or domestic. By the Viet Nam Competition Authority's own admission, all or at least some of these requirements are not present as it suffers from "limited resources and unsound regulations"[10].

Institutional aspects

The main legal instrument to promote competition is the Viet Nam Competition Law (No.27/2004/QH11 or VCL). The VCL was enacted in December 2004 and took effect on 1 July 2005. However, by end of 2016, Viet Nam started revising and amending their Competition Law. As scheduled, the draft of new Competition Law will be submitted to National Assembly for adoption. The VCL stipulates rules governing procedures, and the government also passed a number of guidance decrees to clarify the procedure on complaints, investigations and orders. Competition proceedings are carried out according to the VCL and relevant guidance Decrees. The VCL stipulates that rules governing procedures. For example,

Chapter 5 of the Competition Law stipulates that competition cases must be considered and handled through hearings to ensure that parties have the right to be heard and present evidence before imposing any sanctions or remedies. In 2014, the government also issued Decree No. 71/2014/ND-CP which has specific provisions on the imposition of penalties for violations against the Competition Law. It includes new provisions on determination of fines for violations, which is aimed at improving the effectiveness and consistency of competition law enforcement.

Under the competition regime in Viet Nam, there are two competition authorities, which are the Viet Nam Competition and Consumer Authority (the VCCA)[11] and the Viet Nam Competition Council (the VCC). The VCCA is established under the Ministry of Industry and Trade, and its Director-General is appointed by the Prime Minister at the proposal of the Minister of Industry and Trade. The VCC is composed of 11-15 members serving a five-year term who are appointed by the Prime Minister at the proposal of the Minister of Industry and Trade. VCCA investigates competition restriction cases[12] which will be transferred to the VCC for final decision. Regarding unfair competition practices, VCCA investigates, handles and issues final decisions of the cases. VCCA is also responsible for a number of other functions beyond the competition provisions: consumer protection and trade remedies. The VCC has adjudicative powers and is responsible for deciding competition restriction cases and may impose fines and deal with breaches of the law on competition[13].

The VCL is divided into five major substantial arrangements: (*i*) prohibited competition restriction agreements (*ii*) prohibited acts of abusing the dominant/monopoly position on the market (*iii*) economic concentration (*iv*) unfair competition acts (*v*) acts that state management agencies are prohibited from performing.

Institutionally, the VCCA is a Division of the Ministry of Industry and Trade (MOIT) which is responsible for industrial and trade policy in Viet Nam. As mentioned above the head of the VCCA and the members of the VCC are all appointed by the Prime Minister. Therefore, this factor may raise issues of independence from government. Some of the main factors that are generally considered to influence the independence of agencies are factors such as (*i*) who appoints the head of the agency or agencies – whether it be the parliament or the head of government, (*ii*) whether the agencies are integrated into the government structure or are placed outside that structure (e.g., not part of a ministry), (*iii*) budget autonomy.

The degree of independence of competition agencies varies considerably across jurisdictions, but at least some degree of independence is desirable for a sound and effective competition policy regime. The degree of

independence of agencies and the advantage of being removed from politics influences legal certainty and consistency of application of rules over time. The fact that the VCCA is integrated into the MOIT means that it depends on the ministry directly for its budget, whilst the appointment of the decision makers of the two agencies (the VCCA and the VCC) by the head of government means that both of these agencies could be more independent than they are currently.

Since the MOIT is a regulatory body, the granting of support to the many industries it governs may impede VCL enforcement in those industries, as this would mean that the same ministry would be delivering what might be seen as contradictory decisions. Furthermore, MOIT's role in industrial policy and in particular in the support of the development of domestic industries may mean that it is hard to ensure fairness and transparency in enforcing the VCL, in particular against state owned enterprises.[14]

In its Annual Report of 2015, the VCCA pointed to several challenges in its investigations due to some limitations. First is a lack of human resources: the majority of staff is young and does not have enough professional expertise and case handling skills which can be linked to the available budget. There are also many cases where companies refused to cooperate and provide information necessary for handling cases, which may be linked to buy-in by the wider community of the importance of competition policy, or the impression that it is not effective. Lastly, as seen in the tables below, most of the decisions are taken on unfair competition acts. This may be explained on the basis of the priorities that are set for or by the VCCA (which may be linked to its degree of independence)[15], although the higher complexity of competition cases may also play a role. By its own admission, the number of competition cases under investigation by the VCCA is "minimal".

