

OECD Peer Reviews of Competition Law and Policy

VIET NAM

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Foreword

Peer reviews of national competition laws and policies are an important tool in helping to strengthen competition institutions and improve economic performance in a country. There is an emerging international consensus on best practices in competition law enforcement and the importance of pro-competitive reform and peer reviews are an important part of the process of moving towards those best practices.

These reviews are a core element of the OECD's activities and are founded upon the willingness of a country to submit its laws and policies to substantive review by other members of the international community. This review process provides valuable insights to the country under study and promotes transparency and mutual understanding for the benefit of all stakeholders. They also function as an important tool to strengthen competition institutions. Strong and effective competition institutions in turn can promote and protect competition throughout the economy, which increases productivity and overall economic performance.

The OECD would like to thank the Government of Viet Nam for volunteering to be peer reviewed at the 15th Global Forum of Competition meeting, held in Paris, on 7th and 8th December 2017. We would like to thank Nick Taylor and Ruben Maximiano, the authors of the report as well as the Lead Examiners Mr. Marcus Bezzi, Executive General Manager, Australian Competition and Consumer Commission, Australia; Ms. Isabelle de Silva, Présidente, Autorité de la concurrence, France; Dr. Reiko Aoki, Commissioner of JFTC, Japan and Mr. Bogdan Mr. Chiritoiu, President Romanian Competition Council, Romania.

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Executive Summary

Viet Nam is today engaged in upgrading its competition law and policy, including the role of State Owned Enterprises in the economy. Issues still remain in these areas and it faces many other challenges, including undertaking competition assessment of rules and regulations in a systematic manner, adapting its competition law to ensure it is more effects base and an institution(s) that is independent and has the necessary resources and skills to improve the competition framework. The current plans to change the competition law in Viet Nam are an opportunity to adapt the competition law and institutions to international best practices.

The country decided to move from a centrally planned economy towards a market economy in the mid-1980s. In 2004 Viet Nam adopted a comprehensive competition law and established two competition authorities – the Viet Nam Competition Administrative Department (VCAD) which was renamed the Vietnamese Competition Authority (VCA now VCCA) and the Vietnamese Competition Council (VCC). The current competition law, and the two principal agencies it establishes, have made important contributions to the evolution of the Vietnamese economy. However, a number of features of the current system have significantly constrained, curtailed and slowed the contributions that competition policy can made to the economy. Indeed, the number of concluded cases concerning the enforcement of the core competition law provisions has been low.

In an effort to continue in the reform process, the Prime Minister asked the Central Institute for Economic Management (CIEM) – a governmental “think-tank” to prepare an over-all competition policy including what should be done about the state-owned sector, anticompetitive regulations and the reform to the competition law by the end of 2018.

It was in this context that this Review was undertaken, with a view to being a relevant contribution to the current review of the competition law and policy. It therefore aims to analyse: the current status of competition policy in the areas

of competitive neutrality given the large role of state-owned enterprises; where Viet Nam stands regarding the competition assessment laws and regulations, and to analyse the current competition law and competition institutions. To do so the Review analyses both the current 2004 Competition Law as well as the draft law made available to the OECD in the second semester of 2017.

A number of institutions participated actively throughout the Review process, in particular the VCC, VCCA as well as the CIEM and the Ministry of Justice.

During an on-site visit the Review team met with a wide range of government and non-governmental representatives, legal private practitioners, as well as with representatives of the National Assembly.

During the Global Forum on Competition at the OECD held in Paris (December 2017), four countries, Australia, France, Japan and Romania, acted as lead examiners. The heads of these agencies peer reviewed Viet Nam using this Review as a basis for their examination. Commissioner Ms. Ho Phuong Chi of the VCC led the Vietnamese delegation that included also senior staff from VCCA, CIEM and the Ministry of Justice. The delegation answered questions from the lead examiners and provided assessment of Viet Nam's competition law and policy.

The OECD's recommendations address the need for: a competitive neutrality framework; a competition assessment framework; an improved competition law framework that is more reflective of economics and effects based; as well as institutional reform, resource constraints and independence.

Implement a comprehensive competitive neutrality framework

Viet Nam has made a great deal of progress in its journey from a centrally planned, developing, and socialist economy towards a rapidly industrialising market economy. Successive waves of reforms have substantially reduced the size of the SOE sector, improved governance and reduced competitive distortions. However, much remains to be done. The Review recommends that the work of implementing clear and comprehensive competitive neutrality framework be pursued until it is fully and effectively taking account of the recommendations of the OECD SOE Guidelines, including assuring a level playing field in the legal and regulatory framework for SOEs. The competition authority or an economic policy agency such as CIEM could play a valuable part in providing competition policy guidance on future equitisations of SOEs to ensure that anti-competitive legacy issues are not left behind in markets where SOEs held significant market power.

Implement competition assessment mechanisms

Viet Nam has made considerable progress in improving the quality of its regulation making processes, including with effective consultation mechanisms. Whilst, the VCCA has long had a role of advocating for unnecessary impediments to competition to be removed or reformed the number of occasions in which it has been invited to participate in regulatory debates is very limited. Two significant issues therefore remain to be addressed: First, the contribution of the competition authority to regulation making needs to be increased significantly by number and intensity of interventions and the process by which the competition authority becomes involved in such debates needs to be institutionalised. Second, attention needs to be given to the vast array of regulation that was passed before the current quality controls were implemented. The Review recommends mechanisms be put in place to: involve the competition authority or another suitable agency with addressing the issue of competitive impediments to competition in existing legislation or regulation; for all proposed new laws affecting business to alert and involve the competition authority or other suitable agency to provide an opinion based on a competition assessment checklist. It also recommends reviewing existing laws and regulations in key sectors for the economy.

Improved competition law framework

Viet Nam was one of the earliest countries in ASEAN to adopt a comprehensive competition law, covering all three major areas: anticompetitive agreements; single firm abuses and anticompetitive mergers. The provisions of the current competition law are, however, generally form-based rather than effects-based, meaning case outcomes are determined to a very significant extent by market shares and not by the effects on the market in question. Also, when it comes to “hard-core” cartels, these are generally only prohibited if they affect 30% of the market, which is not in line with international best practice. Even if the form-based approach may have had advantages when the country’s transition to the market economy was just starting and competition law was new, for Viet Nam’s economy to reach its full potential, the substantive provisions of the competition law need to be adapted and to evolve. The government has recognised this and an advanced draft of a new law sits before the National Assembly. The Review includes a number of recommendations to make the new draft competition law more effects-based, as well as to bolster its investigation powers, in particular an effective compulsory unannounced inspections powers.

Institutional reform and resource constraints and independence

Viet Nam still has a separate investigatory and decision making authorities for general competition law enforcement. This has resulted in the already very limited resources not being used to their maximum potential. A number of other institutional issues that significantly undermine the effectiveness of the competition law agencies have been identified by the Review, including the lack of autonomy and independence of the competition agencies, the under-resourcing and under-staffing of the competition agencies, and a lack of transparency of process. The Review thus recommends a number of measures to help solve these issues. There is also a recommendation for judges to be given financial support for training on competition issues.

1. Introduction and Foundations

Viet Nam decided to move from a centrally planned economy towards a market economy in the mid-1980s. During this period, the country had early forms of competition law located in a range of laws concerning pricing and particular industry sectors.

In 2004 Viet Nam adopted a comprehensive competition law in connection with (but not required by) its accession to the WTO. The primary purpose of adopting competition law was primarily to demonstrate to the world that Viet Nam was committed to a market-based economic system that is interconnected internationally¹. That law established two competition authorities – the Viet Nam Competition Administrative Department (**VCAD**) which was renamed the Vietnamese Competition Authority (**VCA**) and the Vietnamese Competition Council (**VCC**).

As detailed below, the VCA had a broad range of functions covering competition law and advocacy, consumer protection and trade remedy functions while the VCC had functions only in the area of competition law enforcement. In August 2017, the VCA was split into two agencies – the Viet Nam Competition and Consumer Authority (**VCCA**) which inherited the competition and consumer protection functions of the VCA and the Viet Nam Trade Remedies Authority (**VTRA**) which inherited the VCA’s trade remedies function. Because this occurred only at the final stage of the drafting of this report, much of the data and historic information in this report concerns the VCA as an entity rather than the VCCA.²

¹ Amongst the general provisions found in at the beginning of the law, articles 5 and 6 of the law includes some requirements of government agencies that mitigate against policies that might otherwise distort international trade.

² In this report, we use the term VCCA to indicate both the current agency and the general history of enforcement before it was split out of the VCA. When referring to a specific case or action undertaken by the VCAD or the VCA before the formation of the VCCA, we will continue to refer to the VCAD or VCA as it was at the time of the action referred to.

Viet Nam is also one of the most significant participants in ASEAN which has made significant progress in the adoption of competition law and policy as part of building one of the largest integrated common markets in the world.

The current competition law, and the two principal agencies it establishes, have made important contributions to the evolution of the Vietnamese economy. These contributions include advocating for a competition-friendly policies within other parts of government and competition-friendly behaviour by businesses.

However, a number of features of the current system have significantly constrained, curtailed and slowed the contributions that competition policy could have made to the economy.

One partial indicator of the system's effectiveness is the number and nature of law enforcement decisions but that statistic can be telling. The number of concluded cases concerning the enforcement of the core competition law provisions has been lower than expected. In 12 years, while initial investigations have been conducted in more than 80 competition cases, only 8 were officially investigated, 6 reached the stage of a formal decision, and only one abuse of dominance case and one cartel case resulted in a final decision with sanctions imposed. That very limited enforcement record is highly unlikely to operate as a meaningful deterrent against anticompetitive behaviour.

Note that the low statistic concerning final decisions in relation to the competition provisions should not be taken as a sign that the VCA's small team of investigators has not been working diligently. As well as the 80 initial competition cases, the VCA has also succeeded in reaching a concluded outcome in a more significant number of unfair competition cases. The statistic is more likely to reflect other problems such as the drafting of the core prohibitions, the two-level institutional structure that applies for the enforcement of the core competition law provisions and the limited resources available to the enforcement agency.

Other indications similarly suggest that the current system of competition law and policy could be making a much more important contribution to the economy and helping Viet Nam to continue on a path of growth and prosperity. For example:

- Despite some important reforms, there remains a very strong presence of state owned enterprises in many markets limiting the opportunities for other competitors to effectively participate in markets.

- While there are examples of the VCA successfully counselling the central and provincial governments to avoid adopting anticompetitive regulatory policies, these examples are relatively few-and-far between. Indeed the economy is replete with regulations and policies that hinder competition.
- While surveys indicate that a not insignificant proportion of businesses are aware of competition law and policy, it is notable that a very significant number of businesses either have an inaccurate understanding of this field or show no awareness at all of such laws and policies.

In short periods of time, other rapidly developing countries' economies have been able to make leaps forward without a strong system of competition law and policy. However, in the journey of any country's economic development there comes a point at which the economy cannot further progress without a fully effective competition law and policy.

Viet Nam has now reached that point.

An effective national competition policy is essential for all economic actors to be included in the economy – from young people who can contribute new ideas and hard work to foreign investors who can provide technology and capital.

A competition law that sets out key norms of economic behaviour that are compatible with, and transcend the details of, other laws should operate like a constitution for the market economy.

As described in this report, the four main constraints that must be addressed for the system of competition law and policy to work fully and effectively are:

- The regulatory framework is not currently conducive to competition, or at least it is not as-conducive to competition as it should be;
- The structures of many key markets are not competitive;
- The institutional framework of the competition agencies, other relevant regulatory agencies and the courts to which appeals are taken hampers the effectiveness of the enforcement system; and
- The technical content of the competition laws themselves contain significant flaws.

The Vietnamese Government has recognised these issues and the Ministry of Trade and Industry (**MoIT**) has been tasked with preparing a new competition law, in co-operation with the VCA, VCC and other relevant agencies and stakeholders. A number of iterations of a draft law were prepared prior to, and during, the preparation of this OECD report. Not all of them were translated into French or English, and some of them were not made public. Nevertheless, the OECD was provided with an unofficial translation of Draft 2 and a number of reports of the principal issues that were being wrestled with in the various drafts since that one. A later draft was submitted to the National Assembly Standing Committee in this September 2017 which is under consideration. The final text of a revised law is expected to be voted in the next full session in May 2018.

There remains, therefore, an important opportunity for further improvements to be made to the current draft law.

The draft law does not explicitly address the issue of resourcing. In that respect, it is wise to be frugal with public expenditure and, indeed, by addressing the areas listed above, a lot more can be achieved with the existing level of public expenditure. However, the current level of resourcing is very low by international standards for an economy of approximately 90 million people and GDP of EUR 192 billion. It is highly likely that making an exception to the current moratorium on the establishment of new agencies, and making modest additional expenditures on staffing, would provide a strong pay-back for the economy as a whole.

This report addresses the following matters:

- State owned enterprises (SOEs) currently comprise the most significant operators in a raft of important markets. Reforms are needed to ensure that these entities perform competitively and that they do not prevent others from competing effectively.
- Policies, actions and regulations administered by line Ministries of the central government and of the provinces currently significantly impede competition. Reforms are required in this respect to enable markets to operate competitively.
- The technical content of the competition laws themselves require updating to reflect international best practices.
- The structure, institutional arrangements and resourcing of the specialist competition agencies need to be over-hauled.

Of course, an effective competition law and policy alone do not bring about a fully inclusive and wealthy economy. Success requires other concurrent and mutually dependent reforms. This report identifies several of the key inter-dependencies.

Indeed, if the latter two elements that constitute the core of this Report, the first two elements would require more in-depth specific analysis that is outside the scope of a Peer Review report of this sort.

2. State Owned Entities

State owned entities can provide a very valuable contribution to an economy - especially a developing economy without a deep capital market – but large scale government investment can constitute a significant burden on the government. Considerable safeguards are also needed to ensure that these entities operate efficiently and do not prevent other market participants from effectively playing their part in the economy.

While most countries have a limited number of notable SOEs³, very few countries have as many, or as powerful, SOEs as Viet Nam. In fact, in 2015 Viet Nam had more than 780 SOEs that were wholly owned by the government present across all major sectors of the economy. Although the number has reduced since then, SOEs are still estimated to account for more than one-third of total assets of Vietnamese enterprises and equitised SOEs represent 450 out of the 700 companies listed on the Ho Chi Minh and Hanoi stock exchanges.

The Vietnamese Government has recently made significant decisions to streamline and restructure the SOE sector. In 2016 it announced⁴ that by 2020 there will only be 103 wholly-owned SOEs and in 2017 (while this report was being drafted) it announced⁵ the details of how 406 SOEs will be divested in 2017-2020 period. Assuming the plan is successfully carried out to its conclusion, it

³ For example, the American Federal Government owns the postal service, the Australian Federal Government owns the owner of the national broadband provider, French Government owns the largest power company and the New Zealand Government is the majority owner of the national flag-carrying airline.

⁴ Decision 58 of 2016.

⁵ Decision 1232/QĐ-TTg of 2017.

will constitute a significant step forward in addressing important constraints on the performance of the Vietnamese economy.

These instruments cover an extensive number of issues, some of which are particularly pertinent to competition including the following:

- A number of competition considerations are included in deciding which entities should be retained in government hands and in deciding what proportion of equity to retain. For example, the criteria for retaining a 100% ownership interest include natural monopoly network considerations in the electricity, rail or air traffic control sectors. Another basis for keeping state ownership is that a business is the only current supplier of a public utility product or service in a given region. On the other hand, there are also non-competition related reasons why some entities are being retained. For example, businesses involved in the production of explosives or the operation of lotteries are being retained for other public policy reasons.
- For enterprises who are retained in government ownership, Article 2(c) of the 2017 resolution provides that a Decree should be put in place to eliminate administrative decisions that intervene directly in markets such as subsidies or preferential access to state resources including credit, land, natural resources, investment opportunities, finance and taxation.

Even so, it has already been decided that the Government will retain ownership of key SOEs such as the oil and gas group of companies Petrovietnam, (although majority outside equity will be sought for some key subsidiaries and a minority interest will be divested in its exploration subsidiary) and many of the details concerning the elimination of state preferences for those that remain are yet to be put in place.