From 2009 until 2016, the VCCA investigated 172 unfair competition cases, including advertising for unfair competition purpose, sales promotion for unfair competition purposes, discrediting other enterprises, and so on (Table 4.6). 136 cases are related to advertising for unfair competition purposes, followed by illegal multi-level sales. The prioritisation of competition cases should therefore be reinforced. Increasing further the independence of the agencies, in terms of budget and where it sits in the state organigram, may be worthwhile considering in future changes to the VCL.

Table 4.5. **Investigation regarding competition restriction acts**

	2006	2007	2008	2009	2010	2011	2012	2013	2014	2015	Total
Initial investigation*	5	3	7	7	10	10	14	12	10	5	78
Official Investigation	0	1	1	1	1	2	1	0	1	0	8
Decision	0	0	0	1	2	0	0	1	1	0	5

* Initial investigation procedure is triggered when the VCCA determines the legal presumption for a case is appropriate, in this stage preliminary evidence is collected to come up with the decision of whether official investigation is justified or not.

Source: VCCA 2015 Annual report

Table 4.6. **Number of unfair competition cases**

Types of unfair competition acts	2009	2010	2011	2012	2013	2014	2015	2016
Advertising for unfair competition purpose	5	20	33	37	2	6	18	15
Sales promotion for unfair competition purpose	2	2	-	-	-	-	-	-
Discrediting other enterprises	4	1	2	-	-	-	-	-
Misleading indications	-	1	-	-	-	1	1	-
Illegal multi-level sales	3	4	1	3	1	-	4	5
Disturbing business activities of other enterprises	-	-	-	1	-	-	-	-
Total	14	28	36	41	3	7	23	20

Source: VCCA 2016 Annual report

Substantive provisions of the Competition Law

Market shares has an excessive role

The VCL uses market shares extensively when determining the anti-competitive effects of a practice or merger. In particular, a 30% market share is a threshold used throughout the VCL to determine substantial market power and to prohibit certain behaviour. In the case of anti-competitive agreements, even most hard core cartels, they are illegal only if the combined market share is 30% or more, whilst a company is considered dominant should it have 30% or more of the relevant market. In the case of economic concentration, a notification is obligatory once their combined

shares reach 30% or more of the market and a merger is prohibited if the combined market share is 50% or more.

There is thus a very strong reliance on the definition of the relevant markets which are needed to determine market shares under the VCL[16]. Market definition is a widely applied analytical framework to examine and evaluate competitive concerns as, if it is done properly, it allows to identify competitive constraints a firm faces, *i.e.* demand and supply side substitution. When a relevant market has been defined, the competitors can be identified and market shares can be assigned to the market participants. Market shares are generally considered to provide an indication of market power[17].

A widely accepted goal of market definition and market shares is therefore to provide a first screen, normally in mergers or abuse of dominance cases, to classify those that give rise to competition concerns and thus warrant closer scrutiny and those that do not. This screening method allows competition authorities to concentrate resources on cases in which it is likely that the merger or practices in question could lead to substantial anticompetitive effects and to eliminate all those cases where the prospect of anticompetitive effects is insignificant. In those cases that merit further competitive analysis, competition authorities normally investigate whether indeed the market power existed in that particular instance by looking at factors such as barriers to entry[18].

This is not the way that market definition and market shares are being used under the VCL, as market shares are more than a first screen as when thresholds are exceeded these determine whether an agreement or commercial practice is considered to be prohibited. This is especially problematic in markets where it is difficult to assess boundaries or where the nature of competition in the market leads to market shares that are only weak indicators of market power, as occurs in a very significant number of markets. Examples may be where products are differentiated[19] or in bidding markets. Indeed market shares are good indicators mostly for homogeneous products.

- Market shares should be used only as a first screen for the Vietnamese authorities to determine which cases to investigate further but not to determine the outcome of those investigations and ultimately prohibitions.

Market definition should allow for more economic analysis

Additionally, the market definition exercise provided for in itself may be rather problematic. As set out in the VCL and Decree No. 116/2005/ND-CP,

the "*relevant product market is a market of products or services which are interchangeable in terms of characteristics intended use and price*". All three of these characteristics must be present to determine a relevant market, in a formal check-list approach to market definition. These difficulties are compounded by the fact that the degree of substitutability between products is analysed using a simplified version of the hypothetical monopolist test[20].

The relevant market is usually defined by applying the hypothetical monopolist test, according to which a 'market' comprises all the products and regions for which a hypothetical profit maximising monopolist would impose a small but significant non-transitory increase in price. However, common practice is usually to consider an increase of 5-10% (and not more than 10% as per the Decree) and the price increase is regarded as non-transitory if it lasts for at least one year (as opposed to 6 months under the Decree). Furthermore, the test provided is too proscriptive and leaves no room for the use of economic tools that better reflect the realities of the constraints facing firms when setting prices (in particular the analysis of margins and switching).

- Laws and regulations should allow economic analysis and realities to be more integrated into the analysis by making market definition more flexible and less proscriptive and permitting the use of economic tools.

SMEs are mostly exempt from the prohibitions in the VCL regardless of their market power

The VCL effectively exempts SMEs[21] from most of the competition rules, namely merger control and anti-competitive agreements. The exception seems to be the provisions on abuse of dominance. It should be noted however that size of a firm as measured by the number of employees or capital does not accurately reflect market power on a particular relevant market. In local or regional geographic markets an SME or SMEs may possess market power and distort competition.

In most instances it can be expected that SMEs would not be dominant in a relevant market. There is therefore room for a presumption that an SME does not hold such significant power but this should be rebuttable in case evidence is obtained that determines that the firm does have significant market power. This would maintain legal certainty, reduce the burden of compliance for SMEs, not undermine the objective of increase the competitiveness of SMEs in Viet Nam at the same time as ensuring effectively competitive markets.

Specific anti-trust instruments

Cartels

Hard core cartels are not *per se* illegal

Hard core cartels (when firms agree not to compete with one another) are not considered as *per se* illegal under the VCL. Under Articles 8 and 9 of the Competition Law these types of agreements are illegal should the market shares of the parties to such an arrangement reach 30% or more of the relevant market.[22] Hard core cartels are widely and increasingly considered the most serious violations of competition law. They injure customers by raising prices and restricting supply, thus making goods and services completely unavailable to some purchasers and unnecessarily expensive for others. The categories of conduct most often defined as hard core cartels are: price fixing, output restrictions, market allocation and bid rigging (the submission of collusive tenders). As such, these types of provisions have been consistently subject to increasing sanctions across jurisdictions and are considered a priority area for investigation and prosecution.

- The VCL should be adapted to reflect the significant anti-competitive effects that arise from hard core cartels. This would lower the burden of proof on the competition agencies and raise enforcement of this type of practice.

Export exemption for cartels

Even between companies amounting to more than 30% market share, hard-core type cartels may be exempted from the prohibition should they comply with one of a number of possible conditions, including "*enhancing the competitiveness of Vietnamese enterprises in the international market*"[23] (Article 10.1 of the VCL).

This constitutes a serious risk of violating the competition laws of the importing countries. This is risk is further compounded by the fact that the use of a justification of such an export cartel[24] will require evidence and documentation that such an agreement leads to enhanced competitiveness of Vietnamese enterprises in the international market. This in turn leads to investigations and severe sanctions not only to the companies (and eventually individuals in the case of criminal sanctions) involved in the cartel but also the Vietnamese government's relationships with those importing countries may suffer. In this context it should be noted that Viet Nam has signed FTAs with a number of countries and also multilateral trade agreements with competition provisions, more recently the Trans-Pacific Partnership which may imply that this exemption may not be applied to export cartels to signatories of those agreements.

A further risk is that companies make cartels their normal business practice and thus even if in a particular instance they may ensure that prices do not increase in the domestic market in that particular product this may have spill over effects to other domestic relevant markets.

Time limits for investigations

Another element of cartel enforcement concerns the length of investigations that is legally set by the VCL[25]. Clarity about the length of the enforcement procedures fosters a climate of trust and certainty for firms operating in Viet Nam, but at the same time this raises the issue of whether the resources and investigative powers available for the VCCA to properly investigate cartels allow it to effectively gather the evidence needed within the legal timeframes established. Only a limited number of cartel cases have so far been brought[26] which raises the question of whether these tight investigation deadlines are affecting the enforcement record.