The World Bank illustrates why the reforms already announced, and further reforms, are important. It notes⁶ that the SOE sector's productivity is well below that of the private sector and that the predominance of the SOE sector in the economy as a whole weighs down the over-all potential for productivity.

Further, the capital needs of this vast array of businesses place a heavy burden upon the Vietnamese government. This, and other drivers, have prompted previous

⁶ World Bank 2016, page xxvi.

reforms measures. Indeed the number of wholly owned SOEs has already been reduced significantly from 12,000 in 1991 to 780 now, and this was achieved via equitisation, mergers, closures and sell-offs. For instance, from 2011 to 2016, 537 SOEs were equitised with a total enterprise value of VND 789.9 trillion (USD 35 billion).

SOEs are prominent in many markets that exhibit oligopolistic characteristics. The SOEs operating in these markets are often owned by the line ministry responsible for policy and regulation or by ministries that are powerful across government. For example, the telecommunications sector has three big players, all of which SOEs. Two are owned by the Ministry of Communications and one is owned by the Ministry for Defence. Similarly the country's largest banks are also SOEs and there are cement producing SOEs.

As well as SOEs operating in oligopolistic markets, many other Vietnamese SOEs operate in markets with lower levels of concentration or lower barriers to entry in which competition is already vigorous or possible. For example, there are state owned hotels, beer brewing companies and construction firms.

Where line ministries are both responsible for regulating the operators in a market and also own the shares in significant operators, it often leads to actual and perceived favouritism. Favouritism can arise where an SOE explicitly requests favourable treatment or where the shareholding ministry simply behaves in the SOE's interests. This in turn has two kinds of anticompetitive effect – first, private operators can be discouraged from entering a market in the first place and second where there privately owned operators in the market favouritism distorts competition.

The State Capital Investment Corporation (**SCIC**) has been established to hold shares in SOEs. Shifting ownership of SOEs to the SCIC enables more rigorous commercial management, it has been a stepping stone towards privatisation and it reduces the scope for favouritism by line ministries. The SCIC has sold-down its interest in key entities, namely it has wholly divested ownership of more than 100 entities worth approximately VND 4.3 trillion (USD 190 million)⁷. At end of 2016 the SCIC held stakes in about 150 companies. However, to date the SCIC has not taken ownership of many of the most important

⁷ www.scic.vn/english/index.php/investment/16-investment/portfolio.html.

SOEs⁸. Currently, approximately 54% of SOEs in Viet Nam are managed by local governments, 27% by line ministries and 19% by state economic groups (such as SCIC).

The following key issues arise in relation to Viet Nam's SOEs:

- Are the SOEs provided with incentives to compete efficiently and effectively and not to 'crowd out' other competitors? (Issue 1)
- Where the government is both regulator and the owner of a regulated business, is regulation impartial? Is regulation actually 'even handed' when applied to SOEs and privately owned entities and is it seen to be fair so that private businesses are not discouraged from entering the market? (Issue 2)
- Is there a good public policy reason for the government to maintain its ownership? If yes, how should the SOEs be structured and, if not, how should the government structure its divestment to reduce risk anti-competitive behaviour following divestment? (Issue 3)

These three SOE-related issues are competition policy issues that go well beyond competition law enforcement but they can also have very significant implications within the law enforcement arena. If these issues are not properly addressed, SOEs can obtain very powerful forms of *both* political power and market dominance. Abuse of dominance cases are amongst the most difficult to address both from a legal perspective and from a governmental institutional perspective. If the broader competition policy implications of SOE structuring is not addressed properly, it is likely to put a great deal of strain on the competition law enforcement system and divert resources from addressing other important law enforcement issues.

2.1. Incentives and competitive neutrality

A fundamental feature of the market mechanism is that it drives *technical*, *allocative* and *dynamic* efficiency – at least in the absence of market failures. The

⁸ The Vietnamese government in 2005 established the State Capital Investment Corporation (SCIC), whose role is to represent the state's shareholdings in the enterprises. It is a special economic organisation of the state whose functions and responsibilities are mandated by law and it is organised as a financial holding company. The SCIC receives and represents state equity ownership in enterprises where the state owns shares.

ability to retain the surplus of revenues over expenses, encourages business operators to simultaneously economise on inputs and to produce in a way that the goods and services are valued highly by customers. The market mechanism also provides incentives for the optimal level of activity within each given market – under-investment causes prices to rise and incentivizes entry and expansion; over-investment encourages consolidation, downsizing and the reallocation of resources to other uses.

When a company is owned by a private sector entity, the owner's right to receive the profits of a successful business drives the owner to itself manage the business in an efficient way or to choose and reward managers who will do so. However, when the government is the owner of a business, it is important to put in place explicit policies to the following effect:

- **Corporatisation:** wherever the benefits exceed the costs (and this will generally be the case for any significant business) an identifiably separate entity needs to be established with its own accounts and management and management needs to be told to seek, and be rewarded for seeking, to operate on a commercial and profitable basis.
- **Competitive neutrality/State aid:** the amounts the SOE is required to pay for debt and equity financing, land and other resources it uses in production need to be an efficient market-reflective rate on parity with what a private sector entity would have to pay. It should not be accorded any benefits from government ownership that would enable or encourage it to inefficiently displace other producers. It should pay taxes (or special dividends to government that are equal to that tax a private entity would have to pay) so that it does not receive an implicit subsidy to displace more efficient competitors.

In 2012 the OECD published a 70 page Compendium of OECD Recommendations, Guidelines and Best Practices concerning Competitive Neutrality which collected together years of work on the topic. The key points include:

- Streamlining the operational form of government businesses.
- OECD SOE Guidelines set out a range of recommendations. Especially in regulated sectors such as energy and communication utilities, transportation and banking, there should be a separation of regulatory functions into separate entities from the entities engaged in commercial functions, the commercial entities should be based on corporate law (and

where this is not possible the arrangements should mirrored corporate law to the maximum extent possible), governance bodies should have clear authority for steering the company according to ordinary commercial considerations and a full awareness of the obligations of the SOE to play by the rules of the market-place.

- Identifying the direct costs of any given function.
- The identification of direct costs is essential for achieving competitive neutrality. It is necessary in order to identify where the public sector bares additional costs (for example if it is required to perform a public service) or where the SOE benefits from its status as a government owned entity so that implicit subsidies can be avoided.

In this case, the relevant “costs” are economic costs such that all of the entity’s explicit expenses should be identified, any benefits or resources that it uses that it does not have to pay for explicitly and there should be an expectation that the entity pay a fair / commercial return on equity funds employed usually in the form of a dividend. Identification of the costs of an SOE’s activities is also necessary in order to ensure that it pays a fair quantum of tax (or tax equivalent payments to the government).

Identifying the direct costs is also necessary when determining efficient, cost based, pricing especially when the activity cannot be (fully) treated as a commercial activity or the entity cannot be (fully) corporatised.

- Achieving a commercial rate of return.

Just as in any business, it is not necessary that every transaction be profitable or equally profitable. However, over-all the business should be operated on the basis that it should earn a profit and pay a commercial level of return (i.e. dividend) to the government on the equity funds employed.

This is important for several key reasons: if the entity is paying less than a commercial return, there is an implicit subsidy by the government (or even predatory pricing) and an inefficient government business may be thus displace more efficient private businesses from the market. Further, if the entity cannot generate a normal commercial return, the community’s scarce public funds are not being used to their fullest potential and the community suffers.

- Accounting for public service obligations.

In some cases SOEs are required to perform public service obligations. These should be separately accounted for and ideally funded directly from the budget (which should also be receiving a normal return for the ordinary commercial functions).

This is more efficient both for the commercial activities (whose prices, returns and level of activity are not distorted by the need to fund public service obligations) and the public service obligations themselves (because it can assist in identifying when there are less expensive options to achieve those public service obligations such as tendering for them to be provided).

- Tax neutrality.

The SOE should ideally be subject to taxation obligations as an ordinary corporate entity but, if this is not the case, a level playing field should be established through requiring the SOE to pay a special dividend or payment to the government that is calculated on the same basis as if ordinary tax were to apply.

This principle should apply equally to income taxes, duties, governmental fee-for-service (e.g. patent registration) and indirect taxes such as value-added-taxes, goods and services taxes or pay-roll / employment taxes.

- Regulatory neutrality⁹

As noted above, regulatory and commercial activities should be separated into separate entities. SOEs should be required to meet the same regulatory requirements as private sector entities and should not enjoy any immunities or exemptions from laws. Regulators should not discriminate in their regulatory approach as between SOEs and private sector entities.

- Debt neutrality and outright subsidies.

In many cases governments (including their SOEs) pay less when borrowing than do private sector entities. SOEs should not, however, receive the benefit of lower debt funding as an implicit subsidy – and nor should they receive explicit subsidies. Explicit or implicit subsidies have the effect of the SOE displacing efficient private operators.

⁹ One example of a way in which Viet Nam does not currently impose regulatory neutrality is discussed below where acquisitions by one SOE of another are not treated as being subject to the merger filing obligations.

There are two mechanisms to remove the implicit subsidy associated with an SOE's ability to access debt funding more cheaply than private rivals. One way is for the government to operate a separate treasury function from its SOEs that undertakes all borrowing activity. It would seek to borrow in capital markets on the most advantageous terms possible and then on-lend funds to SOEs at interest rates that are benchmarked against the interest rates paid by a private business with comparable levels of risk.

An alternative is for the SOE itself to raise debt funding on the most advantageous terms possible but that a special additional dividend be paid to the government reflecting the difference in interest rate that would have to be paid by a private business with a comparable level of risk.

- Public procurement.

SOEs should neither be required to provide goods or services to the government for free or below cost and nor should there be a preference by the government to buy from its own SOEs. SOEs should also be subject to the same requirements as private suppliers when participating in procurement processes.

The OECD has previously documented¹⁰ concerns in this respect: SOEs have had a range of official and unofficial benefits including preferential access to finance, loans, state budget capital, land and other resources.

Vietnamese SOEs were frequently able to borrow from commercial banks on easy terms. 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 unknown. This may be crowding-out funding to more efficient private sector companies.

SOEs also have had easy access to finance, loans, state budget capital, land and other resources meaning that the cost of capital for SOEs is lower than the market price and does not fully cover the risks (World Bank 2016¹¹). If SOEs are unable to pay their debts, the government does not let them go bankrupt but tends to bail them out, freeze, restructure or even eliminate their debts, or transfer the debts to other SOEs. When SOEs are unable to pay tax, these enterprises are

¹⁰ OECD 2016, page 320.

¹¹ Page 84.

permitted to be in arrears with their debts or enjoy debt reduction or even debt elimination. This all suggest that a level playing field between public and private sector entities in Viet Nam needs to be developed and ensured via specific policies.

As noted above, the Vietnamese government has recently adopted reforms that, if fully and effectively implemented, should result in major improvements in the performance of SOEs and, due to their importance in the economy as a whole, national economic performance generally.

In some countries, public authorities are prohibited from acting in a way that limits competition or discriminates between market players, and the competition authority has the power to take action against central or provincial level public entities that do so. This prohibition applies to discrimination between state owned entities and other entities. Examples of such countries include Lithuania, Romania and Italy.

Recommendation 2.1:

The work of implementing clear and comprehensive competitive neutrality framework should be pursued until it is fully and effectively implemented. This includes implementing the recommendations of the OECD SOE Guidelines including: level playing field in the legal and regulatory framework for SOEs, separating state ownership function from other state functions, high standards of transparency and disclosure, high quality of accountability, separate accountancy for SOEs' economic and non-economic activities, monitoring and assessing of SOE's performance and their compliance with corporate governance standards. *Note: For further guidance on implementing competitive neutrality, reference should be had to the OECD's generic competitive neutrality recommendations.*

Recommendation 2.2:

The legal provisions that provide that state owned businesses do not (vis a vis privately owned entities) have preferential rights, for instance access to land or other resources available to the state; pay below commercial rates for access to capital nor be exempted from taxes and charges, should be put into full effect.

Recommendation 2.3:

Each SOE should be constituted in the same way as a privately owned company or, if that is not possible, the corporate governance arrangements should mirror those of a privately owned company as closely as possible.

Recommendation 2.4:

The Competitive neutrality principles should apply to all levels of government including central, provincial and municipal governments.

Recommendation 2.5:

Under the Competition Law central and local public authorities should be prohibited from acting in a way that limits competition or discriminates between market players, and the competition authority should have the power to take action against public entities at central and local levels that adopt/adopted acts that limit competition or discriminate among market players.

2.2. Separation of regulatory and business management functions

When the Government both sets government policy and regulation in a market and is also a shareholder of the businesses operating in the market, a conflict of interest can arise. The conflict of interest can be damaging to the economy in two ways:

- From the point of view of best practice regulation, there can be a temptation by government to let regulatory standards slip or for them not to be properly enforced. If this occurs, the public may not be protected in the way that they should be by the regulations.
- Further, there may be a temptation for regulatory powers to be unevenly applied to favour an SOE compared with a private competitors and that would operate as an implicit subsidy for the SOE compared with its private competitors. That may tend to encourage inefficient SOEs, or encourage inefficient behaviour by otherwise efficient SOEs, displacing efficient production with inefficient production to the detriment of the economy as a whole.

The World Bank's 2016 report makes frequent reference to the problems related to the conflict of interest between specifically particular organs of government as policy makers and their role as owners of SOEs. The report explains that SOEs have a disproportionate influence on government decision making generally and on regulations with an anticompetitive effect in particular.¹²

¹²

“Narrow interests block a master plan”, Page 58; Page 84, Page 138.

Similarly, when the OECD conducted its mission to Viet Nam for this report, multiple persons within and outside government pointed to the actual and perceived conflict of interest as a factor discouraging investments by private sector entities, reinforcing the dominance of key SOEs and more generally distorting good policy making and the operation of markets.

An important feature of conflicts of interest is that they must not only be addressed in substance but also it must be explicit and apparent that the conflict has been addressed. To illustrate this point, consider a situation in which the same Ministry was determined to be rigorously objective when regulating its own SOEs and any private participants but had no explicit policies or structure in place to demonstrate that it was being completely objective. Private sector investors might be reluctant to invest for fear that they would be treated less favourably and customers might suspect that they might receive a more dependable service from a well-connected SOE than a private sector entity.

A perceived conflict of interest can be just as damaging as an actual conflict of interest.

While the OECD does not have evidence of actual unfair treatment between SOEs and their private competitors by line Ministries in relation to policies and regulations applied, there certainly is evidence that the safeguards needed to avoid an actual or perceived conflict are absent.

For example, airlines compete strongly on both price and reliability of service. In 2010 (and at other times), there was a great deal of controversy over timeliness of the services provided by different airlines in Viet Nam and in consumers have sometimes observed that Vietnam Airlines seems to have a better record for on-time flights. If the market is working well, airlines can be expected to compete with each other to establish a good reputation for on-time reliability. If Vietnam Airlines has performed better on the merits then it should reap the rewards of that good performance.

On the other hand, allegations that its Vietnam Airlines benefits from unfair treatment by its owner-regulators are widespread. The World Bank notes that¹³:

13

World Bank 2016, page 138.

“At airports, the slot allocation policy is not competitive. State-owned Vietnam Airlines has grandfathered rights on international routes, while charter flight rights on domestic routes are granted case by case.”

Members of the travelling public also perceive¹⁴ (rightly or wrongly) that the State ownership gives Vietnam Airlines more favourable scheduling treatment and this motivates some travellers to purchase tickets with that airline rather than its privately owned competitors.

The above statements *may* or *may not* be accurate. It may be that today Vietnam Airlines competes more effectively on the merits. The problem is that without explicit safeguards separating the government’s regulatory role from its role as an investor in the largest market participant, customers and investors are likely to participate in the market as if their worst fears of unfair regulatory treatment are true. Customers may purchase more expensive flights from the incumbent than are necessary and less investment may occur than is efficient.