Furthermore, the fact that hard-core cartels (price fixing, market allocation, volume control, bid rigging) are not treated as a *per se* infringement and thus require not only direct evidence of such an arrangement but also additional analysis of relevant markets and market shares, means that additional analysis and investigative efforts are needed. This may further undermine the effectiveness of the cartel enforcement in Viet Nam.

Very few cartel cases

The VCCA has undertaken only four investigations of cartels leading to enforcement decisions since 2004 (2014 Annual Report). None of these cases include bid rigging cases. Competitive markets may also be ensured by fighting cartels in the context of public procurement processes (bid rigging). Not only is it estimated that bid rigging can add an additional 20% or more to procurement prices but procurement that minimises the possibilities of cartels is also a key to keeping markets functioning well and competitive. The few cases and low amount of fines may be due to either short resources or low prioritisation of cartel-type infringements by the VCCA and clearly an area requiring more attention is the fight against bid rigging in public tender procedures.

Leniency

The VCL contains no leniency programme. There is a general consensus that leniency programmes play a crucial role in ensuring effective cartel enforcement by offering lenient treatment to companies or individuals that decide to disclose the existence of a cartel to the authorities and cooperate with the investigation (OECD, 2015). Today a large number of countries have leniency policies in place. Naturally, leniency becomes all the more significant as an effective tool the higher the exposure of the company to liability is, which includes not only the legal sanctions that may apply (e.g., fines or criminal sanctions) but also the higher probability of enforcement of those sanctions by a competition authority. As noted above, the record of enforcement is relatively reduced.

- Leniency should be introduced into the VCL, but this must be accompanied by increased enforcement and application of significant sanctions.

Abuse of dominance

In Viet Nam there are clear thresholds set for dominance and then certain kinds of conduct are prohibited *ex ante*. The thresholds are based on market shares, so that a firm is dominant if it has "*market shares of 30% or more on the relevant market or if it is capable of restricting competition considerably*" (Article.11.1 of the VCL). The VCL therefore sets out a "regulatory" abuse of dominance which does not require evaluation *ex post* to determine anti-competitive effects. Arguably this form-based approach may provide more certainty and is relatively easy to administer, but also may generate results that are inappropriate, given what the actual market effects are (which may even lead to actual efficiencies in some cases). In particular, apart from the issue of using market shares as a bright line test (the limitations are discussed more in detail above) the 30% threshold for single dominance seems rather low and leads to more false positives than would be necessary[27].

Further, the VCL sets out that "groups of enterprises shall be considered to hold the dominant position on the market if they take concerted action to restrict competition" (Article 11.2 of the VCL) and collectively hold combined markets that differ depending on the number of entities[28]. The VCL thus sanctions as a collective abuse of dominant position firms that meet the requirements on the number and market share thresholds. This seems to blur the line unnecessarily between cartels type behaviour and abuse of dominance, which may create additional legal uncertainty. Furthermore, considering that there have only been two cases since 2004, this does not seem to be a priority area for the VCCA and VCC.

Mergers

As under competition restriction practices, the VCL takes a regulatory approach that prohibits mergers that lead to combined market shares greater than 50%, but provides exemptions if one of the parties is at risk of bankruptcy or if the merger promotes exports or contributes to socio-economic development or technological progress (Article 19 of the VCL). This differs from other Southeast Asian jurisdictions with competition law that have adopted a case-by-case assessment of the anti-competitive impact of a merger[29]. The approach is one based exclusively on market shares with no account taken for actual effects that may arise from the merger (including efficiencies). The approach taken should be based on effects of the merger and not just on market definition and market shares be taken in merger control.

In the case of Mergers approved on the basis of the export promotion criteria, this may cause domestic consumers in Viet Nam to pay higher prices. Importing countries may also exercise their merger control rules to intervene in the merger should their substantive rules on merger control meet their legal tests for prohibition.

Notification thresholds

Even the thresholds for notification of a transaction are based on the market shares. This is not in line with the OECD Recommendation[30] nor with the ICN Recommended Practices[31] which in broad terms consider that jurisdictions should base their notification obligations on appropriate local nexus criteria established on objective data such as local turnover or value of assets. Using market shares as notification thresholds imposes serious costs on all transactions, not least legal uncertainty – the parties to any merger would have to calculate their market shares regardless of whether the transaction ultimately needs to be notified, and this when parties are usually not in possession of data on market shares and may lack the ability to properly define markets.