Similarly, in the past, when the Vietnamese Competition Council has been asked to make a decision on whether SOEs have breached the competition law, representations have been received from SOEs seeking the assistance of line Ministries to intercede on their behalf with the VCC. On at least some occasions the line Ministries concerned have approached the VCC in support of the SOEs they own. Although the VCC is confident that it has not acted inappropriately, the damage to the competitive process already occurs where there is no safeguard to address the perception that a line Ministry might be able to sway the course of objective decision making.

For this reason, it is important for there to be a separate arm of government responsible for owning the shares in SOEs from the line Ministries that are responsible for policy and regulation.

Viet Nam has already established in 2005 such a vehicle (i.e. SCIC) to centralise or integrate the ownership function and clearly separate it from (other) regulatory and policy functions carried out by line ministries but so far there are many ownership interests that have not been transferred to SCIC.

¹⁴

Comeandgo on Tripadvisor, 22 April 2010.

The Government has now decided¹⁵ to also separate ownership from regulation for most, if not all, large SOEs. It has committed to create by 2018 at the latest, an agency to represent the government's ownership in SOEs and state-invested enterprises thus separating more fully business ownership from regulation.

Specifically, government agencies involved in economic regulation should not engage in business of any kind, to avoid the appearance and reality of conflicts of interest.

Recommendation 2.6:

Viet Nam should ensure that the decision that all the equity in all state owned enterprises should be transferred to the SCIC (or other such body whose sole responsibility is to manage the government's investment in the business) is put into full effect. That agency should to the maximum extent possible ensure that the businesses are structured and managed in a profit making, commercial manner.

Recommendation 2.7:

Policy and line agencies (e.g. the Ministries responsible for making policy in telecommunications, energy and transport or the agencies responsible for enforcing laws in those areas) should perform their functions without favour or discrimination between businesses that are state owned or privately owned.

2.3. Market structuring issues

Although Viet Nam faces many competition issues due to its high level of state ownership, government ownership provides an important opportunity. The OECD understands that the government has been undertaking a systematic analysis of which assets it considers should remain in state ownership for public policy reasons and which it wishes to divest.

Where the government decides it is important to retain ownership, it can decide to keep each SOE as it currently is, it could merge SOEs with each other or it could split the SOE into competing companies. Similarly, if the government decides it

¹⁵ Party Resolution 12-NQ/TW and Government Resolution 97/NQ-CP dated November 2, 2017 on restructuring SOE sector.

wishes to sell an SOE, it can sell it as a single entity or split it up into several entities for sale. Competition policy should be ‘front and centre’ in any such decision making.

The formation of Australia’s National Electricity Market (NEM) is illustrative of the benefits that can be achieved. Until 1995, each State and Territory government owned its own power company but from that time four of the mainland states and one territory agreed to create a competitive market for electricity production and supply.

Two State governments (Victoria and South Australia) wished to privatise their assets and two State governments (New South Wales and Queensland) wished to retain state ownership of their assets. The Australian Capital Territory decided to enter into a public-private partnership between the local publicly owned power company and the local privately owned gas company. Despite retaining their sovereign right to decide whether or not to privatise, the five governments all agreed to the following approach:

- The state systems were physically interconnected and the technical ability to send power in both directions between the participating states was established and subject to price and network usage regulation;
- The companies were split up so that any company owning transmission networks did not own any generation or retail assets;
- The generation assets in each state were split into at least three competing companies; and
- The “customer facing” distributor/retailers were also split up into businesses which each had approximately 1 million customers and permitted to supply customers in any state. The smallest state started with one retailer and the largest states had four or five each but they all started selling power across all the states.

As a result, after implementation, the interconnected market had more than 10 significant generators competing to bid to provide wholesale generation to the system and more than 10 retailers supplying end customers. Approximately half the companies by number were state owned and the other half were privately owned. Careful thought about how to structure both the assets that remained in government ownership, and the design of the divestment packages, resulted in the transformation of the power sector to a vigorously competitive industry.

Because electricity is such an important input to all parts of the economy, the lower costs and improved reliability that resulted from the formation of the National Electricity Market was a key engine for national growth for at least a decade.

As a post-script, it is worth noting that as in many other countries, the supply of electricity generally, and in particular the effect of carbon reduction policies on the industry, has been highly politically charged. Nevertheless, the fundamental structural design of the market explained above has withstood disruption and assisted in providing a stable back-drop the country managed contentious environmental policy changes and short term reliability crises.

By contrast, when Australia decided to permit competition in the telecommunications system, it decided (with one relatively minor asset exception) to keep the incumbent SOE (“Telstra”) as a single entity. The government progressively sold the shares in the company over an extended period. Private competitors were permitted to enter the market and, indeed, they did so. In some respects (for example international calls) vigorous competition was swift but for very many years the majority of the services remained in monopoly hands. Competition issues have persisted and regulating this one company has taken more of the ACCC’s resources than any other task.

There is an existing plan for the vertically integrated electricity operator, EVN, to be reformed but it would still provide for a single entity to own the transmission system and major generators. In 2001 the OECD adopted a Council Recommendation that members consider the costs and benefits of requiring structural separation of potentially competitive parts of regulated industries from the natural monopoly parts instead of relying on behavioural requirements. In other words, is it preferable to leave EVN as the owner of both generators and the transmission network and rely on the prohibition against the abuse of dominant position to enable competition from new generators or would it be preferable to implement ownership or structural separation of EVN’s generation activities from its network operations.

Structural solutions bring the benefit of much greater certainty that the network operator will behave fairly and efficiently when dealing with competing generators and the regulatory task is generally considerably simpler (i.e. establish an optimal pricing structure and an appropriate ‘queuing’ system for connections).

Consistent with that 2001 Recommendation on Structural Separation, OECD countries who have reformed their electricity sectors¹⁶ have generally required ownership or functional separation of the network parts of the industry from generators and/or energy retailers to enable competition to thrive in those parts of the industry that can be competitive and to target regulation only to those parts of the industry that are natural monopolies.

Viet Nam is in the process of considering whether and how to separate:

- The ownership and operation of transmission and distribution networks that are natural monopolies that must be price and access-regulated; and
- Multiple competing generators and retailers (either as separate entities or as “gen-tailers”) for which regulation is unnecessary if a well designed pool market has been put in place.

Similarly in the rail sector it is possible to separate:

- The ownership and operation of railway networks that are natural monopolies that must be price and access-regulated; and
- “Above rail” competing train operators who can pay for the use of the rail system.

Viet Nam has recognised that, while both the entities that own and operate networks and that operate in competitive markets can be privatised, there is a particularly strong rationale for the privatization of the segments of the electricity and rail industries that can operate in competitive markets. The decision has been made to privatise the competition elements but not the natural monopoly elements of these businesses.

On the financing side, the Vietnamese Government envisages mobilising financing from divestment of major SOEs, for a range of purposes for which funding is required. The competition authority or an economic policy agency such as CIEM could play a valuable part in providing guidance on future equitisations of other SOEs to ensure that anti-competitive legacy issues are not left behind in markets where SOEs held significant market power.

¹⁶ See, for example the European Union’s requirement on its Member States (page 10 – OECD’s Competition Committee’s “Report on experiences with Structural Separation”).

Recommendation 2.8:

When the government decides to sell assets in the industries where SOEs are dominant or are oligopolistic operators, advice should be sought from the competition authority (or another suitable independent body with competition law and policy know-how and expertise) about how to ensure that the relevant market after the sale is subject to the maximum competitive dynamic.

The opinion would include advice on the optimal structure for the sale – whether the entity should be sold as a single entity or as multiple entities, whether regulatory or other barriers to entry could be removed and whether any form of regulation may be required to deal with market power issues after the sale. The competition authority should be adequately resourced to enable it to give thorough and considered advice on these issues. Unless there are compelling public interest reasons to disregard the advice of the competition authority it should be followed. If advice is not followed and the privatised or equitised entity has dominant or substantial market power consideration should be given to introducing regulatory controls that address that market power. This may include for example rules for provision of access to essential facilities on reasonable terms.

3. Regulations affecting competition

Viet Nam's competition law prohibits state agencies and public service agencies from engaging in certain acts that restrict competition such as:

- assigning markets or indirectly preventing competition on the market;
- discriminating against enterprises;
- forcing industry associations or enterprises to align with one another with a view to lessening competition; and
- other acts that prevent lawful business activities of enterprises.

However, there is no explicit mechanism to bring such matters to the attention of the VCCA or for the VCCA to seek remedies in such cases. Indeed, Viet Nam has a competition policy problem with both existing regulations and the process of passing new laws and regulations. As in other developing countries, there is a particular problem with license based regulatory structures.

Well-designed regulations are very important for the performance of the economy as a whole. In some industries regulations are needed before competition can work effectively and in other industries they are important in addressing market failures that can otherwise emerge.

Examples of regulations that enable competition include telecommunications legislation that enables competing telephone companies to place and receive calls between customers on different networks, banking regulations that enable payments from any account-holder to any account-holder and electricity interconnection.

Examples of regulations that address market failures include regulations that require extensive medical training before doctors are permitted to provide medical services to patients who are not medically trained and often do not in a good position to understand and bargain for services.

Poorly designed regulations can significantly impede economic performance and one of the main ways that this can occur is if regulations unnecessarily prevent or restrict competition.

Competition authorities can play an important role in reducing government restrictions on markets that can be an important source in incentivising informality, as with a heavy regulatory burden many firms may turn to informal ways of doing business. Competition authorities can do so by helping government bodies identify existing regulations that unnecessarily restrict competition or helping policy makers design new regulations that hinder competition as little as possible yet still achieve their policy goals (OECD, 2009¹⁷). By failing to comply with various economic rules and regulations, informal firms are often able to undercut and steal business from formal firms, even when they use inefficient production techniques. As a result, formal firms are less able to fully exploit economies of scale, limiting their own growth and productivity.

Based on the experience of its members, the OECD has a Competition Assessment Toolkit in 16 languages¹⁸ to assist countries to avoid the competitive

¹⁷ OECD, Competition Policy and the Informal Economy 2009.

¹⁸ The translations of volumes 1 and 2 have generally been undertaken co-operating with a competition authority in a country who has the language concerned as its official language (or one of its official languages). To date the Guidelines have not been translated into Vietnamese. Volume 3 has not yet been translated.

problems that can arise from poorly designed regulations. It is comprised of three volumes – Principles, Guidance and the Operational Manual. The appendix sets out the key aspects of these three volumes.

This section discusses:

- Business licensing;
- Other regulatory instruments; and
- The process for making new laws.

3.1. Existing regulatory impediments to competition

Viet Nam has a body of regulation that contain impediments to competition. For example, the *Law on Investment*¹⁹ (as amended), sets out requirements for participation in 243 industries and in some cases these requirements create impediments to competition.²⁰

The OECD’s Competition Assessment principles singles out licensing as being a form of regulation that is particularly susceptible to harming competition because it raises the barriers to entry and limits the number of participants in markets.

In many industries regulated by the Law on Investment, it is important to impose requirements to protect public safety or to further the public interest. However, in a significant number of cases, the Law’s requirements limit market entry and do not have a clear or sufficient public interest justification.

The Government has now recognised that regulatory reform is needed and increasingly the regulatory requirements are considered under a necessity test. In October 2017 the Government passed a resolution²¹ which requires ministries/regulators to reduce the over-all quantity of regulation by one third to one half and in December 2017, the Ministry of Planning and Investment proposed that 21 industries will be excluded from the purview of the Law on Investment altogether.

¹⁹ No. 67/2014/QH13.

²⁰ See Annex I for a list.

²¹ Resolution 98/NQ-CP dated 3/10/2017.

Nevertheless, a formal decision to relieve the 21 industries from coverage by the Law on Investment has not yet been put into effect and in a number of important instances the remaining 222 industries have extensive requirements that are unnecessary or disproportionate to protect the public interest.

In implementing the decision referred to above to substantially reduce the over-all regulatory burden (or otherwise), the requirements in each of the sectors covered by the Law on Investment should be assessed applying the OECD Competition Assessment Toolkit approach. In particular, the following should be considered:

- What is the public purpose of regulating?
- The requirement should be removed altogether unless there is an identifiable and material public policy rationale requiring regulation (akin to the necessity test that Viet Nam is already applying).
- The content of the requirements should each be assessed to remove or redraft any that restrict competition unnecessarily or which are disproportionate compared with the public policy purpose that they are protect.
- Wherever possible it is preferable to convert licensing requirements into rules that apply to any business that chooses to engage in a particular activity so that the licensing requirements create less of an *ex ante* barrier to entry that must be satisfied before an entity can even commence trading.

Recommendation 3.1:

The National Competition Commission, NCC (or another suitable agency with a broader economic mandate such as CIEM – this applies to the rest of the recommendations in this section), should be tasked with addressing the issue of competitive impediments to competition in existing legislation or regulation.

The NCC should have the power to issue public recommendations or inter-departmental recommendations concerning the re-establishment of the competitive environment if public authorities at the central and local levels have put in place/adopt acts that limit competition or discriminate among market players.

The first step should be to identify the sectors that are in most need of a detailed assessment. A list of priority candidate sectors should be established drawn from:

1. the top 20 most important sectors of the Viet Nam economy in terms of contribution to GDP, employment, exports or other criteria considered relevant for Viet Nam; and
2. any other sectors that after a wide consultation or a consultation with e.g. the Viet Nam Chamber of Commerce and Industry proposes as a candidate.

The second step should be to undertake assessments in a targeted number of sectors per year according to the OECD Competition Assessment Toolkit making appropriate recommendations for reforms to facilitate competition.

The third step would be for the agency to evaluate the progress of the programme and to decide whether to proceed with further reviews and how to identify candidates based on maximising the contribution of this reform work to Viet Nam's national economic wellbeing.

3.2. New and existing laws affecting business

An important Recommendation of the OECD was adopted in 2012 concerning Regulatory Policy and Governance. It addresses both:

- The making of new regulations (i.e. regulations should be limited to where the aims justify the costs and rigorous and transparent approaches should be adopted to designing such regulations); and
- The need to periodically conduct “health checks” on existing regulations to ensure that they meet the same standards as new regulations and are still net beneficial and continue to be the most effective solutions to the policy aims.

In Viet Nam, according to the law on making laws, a number of agencies must be notified of proposed laws and provided the opportunity to be consulted before the law is endorsed by the government to be submitted formally to the National Assembly for consideration. The agencies that must be consulted include the Viet Nam Chamber of Commerce, the Ministry of Justice and Industry and the Ministry of Planning and Investment.

Whenever a new or existing law affecting the business community is proposed, a regulatory impact assessment (RIA) should be undertaken. RIAs focus on ensuring that regulations are efficient by achieving their aims with a minimum of compliance and enforcement costs. RIAs also remind agencies to consult with affected parties to ensure that the regulatory outcomes are optimal.

RIAs do not, however, focus explicitly on the competition effects of new laws and regulations.

Whenever a new or existing law affecting the business community is proposed, the competition authority should also be consulted and where it detects that regulations will significantly impede competition, it should provide an opinion about how this can be avoided. In performing this analysis, the competition authorities would ordinarily adopt a process of the sort explained in the OECD Competition Assessment Toolkit.

The VCCA currently has the mandate to consider proposed laws but only when specifically asked to do so. In practice very few new laws are put before the VCCA for comment.

The VCA and VCC have also provided advice to government on reforming existing laws to remove impediments to competition. For example, in 2010 the VCA undertook a competition assessment exercise covering the following ten sectors that culminated in a series of recommendations including for law reform:

Table 1. Sectors recommended for law reform

Manufacturing sector	Services sector
Rolled steel for construction	Gasoline and diesel distribution
Cement	Insurance (non-life)
Urea fertilizer	Banking (for credit)
Feed for livestock and poultry	Telecommunications (mobile & fixed)
Powdered milk formula	Domestic aviation

Source: VCA

The VCA has also provided advice to government on competition inspired reforms to the laws governing the pharmacy and telecommunications industries.

The VCC too made recommendations to the government to facilitate entry into the market for the supply of aviation fuel at airports as part of its decision concerning the VINAPCO case.