- The government should consider amending the VCL to reflect the 2005 OECD Recommendation of clear, objective and quantifiable merger notification thresholds.

Competition policy commitments in free trade agreements

As regards Viet Nam's bilateral and multilateral trade agreements, there are currently eight FTAs with individual chapters on competition. Since 2010, a competition policy chapter is included in all FTA negotiations, notably in far-reaching agreements such as the FTA between Viet Nam and the EU, the Trans Pacific Partnership, the Regional Comprehensive Economic

Partnership, where the competition chapter's content has reached deeper and wider commitments. These obligations aim to create and ensure a fair competition framework, prevent and eliminate the anti-competitive behaviour in the market, therefore promoting economic efficiency and welfare of consumers in Viet Nam. As such, the business environment increasingly maintains a level playing field for all types of businesses.

Recommendations concerning competition policy

Viet Nam should consider amendments to bring key provisions of the draft law in line with international best practice. The law contains a number of provisions that are not commonly found in the laws or enforcement practices of other jurisdictions. In the interest of adopting a legal framework that can be readily implemented and that avoids politicising the enforcement of law, the following rules and principles should be amended or adopted:

General recommendations

- Market shares should be used only as a first screen for the Vietnamese authorities to determine which cases to investigate further but not to determine the outcome of those investigations and ultimately prohibitions of anti-competitive agreements, abuse of dominance and mergers.
- Laws and regulations should be changed to allow economic analysis and realities to be more integrated into the analysis by making market definition more flexible and less proscriptive and permitting the use of economic tools.
- Market power should be measured not only via market shares but by considering a number of other factors such as barriers to entry, countervailing buyer power, amongst others.

Instrument specific recommendations

- Hard-core cartels should be made illegal per se and not benefit from exemptions.
- A leniency system should be introduced into the VCL. This should be accompanied with increased enforcement and application of significant sanctions.
- The VCL should be changed to reflect the 2005 OECD Recommendation of clear, objective and quantifiable merger notification thresholds.

Notes

1. The base of institutional investors in Viet Nam remains small. Some of the largest domestic institutional investors include Mekong Capital, Dragon Capital, Viet Nam Holding Limited, VinaCapital and PXP Asset Management.
2. Implementation of SOE restructuring should be done in accordance with SOE criteria issued by Decision No. 58/2016/QD-TTg (28 December 2016) and with the measures in the SOE restructuring project for 2016- 2020.
3. The definition of SOEs having evolved over time, their number across years may have not been calculated exactly on the same basis.
4. Equitisation refers to the transformation of SOEs into joint stock companies, through either the partial or full sale of state capital.
5. As of end-2015, the SCIC held stakes in about 197 companies. Established in 2005 with the aim of improving the efficiency of state capital utilisation, the SCIC had at one point stakes in about 900 companies, though the number has been reduced substantially through a divestment strategy.
6. As of the end of February 2016, Ho Chi Minh Stock Exchange had 311 listed companies with a market capitalisation of USD 50 billion. Hanoi Stock Exchange had 380 listed companies with a market capitalisation of USD 6.7 billion. Ho Chi Minh Stock Exchange and Hanoi Stock Exchange opened for trading in 2000 and 2005, respectively.
7. In 2015, the 8th Vietnam Annual Report Awards honoured the 50 best annual reports from companies, 37 of which are listed on the Ho Chi Minh City Stock Exchange, and 13 on the Hanoi Stock Exchange. The Outstanding Award went to the Ho Chi Minh Securities Corporation. Second and third place were awarded to Bao Viet Holdings and Vinamilk.
8. Circular 155/2015/TT-BTC was issued by the Ministry of Finance on 6 October 2015, and came into effect on 1 January 2016.
9. Article 134 states that for joint-stock companies "at least twenty per cent of the number of members of the Board of Directors must be independent members and there must be an internal auditing committee under the Board of Directors."
10. Page 54 of the 2014 Annual Report; page 50 of the 2013 Annual Report.
11. According to Decree No.98/2017/ND-CP defining the functions, power and organisation structure of the Ministry of Industry and Trade, the Vietnam Competition Authority (VCA) became the Vietnam Competition and Consumer Authority (VCCA) on 18 August 2017.