On the other hand, there appear to be many laws restricting competition that the competition authorities have not commented upon. For example, the VCA did not participate in the consultation in relation to a 2011 the Ministry of Industry

and Trade Circular²² which required that an automobile import license can only be obtained if the applicant has been authorised by the original equipment manufacturer. Similarly, the VCCA did not participate in the consultation process for a 2017 Government Decree²³ restricting a range of warranty and maintenance services for automobiles to entities that are authorised by the original equipment manufacturer. These regulations inhibit competition from parallel imports and from many smaller entities competing to perform maintenance.

Under the Law on Legal Normative Documents (adopted in 2015), any person or agency has the right to comment on proposed legislation but this has not resulted in a noticeable increase in the limited number of times that the VCCA participates in the process of law development.

In some countries it is not necessary to formalize an arrangement for an authority to undertake a competition assessment for proposed new laws because their system already provides a significant degree of prominence to any proposed new law and the competition authority routinely monitors and provides comments to those responsible for drafting. In other countries (and Viet Nam is one of these) a review is unlikely to occur as a matter of routine and the country would benefit from a systematic process of referring proposed new business laws to the competition agency to consider whether and how it can contribute to avoiding unnecessary restrictions to competition.

Recommendation 3.2:

A mechanism should be implemented that alerts the NCC of all proposed new laws affecting business at an early stage and the NCC should be provided with an opportunity to provide its opinion based on a competition assessment checklist. The NCC should perform this work using the principles and methodology described in the OECD Competition Assessment Toolkit.

²² 20/2011/TT-BCT.

²³ No 116/2017/ND-CP.

4. The Current Restrictive Competition Law Framework

This section discusses a range of issues with the current law. The recommendation that relate to how these issues should be handled in the new law appear in section 6.

4.1. Overview of the legal instruments, the enforcement system and the proposals for reform

The most important instruments that together comprise Viet Nam’s competition laws, and how this report refers to them, are:

- The Law on Competition No. 27/2004/QH11 (“**the 2004 Competition Law**”);
- The Decree Detailing the Implementation of a Number of Articles of the Competition Law No. 116/2005/ND-CP (“**the Decree 116**”);
- The Decree Implementing the Law on Competition on Dealing with Breaches in the Competition Sector No. 71-2014-ND-CP (“**the Penalties Decree**”);
- Articles 217 and 220 of the Penal Code No 100/2015/QH13 (“**the Penal Provisions**”); and
- Article 584 of the Civil Code (“**the Private Action Provision**”).

Competition law prohibitions can also be found in a range of other laws including the law on prices and laws in specific sectors such as the telecommunications and electricity sectors. Additionally, there are also other instruments that affect the system of competition law enforcement such as laws concerning the administrative arrangements for the law enforcement authorities and the courts.

The 2004 Competition Law addresses two areas:

- prohibitions against the “**restraint of competition**” comprising prohibitions against anticompetitive agreements, abuse of dominance, abuse of monopoly and the system of merger control; and
- prohibitions against “**unfair competition**” comprising ten prohibitions against *competition deloyale* (discussed below).

Although the 2004 Competition Law sets an over-all maximum penalty of 10% of the total turnover of the relevant entity in the financial year preceding the breach, the law on dealing with administrative offences and the Penalties Decree set more detailed and lower maxima for particular contraventions.

Importantly, the penalties for the prohibitions on the restraint on competition are significantly higher than those applying to the prohibitions on unfair competition. The former fines are “punitive” in character while the latter are “administrative” in character. Consequently, the 2004 Competition Law provides for a two tier enforcement structure:

- The VCCA conducts investigations concerning both the prohibitions on the restraint of competition and the prohibitions against unfair competition but can only itself determine liability and penalties with respect to unfair competition cases.
- In relation to restraint of competition investigations (such as cartels and abuse of dominance) if the VCA conducts an investigation and forms the view there has been a breach of the law, it refers the dossier to the VCC who determines whether the accused is liable and what sanctions should apply.

Interested parties can appeal decisions of the VCCA or VCC initially to any of the 63 Provincial Courts and, from those courts, to one of the three regional Courts of Appeal/High Courts. The ultimate court is the Supreme Court.

As discussed below, it is widely acknowledged that there are a number of features of the above system that need to be reformed and the VCCA co-ordinated the work of a drafting committee which a number of iterations of a draft new law.

The police and the procuracy²⁴ are responsible for investigating cases and prosecution before the criminal courts. The Penal Provisions concern agreements

²⁴ “Procuracy” is the term conventionally used when translating Vietnamese into English. This agency that takes prosecutions of criminal cases.

restricting competition (Article 217²⁵) and bid rigging conduct (Article 222²⁶) will take effect from 1 January 2018.

4.2. Current prohibitions on restraint of competition

There are eight kinds of agreements that are prohibited by Articles 8 and 9 of 2004 Competition Law. These are agreements that:

- Directly or indirectly fix the price of goods or services;
- Allocate consumer markets or sources of supply of goods and services;
- Restrain or control the quantity or volume of goods or services produced, purchased or sold;
- Restrain technical or technological developments or restrain investment;
- Impose on other enterprises conditions for signing contracts for the purchase and sale of goods and services or to force other enterprises to accept obligations that are not related in a direct way to the subject matter of the contract;
- Prevent, impede or do not allow other enterprises to participate in the market or to develop business;
- Exclude from the market other enterprises which are not parties to the agreement; and
- Collusion in order for one or more parties to win a tender for the supply of goods or services.

Importantly, items (1) to (5) above are only prohibited if the parties to the agreement have a combined market share of 30%. There is no market share threshold applying to items (6) to (8).

²⁵ Fines range from VND 200 million to 1 billion, non-custodial reform for up to 2 years or imprisonment from 3 months to 2 years. The range of fines is increased to VND 1 billion to 3 billion and imprisonment of 1 to 5 years if certain aggravating circumstances are present.

²⁶ Penalties are only imposed upon individuals. Prison terms of up to 20 years can apply in addition to being prohibited from certain occupations for up to 5 years and confiscation of property.

In practice, the VCA found the 30% requirement to be a significant impediment to cartel enforcement. Unlike almost any other competition authority in the world, the VCA had to undertake complex market definition assessments that were often challenged by the defendants before the VCC. In other cases the market definition was simpler but it was difficult or impossible to obtain sales data to enable the market shares to be calculated with sufficient rigor to withstand challenge. Obtaining such data is particularly challenging in a developing country with poorly resourced agency without effective powers to require the production of evidence from the accused and other parties with key evidence.

Further, the 30% requirement has complicated the message when the VCA has sought to educate the business community about a form of conduct that in almost any other country would be strictly prohibited without complex economic or evidentiary “ifs and buts”.

Box 1. Case Study: Automobile insurance cartel

The VCA initiated an investigation in the automobile insurance market in 2008 after receiving a notification that some insurance companies organised a meeting to fix insurance premiums for vehicles by an agreement on coverage and calculation method for premium car insurance services.

The VCA investigation found that the insurance companies had concluded an agreement directly fixing price of insurance services. Collusive price fixing is only illegal if 30% of the relevant market is affected and collecting the evidence to prove this element of the prohibition was a particular challenge for the VCA.

The VCA ultimately referred a substantial dossier to the VCC seeking a finding of liability and fines. A number of the insurance companies concerned are State owned entities under the Ministry of Finance. Several of the insurance companies interceded with the Ministry of Finance seeking its support.

Nevertheless, the VCC (including a nominee employed by the Ministry), determined that a contravention of the price fixing prohibition in Article 8 and Article 9 of the 2004 Competition Law and penalties totalling VND 1.7 billion were imposed.

Consistent with the 1998 OECD Council Recommendation Concerning Effective Action against Hard Core Cartels and subsequent reports, Viet Nam’s

Penal Code criminalises certain ‘hard core’ cartel conduct. Article 217 of the Penal Code replicates the prohibitions in (1) to (6) above, including the 30% market share requirement for items (a) to (e). Article 222 replicates item (8). Two additional matters are important:

- Criminal liability only applies if the perpetrator earns illicit profits of VND 200 million or more or victims suffer losses of VND 1 billion or more;
- The penalties are significantly increased if one of the following aggravating circumstances are present: the offender repeats the offence multiple times, sophisticated deception is used, an abuse of dominance is involved, higher levels of illicit profit are made or higher levels of damage occasioned upon victims.

Box 2. The case of competitive restraint in student insurance of 12 enterprises in the Province of Khanh Hoa

The VCA discovered that 12 insurers had signed a written agreement dated in 2011 fixing the premiums for student insurance in the coastal Khanh Hoa Province which has a population of 1 million people.

Since price fixing is only prohibited if it covers at least 30% of the market, the VCA had to determine the product and geographic boundaries of the relevant market. The VCA determined that the product market was limited to student insurance and the geographic market was limited to Khanh Hoa Province. The VCA found that the 12 insurers who executed the agreement accounted for 99.81%, of the market.

Nine months after the illegal agreement had taken effect, all 12 insurance companies acknowledged wrongdoing and they voluntarily annulled their first agreement and they agreed to take remedial measures to prevent future violations of the competition law.

In view of their co-operation, the companies were not required to pay penalties but they were required to pay a case handling fee of VND 100,000,000.

Article 10 of the 2004 Competition Law provides that an exemption can be sought for a defined period for agreements that would otherwise be prohibited by Articles 8 and 9 in the following cases:

- The agreement rationalizes an organizational structure, or business scale or increases efficiency;
- The agreement promotes technical or technological progress or improves the quality of goods or services;
- The agreement promotes uniform applicability of quality standards and technical ratings of product types;
- The agreement unifies conditions on trading, delivery of goods and payment but does not relate to price or pricing factors;
- It increases the competitiveness of small and medium sized enterprises; or
- It increases the competitiveness of Vietnamese enterprises in the international market.

Articles 51 and 84 of the Penal Code provides that mitigating factors including co-operation with the law enforcement agency are to be taken into account to reduce the level of sanctions imposed. However, there is no indication yet as to whether there can, or will be, an instrument put in place to make it clear to a fully co-operating leniency applicant that they will be free of sanction (as opposed to having a reduced sanction) under any Penal Code action.

There is no general prohibition against agreements with an anticompetitive object or effect and it is not currently possible to apply for leniency to any of the VCCA, VCC, police or the procuracy.

4.3. Current prohibitions on abuse of dominance and abuse of monopoly

Whether a firm has a dominant market position is determined as follows:

- A single firm is conclusively deemed to have a dominant market position if it has a market share of 30%.
- Firms are collectively dominant if they act together in order to restrain competition and account for any of the following market shares – a duopoly accounting for 50% of the market; three enterprises accounting for 65% of the market or four enterprises accounting for 75% of the market.

- Alternatively, a firm is dominant if it is capable of substantially restraining competition.

A monopoly position exists where an enterprise has no competitors at all in the relevant market.

One of the unavoidable characteristics of abuse of dominance laws is that their enforcement is unavoidably complex and subject to a significant degree of judgment. This means that there is the potential for a false positive or a false finding of guilt (sometimes called a Type 1 error) and the potential for a false negative or a false finding of innocence (sometimes called a Type 2 error).

Most other countries either:

- have rebuttable market share presumptions that a firm is in a dominant position or has a substantial degree of market power that are set out in the statute (particularly in developing countries with new laws) or which appear in court judgments or competition agency guidance (longer standing countries); or
- require the authority to actually establish on the basis of economic evidence that the firm is dominant or has a substantial degree of market power in each and every case.

The problem with Viet Nam's non-rebuttable deeming provision by which a firm with 30% is taken by the law to be dominant regardless of the economic evidence is that the threshold is very low and inflexible and it will almost inevitably catch many firms that do not actually have market power. For example, in a market with only two suppliers, an entrant that achieves a 30% market share may be weak because there is a player in the market that is more than twice its size.

Similarly a supplier of a brand new product may have a 100% market share yet be struggling to develop any market at all for its product. Alternatively, in a dying industry, the last remaining supplier may be barely surviving yet have a 100% market share.

Viet Nam's current law is therefore highly likely to have a high incidence of Type 1 errors. A particular problem of such Type 1 errors is that it has a chilling effect on the behaviour of non-dominant firms (at least if the provision is enforced and especially if there are high penalties imposed). For instance, it may

significantly discourage a non-dominant firm from offering a significant price discount for fear of being prosecuted for predatory pricing.

Rather, the focus investigative resources and compliance attention should go to the conduct that is of real harm, rather than preventing particular behaviours (such as pricing below cost) that may or may not be anti-competitive.

When it comes to what dominant and monopoly firms are prohibited from doing, Article 13 provides that enterprises who hold a dominant market position or a monopoly market position are prohibited from engaging in the following conduct:

- Selling goods or providing services below the total prime cost of the goods aimed at excluding competitors;
- Fixing an unreasonable selling or purchasing price or fixing a minimum reselling price for goods or services thereby causing loss to customers;
- Restraining production or distribution of goods or services, limiting the market or impeding technical or technological development thereby causing loss to customers;
- Applying different commercial conditions to the same transactions aimed at creating inequality in competition;
- Imposing conditions on other enterprises signing contracts for the purchase and sale of goods or services or forcing other enterprises signing contracts for the purchase and sale of goods and services or forcing other enterprises to agree to obligations which are not related in a direct way to the subject matter of the contract; or
- Preventing the participation of new competitors.

Additionally, Article 14 provides that enterprises who hold a monopoly position must not:

- Impose disadvantageous conditions on customers; nor
- Abuse a monopoly position in order to change or cancel unilaterally a signed contract without legitimate reason.

Box 3. Abuse of Monopoly in the Aviation Fuel Market

Vinapco (a company owned by the largest domestic airline, Vietnamese Airlines) used to be the only company permitted to supply aviation fuel at Viet Nam's main airports.

In 2007 Vinapco entered a contract to sell Pacific Airlines aviation fuel in 2007 which, naturally, included a fuel supply charge. By 2008 the cost of aviation fuel had risen substantially and Vinapco sought to negotiate a new aviation fuel supply charge with Pacific Airlines.

Vinapco sought to charge Pacific Airlines more for fuel than the amount paid by its own parent, Vietnamese Airlines. Pacific Airlines acknowledged an increase in the supply charge was appropriate as market costs increased, but sought equal treatment vis a vis the amounts paid by it and Vietnam Airlines but Vinapco would not agree to do so.

Pacific Airlines sent a letter to Vinapco expressing its opposition to Vinapco's differential charging structure between Vietnam Airlines and Pacific Airlines and requested that the matter be settled by the Government.

Vinapco sent a fax to Pacific Airlines demanding that it approve the new supply charge in writing before 31 March 2008. When Pacific Airlines failed to agree to the demand, Vinapco sent a written notice to the Pacific Airlines informing it that supplies of aviation fuel would cease the next day.

Vinapco agreed to temporarily resupply Pacific Airlines but based on the threats to discontinue supply, the VCA decided to investigate the case. It did so and forwarded a recommendation to the VCC to impose fines.

Vinapco interceded with the Ministry of Transport who approached the VCC seeking to mediate the matter between the Vinapco and the VCC. The matter was referred to the Prime Minister who reaffirmed that the VCC should decide the matter objectively according to the law.

A five member panel of the VCC (including a nominee employed by the Ministry of Transport) conducted hearings and ultimately made a determination that Vinapco had engaged in an abuse of a monopoly position in the aviation fuel market in violation of the prohibitions that enterprises with a monopoly market position must not:

- Impose disadvantageous conditions on customers; nor
- Abuse a monopoly position in order to unilaterally change or cancel a signed contract without legitimate reason.

Note that the finding was an abuse of a monopoly position rather than an abuse of a dominant position.

The VCC decided to fine Vinapco VND 3.378 billion for violations and VND 100 million for handling the case.

Vinapco appealed from the five member panel to the full bench of the VCC who reaffirmed the five member panel's decision.

Vinapco then filed an administrative law appeal to the People's Court of Ho Chi Minh City that reaffirmed the VCC's decision and then made a further appeal to the Supreme People's Court.

In 2011, the Supreme People's Court held an appellate hearing and the court ultimately decided to uphold the decision of the VCC despite finding that there had been some relatively minor irregularities in the VCC's hearing process.

As can be seen from the above provisions, there is a complex combination of *per se* elements in relation to some forms of conduct and 'rule of reason' or competitive purpose or effect elements in relation to other conduct.

There is no general prohibition on market foreclosure by enterprises with a dominant market position.

Relief from the above prohibitions applies for State monopoly sectors and enterprises engaged in production or supply of public utility products or services in relation to decisions by the State on prices or quantities.

4.4. Current merger administration

Viet Nam's system for controlling economic concentration applies to mergers, consolidations, acquisitions, joint ventures and other forms of concentration stipulated by the law.

Notification to the VCCA is compulsory if the parties to the concentration have a combined market share of between 30% and 50% of the relevant market unless the merged entity will still comprise a small or medium enterprise after the merger is consummated.

Box 4. Compliance context: Merger cases not filed

Despite the general requirement to file proposed mergers with the VCA when the merged entity would obtain a 30% market share and that mergers resulting in a market share of 50% are prohibited unless they can benefit from an exemption there are a significant number of mergers not filed:

“The number of M&A cases reported to VCAD is quite limited and we are not aware of any decision rejecting a purported merger or acquisition. From 2008 to 2011, only 12 notifications of M&A were submitted to VCAD. This however does not correctly reflect the buoyancy of the M&A sector in Viet Nam, (valued at USD 4.7 billion in 2011) during the past years, particularly in banking, real estate and the retailing sectors.”²⁷

The updated statistic is that from 2008 to 2016 there have been 32 merger cases filed but the key point remains – the very low number indicates that there are almost certainly a large number of mergers that the law requires to be notified that are not being notified or that are occurring in contravention of the prohibition.

Where there is a strict prohibition on mergers that result in the merged entity gaining a 50% market share it would certainly be tempting for parties not to file in Viet Nam, particularly if the domestic effects were connected with a global merger that other competition agencies approved after an investigation of the merits of the transaction.

A second issue reported by a number of practitioners and commentators²⁸ is that mergers between SOEs may not be subject to VCCA scrutiny and these reports cite a number of transactions said to demonstrate their contention although others disagree. There is certainly no explicit statement in the law concerning whether a merger of SOEs should be treated as a concentration or not. One reason why some practitioners consider that an SOE to SOE transaction may not constitute a concentration is because the State is the ultimate owner of the assets in question both before and after the transaction.

The OECD Recommendation on Merger Review (2005) against market share thresholds in mandatory filing regimes because wasted investigative effort and compliance risk is bound to arise. In many cases half the substance of an

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T. Nuygen 2014, <https://www.linkedin.com/pulse/20140605040237-170865371-competition-law-in-vietnam-is-it-anti-trust-worthy-2012>.

investigation will have to be undertaken to define the market even in a case that from a public policy viewpoint is highly unlikely to pose a problem. Data concerning other parties' sales may simply be unavailable leaving the merging parties in an invidious position and may tempt many parties to simply disregard the requirement to file.

Subject to the three exceptions, mergers are *per se* prohibited if the parties to the concentration have more than 50% market share. A merger that results in the merged firm having greater than 50% market share is only permitted if:

- The resulting entity will still constitute a small to medium enterprise;
- One or more of the parties is at risk of being dissolved or becoming bankrupt;
- The concentration has the effect of increasing exports, contributing to socio-economic development or technical / technological progress.

Exception (1) is directly applicable; exemption (2) is assessed and determined by the Minister for Industry and Trade; and exemption (3) is assessed and determined by the Prime Minister.

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Tan Loi Huynh, Anh Tuan Nguyen (LNT & Partners) (2015) "The Asia-Pacific Antitrust Review 2015 Vietnam: Merger Control"; and Phan Cong THANH (Viet Nam Competition Authority) (2015) "ERIA Discussion Paper Series: Competition Law Enforcement of Viet Nam and the Necessity of a Transparent Regional Competition Policy". These commentators refer a number of examples such as Vietnam Airlines acquiring a substantial interest in Jetstar Airlines and another in which EVN's telecommunications business was acquired by Viettel.

Box 5. Case of exemption to participate in economic concentration between Viet Nam National Financial Switching Joint Stock Company (Banknet) and Smartlink Card Services Joint Stock Company

The Viet Nam National Financial Switching Joint Stock Company (Banknet) and Smartlink Card Services Joint Stock Company were the only two banks providing intermediary payment services. In 2014, they approached the VCA with a proposal to merge their operations.

Because their combined market share would be 100%, the concentration would have been prohibited under the provisions of Article 18 of the Law on Competition unless an exemption was obtained.

The parties did indeed apply to the VCA for an exemption on the basis that the merger would:

- have the effect of expanding exports;
- contribute to socio-economic development; and/or
- contribute to technical and technological progress.

VCA assessed the application and submitted a report to the relevant decision maker under the Competition Law – in this case the Prime Minister.

The Prime Minister considered the VCA's report and on that basis granted a conditional exemption sought for a period of 5 years which would be automatically renewed every 5 years provided that the parties do not violate the conditions. The conditions were:

- (i) The merged entity is required to abide provisions in Article 14 VCL;
- (ii) The merged entity must parties purchasing intermediary payment services must be treated on a non-discriminatory basis;
- (iii) The merged entity must lodge the modal service contract with the VCA and the banking regulatory body before it rolls it out to clients.

As a result of the merger between Banknet and Smartlink, there is currently only one united card union operating in Viet Nam.

It should be noted that many efficiency enhancing mergers may involve exceeding a 50% market share in one or more markets. This may be particularly likely if there are, say, 20 or 30 localised markets affected with low barriers to

entry. A relatively small market may currently have only two players but be subject to competitive constraint from the other player and/or relatively easily contested by an entrant from an adjacent region. Similarly, it is possible that a merger can harm competition at concentration levels below 50%.

Where there are strong public policy reasons not to prohibit a merger where there is a prohibition based on market shares a prohibition of this kind can place pressure on both the parties and the investigative agency to “bend the rules” (or even disregard them) to accommodate a sensible, economically beneficial outcome but this may result in poor precedents.

4.5. The Substantive requirements of implementation of Decree 116

In Viet Nam, it is usual for subordinate legislation to provide extensive detail concerning the application of the primary legislation. In the case of competition law, the provisions in Decree 116 are arguably of more practical significance than the provisions of the 2004 Competition Law itself.

While it is important to understand the scale and nature of Decree 116, it is beyond the scope of this report to provide a comprehensive analysis of the document which runs to more than 40 pages of text.

As explained above, market shares play a central role in the law on anticompetitive agreements, abuse of dominance and economic concentration. It is therefore illustrative to consider the effect of the provisions of Decree 116 in relation to defining the market and quantifying market shares. The relevant provisions are as follows.

4.5.1. Market definition

A market is defined a market of products or services that are “*interchangeable in terms of characteristics, intended use and price*”. With respect to the requirement to identify the “*characteristics*” the market must be defined by reference to at least one of the following characteristic:

- Physical characteristics;
- Chemical characteristics;
- Technical properties;

- Side effects on users; and
- Absorbability.

“Intended use” must be determined as its “most principal intended use”.

“Price” is the price “written in its retail invoice according to the provisions of the law”.

“*Interchangeability*” is defined as follows:

“Products or services shall be regarded as interchangeable in characteristics if they have many similar physical properties, chemical properties, technical properties or side effects on users and absorbability.

Products or services shall be regarded as interchangeable in intended use if they have similar intended use or if they have similar intended uses.

Products or services shall be regarded as interchangeable in price if, in case of an increase of over 10% the price of such products or services which is maintained for six consecutive months, over 50% of a random sample of 1,000 consumers living in a relevant geographical area switch or intend to buy other products or services with the characteristics or intended use similar to the products or services which they are using or intended to use.

In a case in which the number of consumers living in a relevant geographical market state at this point is less than 1,000, a random sample must include at least 50% of the number of such customers.”

The above provisions are a highly prescriptive form of the “small but significant non-transitory increase in price” or “SSNIP” test commonly used by many competition authorities around the world. This report refers to the above requirement as the “Decree 116 SSNIP Survey Test”.

There are then provisions that provide that in limited circumstances in which the competition authority could address a circumstance in which the survey referred to above was inconclusive.

Further detailed requirements concern complementary products, supply side substitutability and geographic market definition.

4.5.2. Market shares

The 2004 Competition Law itself provides that the market share of an enterprise with respect to a certain type of goods or services means the:

“Percentage of turnover from sales of such enterprise over the total turnover of all enterprises conducting business in such type of goods or services in the relevant market or the percentage of turnover of inwards purchases of such enterprise over the total turnover of inwards purchases of all enterprises conducting business in such type of goods or services in the relevant market for a month, quarter or year.”

Decree 116 supplements the above strict requirements with the provisions explain how the sales of associated enterprises should be quantified and provisions concern the calculation of market shares for insurance companies and credit institutions.

Interestingly, Decree 116 also effectively alters the primary legislation in that it provides that the above provision of the 2004 Competition Law is inapplicable when an enterprise has not yet been operating for a full fiscal year and provides its own directions in that respect.

4.5.3. Other examples

Decree 116 provides further detailed provisions concerning each and every one of the prohibited forms of anticompetitive agreement. It also provides pages of prescriptive detail concerning how to measure cost in relation to an alleged predatory pricing abuse of dominance allegation and, similarly, pages of prescriptive detail concerning other abuses such as allege refusals to supply.

4.5.4. The effect of the substantive prohibitions of Decree 116

Decree 116 has had a very significant effect on what complainants must provide in order for a valid complaint to be accepted by the VCCA. It generates a considerable proportion of the workload of the investigatory authority when investigating cases and an inability to satisfy its prescriptive requirements has resulted in cases not proceeding beyond a preliminary investigation.

For instance, the Decree 116 SSNIP Survey Test may be expensive, time consuming or impossible to attempt, preventing the VCCA from defining a relevant market. Even if a market is successfully defined, the VCCA may spend an inordinate amount of time and resources identifying the value of sales of each and every market participant so that it can establish what the total of “all enterprises conducting business in such type of goods or services” as mandated by the provisions of the law.

A number of investigations have been stymied altogether when one or more market participant declined to provide its sales data, thus preventing the VCCA from establishing the required proofs for an infringement decision.

4.5.5. OECD Observations on Decree 116

Effective competition analysis must be responsive to the markets and behaviours in question and the data and investigative techniques available.

For example, the most probative evidence may be one or a combination of the following:

- A small number of markets may be characterised by well documented time series price data straddling periods replete with: “natural experiments” allowing econometric analysis.
- In other cases, evidence from witnesses in competing businesses may provide extensive evidence concerning competitors capacity constraints and cost structures that can found a strong basis for competitive analysis.
- In a further cases, the most compelling evidence may be found in the internal documents of the accused business in which experienced business people have evidenced confident conclusions as to their intentions and ability to achieve anticompetitive outcomes.

To pursue the most economically damaging conduct in the most efficient fashion, professional competition investigators need to use their professional judgment to apply the most appropriate techniques using the best available information to the case before them.

4.6. Enforcement record and approach

The VCA is an agency “under” the MoIT and as such it is perceived as being a relatively junior administrative agency subject to influence by a ministry that is

the shareholder of many significant SOEs (see below section 6.2.1). It was responsible for antidumping matters, consumer protection, unfair competition and restrictive competition cases. The new VCCA has the similar features, but has only competition and consumer protection functions.

Restrictive competition cases can be initiated by a complainant if they provide a form that is fully particularised, signed or finger-printed and accompanied by the filing fee which is currently VND 100 million. The VCCA has no discretion to reject a properly substantiated filing. Alternatively, the VCCA can act on its own motion or on information provided by informants.

The VCCA distinguishes between “pre-litigation” inquiries; initial investigations; and full investigations.

The “pre-litigation” stage is an informal scoping exercise used to establish whether there is a sufficient indication of an issue that the Director General can be satisfied warrants an initial investigation or full investigation.

One issue that has undermined the level of effective enforcement is that to date some parties have evaded investigation on the basis that anticompetitive agreements were entered into outside Viet Nam.

Next, on paper, the VCCA has “dawn raid” powers to compulsorily obtain evidence but these powers can only be used after the accused has been informed of the allegation against them. It is not surprising, therefore, that the VCA has never sought to use these powers.

There are also currently provisions that impose unrealistic deadlines on investigations.

At the conclusion of a VCCA investigation, the VCCA sends an extensive dossier of evidence to the VCC for decision. Reasonably frequently, the VCC has sent dossiers back to the VCCA’s predecessor, the VCA requiring a second or third investigation to take place.

The VCC is comprised of 11 part time Council members and there have been two major rounds of appointments since the 2004 Competition Law took effect. First instance determinations are made by a panel of five (or seven) members and appeal decisions are made by the full bench of 11 members.

Despite the severe institutional weaknesses (see below Section 6.3), the VCC has made a range of decisions imposing sanctions or requiring corrective action even when the VCC's panel includes appointees from agencies that own the shares in accused SOEs. The VCC has made two penalty decisions and several other cases were resolved with commitments, in some cases with the consent of the complainant and in other cases over opposition from the complainant.

In the only abuse of monopoly case, the defendant appealed to the provincial and supreme courts.

Statistics concerning restrictive competition cases are as follows:

Table 2. Statistics concerning restrictive competition cases

	2006	2007	2008	2009	2010	2011	2012	2013	2014	2015
VCA Initial investigation	5	3	7	7	10	10	14	12	10	5
VCA investigation	0	1	1	1	1	2	1	0	1	0
VCC Decision	0	0	0	1	2	0	0	1	1	0
VCC Sanction	0	0	0	1	1	0	0	0	0	0
Provincial Court Appeal ²⁹	0	0	0	0	1	0	0	0	0	0
Supreme Court Appeal	0	0	0	0	0	1	0	0	0	0

Source: VCA

Private enforcement has also been extremely limited. There is ambiguity as to whether the Civil Code provisions that enable private litigation require that there is a determination by the VCC that there has been a breach before a private action can be brought or whether “stand-alone” action can be brought. Nevertheless the OECD is aware of one stand-alone private litigation case

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This statistic concerns substantive determinations of appeals. There has also been a case dismissed by the HCM City provincial court brought by a complainant against a decision by the Vietnamese Competition Council to suspend an investigation but this appeal was dismissed on procedural grounds prior to hearing.

reported in 2010 that concerned an agreement between photo printing management agency and an exclusively appointed photo printing services provider in Chau Doc District in An Giang Province. According to the report, the three other printing services providers took court action against the management agency. Although the District Court decided that the agreement did not violate the competition law, the Provincial Court disagreed, finding a violation and awarding damages of VND 300 million.³⁰

Further evidence of a low level of deterrence and compliance exists.

After the law had been in operation for seven years, the VCA conducted a broad survey concerning awareness of competition law. The survey covered the country's two principal cities; small and large enterprises; SOEs and private sector entities; and legal advisors. The results were published on the VCA's website in 2013.

More than half of the businesses surveyed reported that they understood competition law only "a little". When asked what kinds of conduct is addressed by the competition law, a small majority of respondents were able to identify abuse of dominance and unfair competition. A minority of respondents realised that the law also deals with agreements that restrict competition and only a small minority are aware that it applies in the context of mergers and acquisitions.

Fewer than one third of the businesses surveyed had an internal compliance programme and an even fewer had adjusted their business activities to ensure compliance with the competition law.

Amongst the respondents, the VCA was best known for its antidumping work rather than its competition law enforcement work. A number of respondents were able to correctly name a company that had been found to have infringed the competition law but a not insignificant number of respondents incorrectly identified the victim of the Vinapco case as its perpetrator.

The survey also shed light on other issues that affect the effectiveness of the 2004 Competition Law. For example, as discussed above, market shares form a central role in relation to the prohibitions against anticompetitive agreements,

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<http://plo.vn/thoi-su/doc-quyen-rua-anh-359555.html>.

abuse of dominance and mergers. Significant numbers of businesses responded that:

- The challenge of being able to substantiate the market shares required makes it difficult to file a complaint (56.8% of businesses);
- The market share requirements mean that important types of conduct that are actually damaging to competition is not illegal (48.8% of businesses); and
- In other cases conduct is prohibited on the basis of market shares when in fact there is no competitive harm (29.0%).