12. The VCCA have responsibilities such as: a) To accept and conduct investigations of competition cases related to competition restriction practices for the Competition Council to handle in accordance with law; b) To conduct investigations, handle or propose the handling measures with regards to acts in violation of the legislation on competition in accordance with law; c) To evaluate requests for exemption eligibility according to the legislation to submit to the Ministry of Industry and Trade for decision; d) To supervise the process of economic concentration; and e) To build up and manage the information system on dominant and monopoly enterprises in the market, competition principles applied to associations and exemption cases.

13. Other responsibilities include: "*(c) Requiring organizations and individuals involved to supply information and data necessary for the Council to carry out its assigned duties; (d) Resolving complaints in accordance with the law on competition about decisions dealing with a case concerning practices in restraint of competition where such decision was made by the Council dealing with such case; (e) Participating in administrative proceedings in accordance with the law on competition and the law on administrative proceedings.*"

14. This is the case in an economy where the state still holds very important positions in product and service markets. The Viettel-EVN decision by government to exempt this merger from the VCL is a widely recognised example.

15. This view may be supported by the fact that of the eight divisions of the VCCA only three divisions deal with competition related tasks.

16. Since 2015 market definition under VCL has served also for fining purposes, as the fines are linked to the turnover of companies on market.

17. The underlying assumption is that the size of the market share is directly and positively correlated with market power and that the degree of concentration in a market is indicative of competition problems, for example in the form of higher prices than in less concentrated industries.

18. Should the competitive analysis show that there are no substantial entry barriers, even a high market share is no indication of durable market power.

19. Product differentiation usually occurs in two distinct ways: the *attributes* of the product that appeal to differing tastes and preferences of consumers (e.g., design) and the *location* of the product or service.

20. Point c. of Clause 5, Article 4 of Decree No. 116 - : "Goods or services shall be deemed capable of being substituted for each other in terms of price if above fifty percent of a random sample quantity taken from one thousand (1.000) consumers living in the relevant geographical area change to purchase or intend to purchase other goods or services with the same

characteristics and use purpose as the goods they are currently using or intend to use where the price of such goods or services increases by more than ten (10) percent and remains stable for six consecutive months."

21. The definition of SMEs depends on the business area and can include firms up to 300 employees and total capital of USD 5 million.

22. The exception is bid rigging which is considered *per se* illegal.

23. Given that the Law also sets out that such an exemption "must reduce costs to benefit consumers" in the domestic market, this condition seems to be the only one that may actually be used.

24. The OECD defines an export cartel as "an agreement or arrangement between firms to charge a specific export price and/or to divide export markets". The rationale for permitting export cartels is that it may facilitate cooperative penetration of foreign markets, transfer income from foreign consumers to domestic producers and result in a favourable balance of trade. See OECD Glossary of Statistical Terms (http://stats.oecd.org/glossary/detail.asp?ID=3213).

25. 180 days with two possible extensions of 60 days each, totalling 300 days.

26. Cases such as the Insurance cases often cited by the Vietnamese competition agencies in international fora, may be considered as low hanging fruit, in the sense they were all based on publicly available information on the internet. This is certainly explained by the insufficient knowledge companies in Viet Nam have of competition policy, certainly in part also due to the relatively low enforcement record.

27. False positives lead to condemning conduct that is not anti-competitive leading to over deterrence and to the chilling of healthy competitive behaviour as opposed to false negatives and under-deterrence of pricing strategies that unreasonably and unnecessarily exclude rivals.

28. "a/ Two enterprises having total market share of 50% or more on the relevant market; b/ Three enterprises having total market share of 65% or more on the relevant market; c/ Four enterprises having total market share of 75% or more on the relevant market".

29. The exception in the region is Malaysia that has no economy-wide merger control rules.

30. The OECD Council adopted a Recommendation on merger review that aimed to contribute to greater convergence of merger review procedures.

31. 2002 ICN Recommended Practices for Merger Notification and Review Procedures and 2008 ICN Recommended Practices.

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From:

OECD Investment Policy Reviews: Viet Nam 2018

Access the complete publication at:

https://doi.org/10.1787/9789264282957-en

Please cite this chapter as:

OECD (2018), “Corporate governance and competition policy in Viet Nam”, in *OECD Investment Policy Reviews: Viet Nam 2018*, OECD Publishing, Paris.

DOI: https://doi.org/10.1787/9789264282957-9-en

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