The VCA and VCC have published records of their key matters – usually no more than a single printed page of information for each case. The examples very usefully record the key facts – both concerning the conduct at issue and the investigative and decision making process. However, the agencies do not publish their reasoning as to how they have applied the law to the facts. In cases in which the investigation has revealed facts falling within ‘per se’ prohibitions, or prohibitions that apply based on market share tests, this form of reporting provides the community with a good level of transparency which can assist in facilitating the provision of legal advice and in enabling the business community to comply with the law.

On the other hand, where the relevant prohibition involves the application of discretion or analysis (such as in the Vinapco abuse of dominance case), not disclosing the detailed facts and agency reasoning means that the community lacks transparency and the level of compliance is likely to suffer.

A more significant issue concerns access to Court decisions. The Courts have considered competition law cases on at least three occasions but the decisions are not widely available. While the Ministry of Justice considers that the agencies are permitted to make the Court decisions available upon request, the authorities themselves are unclear on whether or not they should release a copy of the decisions and publication certainly does not occur.³¹ In future this should not be an issue if reforms discussed below making court decisions publically available are maintained and improved.

³¹ This issue is discussed further in section 7.4 below.

4.7. Interaction with other agencies and laws

Viet Nam has a history of administrative control by the government in markets and this has not ceased since the 2004 Competition Law took effect. Typical examples of the sorts of administrative intervention that occurs are as follows.

A number of years ago, the price of eggs charged by a multitude of competing farmers in a particular province rose sharply for no apparent reason. Before any significant VCA investigation could be commenced, the Ministry of Agriculture intervened and directed the farmers in question to reduce their prices to their former level. Similar directions are given by a broad range of ministries within their fields of responsibility. At first sight this might appear to be a swifter solution than a drawn-out competition law investigation.

However, such administrative control has significant downsides. Firstly, it is quite possible that further efficiencies and price reductions may be possible but only competition will deliver an equilibrium in which the producers are adequately rewarded to encourage investments yet not over-rewarded. Secondly, such centralised price setting tends to be at a level that enables all the producers to recoup their costs and survive and it does not drive inefficient producers out of the market. Thirdly, it is likely that the need for administrative intervention will re-emerge each time there is a change to market conditions.

Another typical form of administrative intervention is almost the reverse of the above situation. A case³² in which the three main phone companies substantially increased their charges on the same morning in 2013. The matter was referred to the VCA for investigation and it said that the price increases were done in accordance with a government decree issued in July 2012. The companies had submitted proposals for price increases to the Ministry for Communications who had then approved the proposals and approved the price rises. It is worth noting that the three main telephone companies are SOEs, two of which are owned by the Ministry for Communications and one by the Ministry for Defence. Not surprisingly the operators each decided to raise their prices.

A more explicit issue arises in relation to the provisions of industry specific legislation. A 2014 report by VCA and JICA identified 30 sectoral laws that

³² Thanhnnien News 31 December 2013, “Vietnam authorities call 3G fee hike legal”.

contained competition related provisions many of which are not consistent with competition policy and the 2004 Competition Law. At least the following problems arise with respect to such inconsistencies:

- confusion about what substantive standard businesses operating in these sectors are expected to adhere to;
- confusion as to which authority should take carriage where similar issues arise under different laws;
- the potential for duplicated investigatory effort;
- the potential for one law to explicitly undermine the achievement of the other – for example, a leniency policy that only exempts reporting entities from the civil prohibitions under the general competition law will not work effectively if the reporting entities face liability under sector specific competition law prohibitions; and
- businesses may be exposed to double jeopardy or be able to escape liability on the basis that they were investigated and cleared, or investigated and sanctioned in only a mild way, under a substantially similar test in sectoral legislation.

The three common ways in which other countries provide for competition law issues in relation to regulated sectors are as follows:

- Only the general competition agency has jurisdiction over competition law matters and a sector specific competition agency has other sector specific regulatory powers;
- The competition agency and the sector specific agencies have concurrent authority to enforce a single competition law standard and there are arrangements in place between them to decide which of them handles any given case; or
- There is a ‘demarcation’ in the law such that only the sector specific agency and not the general competition agency has competence to enforce competition related prohibitions.

In choosing between which of the above is most suitable for Viet Nam, one factor to consider is that there is clearly a problem of actual (or perceived) conflicts of interest between ministries that are both shareholders in major SOEs operating in the same sectors for which they are responsible for regulation. Even a perceived conflict of interest can discourage investment by private competitors.

Such actual or perceived conflicts should therefore be avoided. One way to do so is to have an independent competition regulator take responsibility for all competition regulation.

On the other hand, sectoral legislation may need to supplement general competition law prohibitions – for example, in the telecommunications sector, the need for any-to-any connectivity implies the need for a regulatory mechanism to resolve interconnection disputes.

Recommendation 4.1:

Arrangements should be put in place to: (i) harmonise the substantive requirements across the different laws that have competition provisions, (ii) 'direct traffic' in relation to which agency is to undertake investigations and (iii) ensure that the leniency policy will provide immunity from competition law prohibitions in sectoral legislation.

Recommendation 4.2:

Additionally, Viet Nam could consider shifting all prohibitions against anticompetitive agreements, abuse of dominance and merger control to the competition agency and repeal competition law prohibitions in sector specific legislation.

4.8. Private actions

The United States is the best-known jurisdiction for the private enforcement of competition law owing to the treble damages system, its discovery processes and the prevalence of class actions. Nevertheless, private action also plays a more limited, yet still important, role in other countries. Depending on the jurisdiction concerned, private action can:

- Enable private parties to obtain compensation or damages that contributes to restoring their incentives to invest especially when a party seeks to enter a market with a dominant incumbent.
- Reduce the burden on public enforcement resources and/or increase the over-all level of enforcement where public funds are limited.

- Enables a form of accountability where a private litigant can itself take a case that a public enforcement agency has failed to recognise is important (or even when an enforcement agency is intimidated or conflicted from taking action).
- Provide for judicial consideration of competition law even when there are cultural or other barriers that strongly discourage entities from appealing from the decisions of competition authorities.

Most common law countries have specific provisions to enable private parties to take action against breaches of the competition law and provisions that assist litigants with discovery. Important private action cases have been brought using such provisions in Australia, the United Kingdom and Canada.

By contrast, most civil countries have general provisions in their civil law that entitle private parties to sue for compensation against a person who breaches a prohibitions found in other laws generally, including breaches of competition law and no framework for discovery. Important private action cases have been taken using such provisions in countries as diverse as Germany, Indonesia and People’s Republic of China (hereafter ‘China’).

In Viet Nam, the latter exists, although it appears not to have been used for the private enforcement of competition law.

The European Union also recognised an implicit right for private action in Member State courts based on what is today the Treaty on the Functioning of the European Union. More recently, the European Union has recognised that the right to take private action can be significantly curtailed in practice if other machinery provisions are not in place such as the ability to obtain discovery, leading it to pass a Directive that is primarily directed at ensuring that these ancillary mechanisms exist.

Even though it is perhaps unlikely that there would be a great deal of private action (particularly in the short term), Viet Nam could benefit from a more explicit legal recognition that private action to enforce competition law. This could assist in a number of respects such as:

- enabling enforcement action beyond the very limited resources of the public agencies;

- providing a “safety valve” for private parties who might perceive (rightly or wrongly) that even after an independent agency is established, it might be reluctant to take action against large SOEs; and
- providing a right to compensation that would tend to redress the disincentive that might otherwise exist for potential entrants to attempt to enter markets that are currently dominated by SOEs. Note that a right to obtain redress is quite different from a discretionary ability for an authority to order compensation in terms of redressing the disincentive for entrants to invest.

For such a mechanism to be (fully) effective, it would be advisable to provide for private litigants to be able to apply to a court for an order requiring the defendant to make the key evidence necessary to determine whether or not they are liable available (i.e. discovery).

Recommendation 4.3:

Viet Nam should consider providing an explicit recognition that private litigants can take action to enforce the competition law to seek compensation for the consequences of breaches of the competition law both:

1. following a finding of breach by the NCC under the civil law or after a Penal Code prosecution; and
2. on a stand-alone basis even when the public enforcement agencies have not investigated or found there to have been a breach.

Such a provision would also be accompanied by a provision that enables complainants with a reasonable *prima face* complaint to obtain access to evidence.

Recommendation 4.4

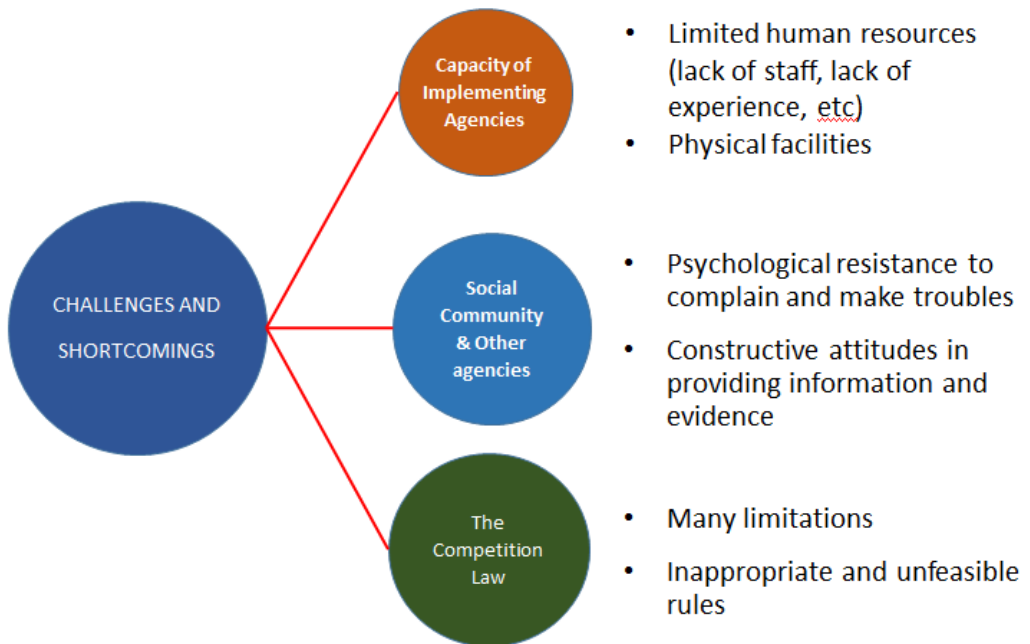
Special care should be afforded to leniency applicants to ensure that they are not worse off in private damage actions than companies that decided not to co-operate, whilst at the same time not absolving them of their civil liability for damages caused by their anti-competitive conduct. Fostering a private enforcement regime should reinforce a strong and effective public enforcement system and not serve to undermine it.

4.9. Summary of problems with the current 2004 Competition Law

As noted above, there have been very few cases that have reached the final stage in which a penalty has been imposed. Indeed the number of concluded cases and the low aggregate quantum of penalties imposed is unlikely to have resulted in an optimal level of deterrence.

Several years after the survey, at the time of the tenth anniversary of the 2004 Competition Law, a representative of the competition law enforcement division gave a presentation that included the following slide concerning the limitation of the current arrangements:

Figure 1.



Based on the matters discussed in the preceding sections of the report, and thus not considering the institutional issues discussed in Section 6.2 below, the

key problems with the current 2004 competition law concern can be summarised 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 anticompetitive agreements;
- most ‘hard core’ cartels are subject to inappropriate and difficult to establish market share requirements;
- the provisions of the 2004 Competition Law are not consistent with the competition law provisions in sector specific laws;
- the 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 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.

The proposed law would address a number of these issues, but not all of them.

5. The Current Unfair Competition Law Framework

The 2004 Competition Law also contains 10 ‘unfair competition’ prohibitions that are not amongst the core competition law prohibitions found in competition laws around the world:

- misleading conduct concerning the branding, logos, business names and packaging of the supplier (sometimes called “passing off” in other countries) or the geographical origin of the goods;
- accessing or collecting competitors’ business secrets without authority or using such illegally obtained secrets to further their own business objectives;
- coercive business conduct vis a vis consumers or suppliers;
- defamation of another business by making untruthful representations about that business;
- causing disruption to another business by hindering or interrupting its lawful business activities;
- comparative advertising (whether or not truthful), imitating another business or providing false or misleading information to customers about the enterprise’s own products;
- making false representations concerning prizes and promotions, or discriminating between customers in different promotional areas within the same promotional campaign;
- discrimination by business associations;
- illegal multi-level selling (sometimes called pyramid selling in other countries); and
- other unfair competitive practices identified by the Government pursuant to clause 4 of article 3 of the Law.

Items 1, 4 and 6 above satisfy Viet Nam’s obligations under Article 10bis of the 1883 Paris Convention for the Protection of Intellectual Property concerning “unfair competition” to which it originally acceded in 1949. Under this Article, signatory countries agree to assure nationals of convention countries are protected from:

“Any act of competition contrary to honest practices in industrial or commercial matters”.

Specifically, the following must be prohibited:

“(i) all acts of such a nature as to create confusion by any means whatever with the establishment, the goods, or the industrial or commercial activities, of a competitor;

(ii) false allegations in the course of trade of such a nature as to discredit the establishment, the goods, or the industrial or commercial activities, of a competitor;

(iii) indications or allegations the use of which in the course of trade is liable to mislead the public as to the nature, the manufacturing process, the characteristics, the suitability for their purpose, or the quantity, of the goods.”

The Convention leaves it to individual countries to determine how the provisions should be implemented and enforced.

The provisions in the Vietnamese law extend considerably further than the core provisions needed to satisfy Article 10bis of the Convention and but each of the prohibitions can be found in the laws of other countries.

The VCCA is both investigator and the agency that determines liability and the nature of the remedies. The VCCA currently has seven full time front line investigators working in this field. Indeed the VCCA has taken many more cases in this field than in the field of the prohibitions against restrictive competitive practices.

The VCCA considers multi-level marketing, in particular, to be a priority area for law enforcement. Multi-level marketing is a rather “special” form of conduct damaging to society because it generally involves tricking consumers into thinking that they could build successful micro-businesses only to find that the profitability is dependent on bringing in an ever expanding wave of new recruits to the system rather than undertaking socially useful supply of goods and services. As such, it could be regarded as a consumer protection issue masquerading as a business-to-business issue.

By comparison, to the Vietnamese position, in France items (1), (4) and some aspects of (6) above are also prohibited in France and commonly referred to as “concurrency deloyale” (unfair competition), although that term itself is not

defined in the law and extends to include other concepts (such as gaining a competitive advantage by not respecting labour laws or the other requirements of lawfully engaging in business). It is important to note that these prohibitions are enforced in the civil courts by the businesses that suffer from the conduct not by the competition authorities.³³

In Australia and New Zealand and Items (i), (iii), (iv), (vi - but only where the representations are misleading), (vii) and (ix) are prohibited. These prohibitions appear in the consumer protection statutes although the victims of the conduct need not be consumers. Both private entities and the authorities (i.e. ACCC and NZCC) have concurrent jurisdiction to enforce these provisions, the ACCC and NZCC, in cases where the victim is a well resourced commercial entity they would generally leave the matter to private litigation.

There is no doubt that some of these prohibitions are in the public interest – although at least the social utility of the prohibition of truthful comparative advertising is questionable. However, there are three key questions that arise:

- Should these prohibitions be enforced solely (or primarily) as an inter-parties business-to-business issue or by the law public law enforcement authorities?
- If the public enforcement agencies are to be involved, should these prohibitions be addressed as part of the restrictive competition enforcement system, the consumer protection system, the intellectual property system or their own system?
- If the public enforcement agencies are to be involved, what level of enforcement attention should these activities be given compared with consumer protection and restrictive competition provisions especially given the limited resources available in a developing country?

6. Proposed new competition law

Since 2014 the VCCA has been involved in significant law reform efforts and a draft law is expected to be submitted to the National Assembly in October 2017. During the period that this report, was being prepared five drafts of a

³³

De la direction régionale des entreprises, de la concurrence, de la consommation, du travail et de l'emploi 2016 “*Chefs d'entreprise, la concurrence déloyale : c'est votre affaire*”.

proposed new law where prepared by an inter-agency drafting committee before a proposal was submitted to the National Assembly. The OECD understands that the National Assembly may be working on a further set of amendments.

The primary themes that all the drafts address are as follows:

- reform the substantive provisions concerning anticompetitive agreements, abuse of dominance and merger control;
- provide for leniency and more effective “dawn raid” powers; and
- provide that a competition authority merging the VCCA and VCC (see Section 6.2.4 below).

This section discusses each the substantive provisions (section 6.1) and detection and investigation provisions (section 6.2). The institutional provisions are discussed in section 7.6.

6.1. Substantive provisions

6.1.1. The prohibition against anticompetitive agreements

With respect to the prohibitions against anticompetitive agreements, the proposals would:

- remove the 30% market share requirement for hard core cartel conduct and other anticompetitive agreements (a consistent theme in all drafts); and
- introduce a “catch all” prohibition against agreements that “causes or can cause anticompetitive effects on the market” (which has been proposed in some drafts and not others).

Both of these reforms would be considerable improvements to the 2004 Competition Law.

However, the provisions would maintain the current wording that makes exclusive dealing ‘per se’ illegal. This is not to be recommended because exclusive dealing can constitute pro-competitive conduct where “vertical partnerships” promote inter-brand competition.

Further, the proposed new law would not reform Articles 217 and 222 of the Penal Code that would retain the current wording from the 2004 law.

Recommendation 6.1:

Hard core cartel conduct (i.e. price fixing, market sharing and agreements to limit capacity) is inherently harmful and should be illegal regardless of what proportion of the market is affected. In other words, the cartel prohibitions in both the Competition Law and the Penal Code should not be subject to a 30% market share requirement.

Recommendation 6.2:

Exclusive dealing should be removed from the list of ‘per se’ illegality and should only be illegal if it substantially lessens competition.

Recommendation 6.3:

A “catch all” prohibition should be enacted that prohibits any agreements that have a substantial anticompetitive effect.

Recommendation 6.4:

The NCC should have an effective compulsory inspections power (i.e. “dawn raid” power). This means that it should be able to enter, unannounced, the premises of those being investigated to search and seize relevant evidence, regardless of its format. There needs to be a balance between having a degree of procedural safeguards (e.g. the requirement to seek judicial authority or warrant) without the requirements being too burdensome for the NCC as to diminish the efficacy of such investigation powers.

Recommendation 6.5:

The law should provide for a leniency policy including complete immunity for the first party to report a cartel. The principal legislation should provide a solid legislative basis for the immunity but the details of the programme should be set out in subordinate regulations that can be drafted, adopted and adjusted over time with experience by the NCC or the government without the need to return to the National Assembly for new legislation concerning those details.

Recommendation 6.6:

Importantly, there needs to be a parallel reform to the Penal Code (or some other kind of mechanism such as an arrangement between the NCC and Procurate) by which a party who reports a cartel would clearly *neither* be exposed to penalty under the competition law *nor* the competition provisions of the Penal Code.

6.1.2. *The prohibitions against unilateral conduct*

The proposals would:

- remove the distinction between abuse of monopoly and abuse of dominance; proposed in some drafts and not others); and
- introduce a “catch all” prohibition as follows: “other acts of abuse of a dominant position that cause or can cause substantial anti-competitive effects on the market” (proposed in earlier drafts but according to information received from the vietnamese authorities not in the draft currently before the National Assembly).

Both of these reforms would constitute a clear step forward harmonization with international standards.

However, the “catch all” provision proposed in earlier drafts needs to be reinstated in the final text and the following issues with the existing law should also be remedied:

- it would still be the case that an operator with a 30% market share is conclusively deemed to be dominant and would be unable to provide evidence to the contrary and in some proposed drafts of the new law this would be exacerbated by additional provisions that would conclusively deem two-firm, three-firm and even four-firm dominance at particular market share thresholds; and
- certain conduct by dominant firms would remain “per se” illegal such as discriminatory pricing.

While rebuttable market share presumptions can be helpful especially in a developing country, conclusive deeming a firm (for firms) to be dominant merely because it has, or they together have, a particular market share is not to be recommended. It can cause a strong disincentive for such a firm to engage in pro-competitive activities.

Further, one aspect of the new drafting is a retrograde step: in many cases the specific prohibitions in the 2004 Competition Law are qualified by including some form of competition test. For example, Clause 2 of Article 13 currently provides that the following is unlawful conduct by a dominant firm:

“Fixing an unreasonable selling or purchasing price or fixing a minimum re-selling price for goods or services thereby causing loss to consumers.” (emphasis added).

By contrast, the draft law omits the concept of consumer harm:

“Fixing an unreasonable selling or purchasing price or fixing a minimum re-selling price for goods or services.”

Recommendation 6.7:

Detailed consideration should be given to whether the abuse of monopoly prohibitions should be removed so that the abuse of dominance prohibitions would be the only prohibitions concerning unilateral conduct. The concept of abuse of dominance is one that has been extensively debated and honed in most major countries around the world. The additional abuse of monopoly concept is not recognised in other countries and there does not seem to be a unique Vietnamese rationale for having such an additional prohibition.

The market share threshold for dominance should be higher than 30%, possibly a more appropriate benchmark may be 50% (such as, for example, in the case of the European courts that have set a rebuttable presumption that market shares above 50% amount to dominance).

This market share threshold should be a rebuttable presumption and thus the law should provide a clear avenue for firms that have more than the threshold to be able to demonstrate that they are not in fact dominant.

Recommendation 6.8:

All of the specifically listed forms of prohibited conduct by dominant firms should have a consistent element of competitive harm (such as, for example, selling goods or providing services below the total prime cost of the goods aimed at excluding equally efficient rivals to the detriment of consumers”).

Recommendation 6.9:

There should also be a “catch all” provision whereby any other forms of conduct that involves exclusionary and harmful abuse should also be prohibited.

6.1.3. Controlling economic concentration

The proposals would:

- from Draft 5 onwards, provide that notification would change from the current market share threshold of 30% to pecuniary thresholds applying to turnover, asset values or transaction values; and
- concentrations would be prohibited if it “causes, or may cause, a significant restriction of competition in a Vietnamese market without a sufficient measure to overcome the actual or potential restrictive effect”.

The above changes would be marked improvements compared with the existing law. It should contribute to the following improvements:

- non-harmful concentrations in which the entities gain a greater than 50% market share would now be permitted;
- harmful concentrations that trigger the pecuniary thresholds will be prohibited even if the resulting entity does not obtain a 50% market share; and
- the temptation not to file mergers because of the rigidities of the 50% threshold should be removed.

Further, the resource implications of the changes should be considered. Compulsory concentration filing regimes in wealthy jurisdictions such as the United States, the European Union/European Economic Area and some European Member States do not seem to pose significant resourcing challenges. On the other hand, China and India have found it challenging to give a full and swift response to the workload that compulsory filing generates.

Other small, and therefore resource constrained, countries such as Singapore and New Zealand and larger countries such as Australia and the United Kingdom have preferred a voluntary (i.e. self-assessment) system to be preferable for them in meeting the resource implications of a merger administration system. Of course, a self-assessment system is only effective if there are strong incentives to make responsible self-assessments. These incentives must generally include strong divestiture and/or penalty provisions where anticompetitive concentrations are consummated without filing and obtaining approval.

Alternatively, Viet Nam would be wise to consider strategies to quickly identify concentrations that are unlikely to pose any potential harm from those

that warrant a substantive investigation. For example, MOFCOM in China implemented a fast track process for mergers that are unlikely to pose a problem in order to reduce its workload. Viet Nam could consider doing likewise.

A further option is available based on its co-operation with other countries. Viet Nam could consider instituting a “short form” notification with a slightly reduced filing fee for global or international concentrations where the parties:

- identify another country’s competition agency to whom they have notified the transaction (say the US, Europe, Australia, New Zealand, Japan, Korea or an ASEAN jurisdiction);
- they provide a statement explaining why the effects in Viet Nam are unlikely to be different from the facts in the other country;
- they execute a standard form waiver to permit the Vietnamese authority to discuss the matter with the other country’s agency; and
- they undertake not to consummate the concentration without first obtaining approval from the other country’s competition agency and providing a copy of the approval to Viet Nam’s competition authority.

The above approach could, over time, both reduce the level of resources expended by the authority and provide a ‘no obligations’ way for the Vietnamese authority to engage with, and benefit from, the experience and resources of agencies from larger or more wealthy countries. It could also contribute to a ‘business / investment friendly’ regime that would not significantly diminish the effectiveness of the merger test.

Recommendation 6.10:

The merger filing thresholds should be based solely on revenue and/or transaction value thresholds.

The decision whether to approve or prevent a merger should not be whether or not a particular market share threshold is reached. Rather it should be whether the mergers would substantially lessen competition.

Recommendation 6.11:

The law should require that the Vietnamese Competition Authority publish guidelines illustrating how the authority will implement the provisions and the approach described should adhere to international merger administration standards.

6.1.4. The “ghosts” of Decree 116

In a number of the proposals for a new law, many provisions from the former Decree 116 would be elevated to the law itself or enable a new such decree to be promulgated. In particular the some drafts would include:

- provisions that prescribe in considerable detail how market definitions and market shares should be established;
- extensive provisions detailing the role of all parties in investigations and how investigations must be performed; and
- a provision to the effect that “The Government shall prescribe details of this Article” in relation to the prohibition against anticompetitive agreements.

For the reasons discussed above, with one exception, excessive prescription in the detail of how competition investigations and analysis proceed should be avoided. Rather, should further detail be appropriate, this should be included in explanatory guidelines rather than subordinate legislation (see below in Section 6.2.4).

The exception concerns the leniency policy discussed below.

Recommendation 6.12:

Viet Nam should move towards providing the competition authority with greater flexibility and autonomy in how it conducts investigations, what information it seeks and uses and how it conducts analysis in competition law enforcement matters. In passing a new law, none of the current provisions of Decree 116 should be “hard wired” or set out in the principal law and the equivalent of Decree 116 should provide additional investigatory and analytical autonomy to the competition authority. Wherever possible the substantive content of Decree 116 (for example on how to arrive at the appropriate market definition) should appear in a non-

binding descriptive guideline published by the authority rather than a mandatory direction to the authority. The equivalent of Decree 116 should be reviewed each five years with a view to further reducing prescription as a body of case precedent develops to provide guidance on the exercise of discretion.

To the extent that it is necessary to have a new decree of this sort, care should be taken to consult with all relevant stake-holders (the national competition authority, the business community, consumer organisations and the legal profession) to avoid the ambiguities that exist in the current decree.

6.2. Detection and investigations

The proposed new law would provide for a leniency policy. The provision is broad enough to provide for complete immunity (which would be appropriate for the first party only) or a “discount” for co-operation.

This is a very important reform that has the potential to substantially improve the ability of the competition authority to investigate cartel matters in particular.

However, such a policy is only be effective if:

- the over-all level of enforcement both by number of cases and quantum of penalty is substantially increased so that immunity is of meaningful value because the time and legal expenses of self-reporting (and perhaps foregoing the profits earned from illegal conduct) are costly and the benefit of self-reporting needs to outweigh the costs; and
- considerable further detail is promulgated in subordinate legislation because time and time again competition enforcement agencies have found that self-reporting is unlikely unless a very high level of written assurance is available that the informant will face no penalty at all (or if an investigation is on foot already that they will obtain a concrete/measurable advantage from co-operating).

Further, there is almost no prospect of the policy achieving any meaningful difference unless equivalent protection for informants is provided in relation to the Penal Code provisions in Articles 217 and 222. It would make no sense whatsoever for an informant to self-report only to expose themselves to jail terms of up to 20 years.

Some countries have been able to achieve this result through a Memorandum of Understanding or Joint Policy between the competition authority and the prosecutor. In many countries no explicit legislation is required for such arrangements to be put in place because the prosecutor already has the necessary powers but in other countries legislation is required.

Further, there should be reforms to the deadlines for investigations and to the jurisdictional nexus to avoid parties evading the law by engaging in anticompetitive conduct outside Viet Nam where the effects arise within Viet Nam.

Recommendation 6.13:

If the competition law (or an implementing decree) contains a deadline for the national competition authority to make a determination, there should be a “clock stopper” where an alleged perpetrator has failed to provide information needed for the investigation within the timeframe required for the production of that information.

Recommendation 6.14:

To combat circumvention, the Vietnamese competition law should apply to any conduct that has a material effect on the Vietnamese market regardless of where the business actors are domiciled or whether they may travel to engage in anticompetitive conduct.

7. Institutional reform: enforcement structures

This section discusses issues that have arisen with the current institutional arrangements. Recommendations arising from these issues are discussed in section 7.5.

7.1. Existing competition policy institutions

Viet Nam like many jurisdictions in Asia (e.g., China, Japan, Korea, Indonesia, Singapore) has adopted an administrative model of enforcement, whereby it is a competition authority that investigates allegations, and also a competition authority and not a court that makes a decision on whether or not there was a breach of the law and, generally, determines the applicable sanction,

if any. In such a model courts function as review bodies of competition cases decided by competition authorities or regulators. Viet Nam has adopted however, a variant of this administrative model as it has a two-stage two-agency system in place, or a bifurcated agency model, with an investigative agency and an adjudicative agency.

This model was expected to help to establish trust in the fairness of the competition decision, in particular given that the competition authority was placed within MoIT. It was at the time considered that establishing a specialised body would help to ensure fairness of the process and develop the know-how and expertise within the adjudicating agency that would be more effective as it would also limit the resource intensity of going to courts for every case.

When Viet Nam's current law was initially drafted, France³⁴, the UK³⁵ and Brazil also had a two-stage administrative enforcement system for restraints of competition cases but these three countries have since adopted a single agency model. The single-agency or integrated agency model is also common across Asia (e.g. Japan, Korea, Indonesia, Malaysia, Singapore) and it is now proposed that Viet Nam adopt that model too.

³⁴ In France a major reform was implemented by the Modernisation of the Economy Act 2008-776 ("LME") of 4 August 2008, a short time later supplemented by Ordinance no. 2008-1161 of 13 November 2008 on the modernisation of competition regulation. According to the French 2014 submission to the OECD Roundtable on Changes in Institutional Design of Competition Authorities ([DAF/COMP/WD\(2014\)104](#)), the new body that was created with the reform of 2008 "brought an end to the two-pillar system that had prevailed since the origin of competition regulation in France and led to a major improvement in quality in terms of independence, extending the Autorité's powers while also strengthening its responsibility".

³⁵ In 2011 the UK Government commenced a programme of wide-ranging reforms to the competition, consumer protection and consumer credit regimes that included the transition of the Office of Fair Trading's (OFT) and Competition Commission's (CC) functions to a range of successor organisations, including the competition functions of the CC and the OFT to the Competition and Markets Authority (CMA). When undertaking its analysis the UK identified many efficiencies and synergies stemming from the new system, of one agency – these include in the case of merger control continuity of case team members and timing efficiencies (Summary of Discussion of OECD Roundtable on Changes in Institutional Design of Competition Authorities, p.12).

The two bodies responsible for the application of the VCL are the VCA and the VCC. For restraint of competition cases (for which a punitive fine can be imposed), the VCCA is responsible for the detection, investigation and collection of evidence and, where it considers that there is sufficient evidence of a contravention of the law, it sends the case file for the VCC for decision on liability and what penalties or other remedies to impose. The VCC takes decisions via the establishment of panels composed of at least five members and parties can trigger a review of those decisions to the full VCC.

The VCCA is also responsible for assessing requests for exemptions eligibility to and submitting recommendations concerning these requests for decision by the MoIT or the Prime Minister (depending on which exemptions is applied for)³⁶.

In unfair competition cases (for which lower-level administrative fines can be imposed), the VCCA is responsible for detection, investigation, the determination of liability and what remedies to impose.

Regarding the VCCA, and in institutional terms it is a Department³⁷ established under MoIT, the ministry which is responsible for industrial policy in Viet Nam.

The internal organisation of the VCCA is determined by the Minister of the MoIT. The VCCA's Director General is appointed by the Prime Minister upon the recommendation of the MoIT. Being part of the ministry (MoIT) the VCCA depends on the ministry directly for its budget. The VCCA had a budget in 2017 of approximately EUR 720,000 that the VCCA inherited upon its formation on 18 August 2017. In future years, the VCCA would have less than this amount (accounting for the split of functions) unless there is policy decision to increase the level funding for competition law enforcement activities.

Since its inception, the VCA steadily grew in staff numbers from approximately 60 persons to approximately 110 persons before the de-merger

³⁶ See Decision No 848/QD-BCT of 5th January, 2013 of the MoIT.

³⁷ It is formally the Viet Nam Competition Administration Department, although by MoIT decree No.: 848 / QD-BCT.

Hanoi, February 5, 2013 its English name was Viet Nam Competition Authority until the de-merger and creation of the VCCA.

between the VCCA and the VTRA. The current breakdown of the VCCA's 43 staff by function is as follows:

- 1 Acting Director General;
- 25 staff dedicated to competition work of which:
 - 18 are 'front line' staff responsible for competition functions (7 in the Unfair Conduct Division, 5 in the Anticompetitive Division and 6 in the Economic Concentration Division);
 - 7 support staff; and
- 14 staff are dedicated to consumer protection (front line and support); and
- 3 staff in the HCMC regional office supporting both competition and consumer protection functions.

The VCC is a separate body from the VCCA and its charter set out the VCC's status as an independent executive body that is organically separate from the MoIT.

The VCC is primarily responsible for hearing and adjudicating cases in restraints of competition cases³⁸. More specifically, the VCC has the following powers and responsibilities³⁹: (a) Imposing fines and dealing with breaches of the competition-restricting acts provisions of the VCL; (b) requiring organizations and individuals involved to supply information and data necessary for the Council to carry out its assigned duties; (c) resolving complaints regarding decisions made by the Competition Council (from the five member panel). Like the VCCA, the VCC has no powers to promulgate regulations or guidelines that may provide further guidance on how the VCL may be applied in practice.

Like the VCCA, it is also reliant on the MoIT for its budget, and its internal organisation must be approved by the same ministry. The board of the VCC is composed of 11 to 15 part-time members (including a Chair) appointed and dismissed by the Prime Minister, upon recommendation of the MoIT. There are no limits in law to the Prime Minister's power to remove the Council Members.

³⁸ Articles 2 and 3 of Decree 05/2006/ND-CP, of 9 January 2006.

³⁹ Decree No.07/2015/ND-CP of 16 January, 2015.

Currently, there are 11 members of the Council, three of which were appointed from the MoIT and the remaining members are drawn from other ministries, such as the MoIT, Ministry of Justice, Ministry of Finance. Previously, there have been VCC members appointed from outside government – for example from academia – but that is not the case at present. The VCC members are appointed for 5 year terms (renewable).

VCC members are not explicitly paid for the work they do in that capacity; rather their remuneration costs are met by the ministry from which they are appointed. The Council members are currently supported by a secretariat which currently has 9 staff members. A broad variety of stakeholders have expressed the view that there has been a low level of commitment by some of these members to their role at the VCC because their primary duties are to their line ministries and they are unpaid.

This set-up suggests a deep dependence on the MoIT, structural, operational, organisational and financial, which is also the generalised perception amongst the business community and wider stakeholders, and is given as one of the main reasons for the ineffectiveness of the current system (see below 7.2. Assessment of current institutional framework). It also causes tension between the non-MoIT members of the VCC and the ministries that appoint them in two ways: first, the VCC may be called upon to take decisions that are not supported by the home ministries or the SOEs they own and second the “home” ministries pay the salary of those members.

7.2. Assessment of current institutional framework

7.2.1. Independence

There is wide recognition within the international community that agency independence from political power is a key element of an effective competition regime (OECD 2016)⁴⁰. In this context independence means that the authority is free from external influence and bases its decisions of starting investigations or applying and interpreting competition rules to cases relying on evidence and

⁴⁰ Independence of competition authorities - from designs to practices – OECD Background Paper by the Secretariat. Equally, competition authorities should of course also be independent of business in order to protect the integrity of their law enforcement activity.

competition reasoning⁴¹. At the same time, independence does not mean that the competition authority develops actions or programmes its policies ignoring the government, but rather that it is not government determining competition enforcement actions.

Establishing the competition regulator with a degree of independence, both from those it regulates and from government, can provide greater confidence and trust that regulatory decisions are made with integrity. A high level of integrity improves outcomes of the regulatory decisions⁴². A degree of independence from government is of particular import for competition agencies as the implementation of competition law and policy involves complex legal and economic assessments that require a degree of discretion to prioritise and deal with the specific facts of a case, industry dynamics and characteristics, and with market developments. Simultaneously, “the need for credibility, stability, impartiality and expertise is high for competition authorities and thus competition agencies meet all of the” conditions set out in the OECD Best Practice Principles on the Governance of Regulators (OECD 2014) for a legally independent and structurally separate regulatory body.

⁴¹ Thus as Bill Kovacic and Marc Winerman put it the political branches of government “ought not to be able to (a) dictate, by rule or by custom, which entities an agency investigates; (b) determine whether the agency will prosecute such parties; or (c) influence how specific disputes will be resolved, including the choice of punishments for alleged wrongdoers (...) These conditions assume greater importance as the severity of the agency’s power to punish increases.” See, William Kovacic and Marc Winerman, “The Federal Trade Commission as an Independent Agency: Autonomy, Legitimacy and Effectiveness”, 100 Iowa L. Rev. 2085 (2015).

⁴² This is consistent with the OECD 2012 Recommendation of the Council on Regulatory Policy and Governance that “independent regulatory agencies should be considered in situations where: There is a need for the regulatory agency to be independent in order to maintain public confidence; Both the government and private entities are regulated under the same framework and competitive neutrality is therefore required; and The decisions of regulatory agencies can have significant economic impacts on regulated parties and there is a need to protect the agency’s impartiality”(section 7.3). See also the OECD Best Practice Principles for Regulatory Policy, The Governance of Regulators.

Such independence ultimately makes for a more sound and effective competition policy regime that provides a stable and predictable regulatory and business environment that helps foster investment.

The actual degree of independence of competition agencies varies considerably across jurisdictions and there is no one size fits all to be applied in every jurisdiction as to be successful an institution must respect and be imbued with the legal culture of the country of which it is an integral part. There are no uniform standards and many countries are looking to find solutions that are suited to their own political and institutional history - setting up an independent competition agency is a dynamic process and institutional building to be successful in the medium to long term necessarily has to account for Viet Nam's specific legal and political culture and frameworks, as well as to its evolution in moving towards an economy more based on market principles and the development of its competition enforcement and culture.

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.

Nonetheless, according to the OECD (2016) “it is widely accepted that structural separation from government provides competition authorities with greater insulation from political control. Structural separation should act as a buffer against political capture and limit the scope for political or ministerial intervention in agency activities”.

Therefore, the situation in which the competition authority is part of a ministerial department such as the case of the VCCA, or clearly within its orbit as is the case of the VCC, may be at odds or jeopardise the independence of the competition agencies.

This is aggravated given the role of MoIT in Viet Nam. It manages many businesses and grants support to many industries, and the Competition Law itself grants the MoIT with the decision-making powers regarding industrial policy exemptions⁴³. These roles may at times be contradictory and therefore impede the

⁴³ These essentially have two purposes “enhance the efficiency and competitiveness of SMEs in the domestic market, and strengthen exporting companies’ capacity in the international market.” see Phan Cong THANH Viet

fair and transparent enforcement of the Competition Law in those industries, in particular against state owned enterprises (see 2. State Owned Entities above), as an intervention under the competition rules by effectively the same ministry might be seen as contradictory. This is also a particular problem in Viet Nam because there is a very low level of understanding within the business and consumer communities as to the existence and purpose of competition law. Burying competition law in an agency that (until recently) has also been responsible for anti-dumping and trade matters within the umbrella of the industry portfolio hampers the agency's ability to project a clear and important message about the importance of competition to the national economy.

Removing the agencies from the dependency of the MoIT, from a structural, financial and operational viewpoints will thus increase its independence.

A number of other factors further contribute to the current system's limited effectiveness, and contribute to the general perception of stakeholders that the VCC may lack the means to monitor the quality and quantity of the work done by the VCCA. The VCC members are only part-time members meaning they have a second employment in a ministry and thus less time to devote to cases. Also they are high-level personnel appointed by ministries, and this leads to a lower level of expertise than the legislator had originally planned for when it implemented this bifurcated agency model.

Further, these factors may expose them to significant conflicts of interest. In particular, since they are appointed and serve specific ministries that may control state-owned enterprises active in markets, the conflicts are relatively clear. The record from the only two cases in which penalties have ever been imposed (and no doubt from cases that have not reached the point of a conclusion and the imposition of a penalty) shows that these conflicts cause problems when the infringement to the competition rules takes place involving SOEs owned by the ministries from which the VCC members are appointed (or more generally in sectors regulated by those ministries). Although there is an explicit commitment to objectivity in the decision-making (and indeed SOEs with VCC members were fined in both the decisions that have reached their conclusion), there is a recurring need within government agencies and SOEs for intervention at high levels to reaffirm the notion that VCC members

Nam Competition Authority Competition Law Enforcement of Viet Nam and the Necessity of a Transparent Regional Competition, ERIA-DP-2015-86 ERIA Discussion Paper Series Policy December 2015.

are not “representatives” of sectoral interests and that objective decision-making is required.

Even if a completely objective decision making could be achieved under the current institutional framework, within the domestic and international community there is a great deal of scepticism concerning whether decision is objective arising from the fact that VCC members are drawn from sectoral ministries with ownership of SOEs. That scepticism undermines investment confidence – particularly in those sectors where investment of new players is crucial to addressing markets with dominant SOEs. As detailed in the case example in Section 3, there is not only a perceived conflict of interest between the appointees’ duties to their line ministries and their role adjudicating in relation to SOEs owned by their primary employers, SOEs accused of wrongdoing have actually approached line ministries seeking assistance from the VCC members appointed.

Further, the reasons for self-recusing participation or removal from the hearing and decision-making process do not protect against such conflicts as they relate only to family links, situations where the Member has rights or obligations related to the company under investigation, or where he/she has other obvious grounds of bias - which is rather vague⁴⁴. In the two cases in which fines have been imposed, far from recusal – the five member initial VCC panel that decided the Vinapco case included a VCC member from the Ministry of Transport and the insurance case included a VCC member from the Ministry of Finance – precisely because those members could draw on their expertise in those sectors when assessing the evidence.

The fact they are part-time also means that VCC members have often been able to devote a limited time to the role which requires the review of substantial, fact intensive and technically complex dossiers prepared by the VCA. The two-tier structure is designed to separate investigation functions from decision-making. A by-product of that structure is that the two agencies appear to have taken different views as to what level of evidence is possible for an investigatory agency to collect and what evidentiary standard needs to be met. As a result, there appears to have been a reasonably significant degree of “yo-yoing” of matters between the VCA and VCC delaying the resolution of matters.

All the above factors weaken the two agencies, and accordingly the current institutional set-up linked to the MoIT has raised a number of concerns from the

⁴⁴ Article 83 of the Competition Law.

stakeholder community in Viet Nam regarding the independence of the two agencies, that affects its specialisation, fairness, transparency, and accountability. Factors such as these have been considered as the main causes leading to the ineffectiveness of competition law enforcement in many countries.

Viet Nam would benefit strongly from a legal framework that establishes a competition agency that is independent from sectoral ministries⁴⁵.

7.2.2. Accountability

However, with greater independence comes greater responsibility in particular the need for accountability to courts, parliament, government and/or the public at large, as this builds and maintains the legitimacy of the competition authority's actions and thus permits its functioning in the long term. A competition agency may not be able to maintain its independence and the ability for the competition authority to impose strong sanctions without accountability⁴⁶. Further, if "a competition agency has no connection to the political process, it runs a risk that its voice will not be heard when these and other decisions are made⁴⁷", referring to policy making an economic reforms that play a strong role in how competitive markets are.

As many other jurisdictions the competition authority should engage with the National Assembly at least once year, as happens already in Viet Nam for other regulatory bodies, with the possibility of the National Assembly members asking both oral and written questions.

7.2.3. Efficiency considerations in decision-making

The current bipartite system with the VCCA and the VCC requires two distinct teams of people to acquaint themselves with the full details of the case and to provide the opportunity for complainants and accused parties to present their case that increases the costs of the system for government, complainants and the businesses being investigated. In addition, the fact they are not integrated means that the process of investigation and decision making is not as optimal as

⁴⁵ This has been one of the reasons given by government for the proposed change to the Competition regime in Viet Nam.

⁴⁶ "The institutional design of Competition Authorities: Debates and Trends", Frédéric Jenny.

⁴⁷ William E. Kovacic "Competition Agencies, Independence and the Political Process".

it might otherwise be, as it may be that the two bodies do not have the same understanding or objectives⁴⁸, and fairly frequently there have been periods in which the VCCA staff are over-stretched in the investigative phase of cases while at the same time VCC secretariat staff have no work to do because cases are not ready for the decision making stage. This has been identified by some stakeholders as one of the reasons for the reduced number of decisions taken over the last ten years and the length of time taken, as the two agencies often disagree or reach different conclusions. The annual reports show that out of over three hundred cases informally initiated and more than eighty formal investigations only six decisions were taken over a decade. This compares with the enforcement record, for instance, of the KPPU in Indonesia, that in the first 10 months of 2016 conducted 59 (fifty-nine) case investigations and 29 (twenty-nine) hearing proceedings, with 228 decisions issued since 2006. From January to October 2016, the KPPU collected fines (for the State Budget) amounting IDR 18 billion (approx. USD 1.35 million⁴⁹).

Some regimes assign the investigation and decision-making function to different bodies. Others separate such functions within the same agency. There are advantages and disadvantages of both systems – it is clear from the wide experience internationally with unitary bodies that it is possible to have not only an efficient but also a fair system based on an internal separation of functions.

The OECD notes that in consideration to the observations made above the successive drafts of the updated Competition law in Viet Nam provide for a single integrated agency model.

7.2.4. Transparency of the VCCA and VCC

A widely held perception of stakeholders is that there is limited transparency of the activity of the VCCA and VCC in applying the competition rules of the VCL.

Transparency is fundamental to support the credibility of competition law enforcement as well as to ensure a wide understanding of an authority's mission

⁴⁸ To which one may add the appointment by ministries, the part-time nature and the lack of conflict of interest rules for the members of the VCC.

⁴⁹ Exchange rate as of 22 August 2017.

and a country's competition culture. Both general transparency measures⁵⁰ and investigation-specific transparency measures need to be in place to ensure that that the process is fair and effective⁵¹. As with a sound institutional framework, due process is fundamental in ensuring the effective application of a Competition law⁵². According to the OECD's Procedural Fairness and Transparency Report (2012) this is applicable across jurisdictions regardless of the system in place.⁵³

Transparency can also increase the independence from government as it can act as "a useful barrier against government or business encroachments. The more transparent the process of decision making by the Competition authority the more visible would be the result of an undue influence and the less likely it is that the competition authority will let itself be influenced by outside forces"⁵⁴.

Regarding general transparency, or non-case related transparency, and as noted above, neither of the VCCA or the VCC are granted with powers to approve regulations that provide guidance or that implement the Competition Law. Further, competition cases are not public, so firms have no access to information or have any public guidance to rely upon on how the law may be interpreted and applied. While the documents and reports of the VCCA may serve as useful references, they have no legal value and cannot provide any official guidance.

⁵⁰ These include the publication of guidelines, regulations, and practice manuals; decisions, speeches, articles and publications; amicus curiae briefs and advocacy filings; substantive agency opinions and court jurisprudence; and adherence to antitrust best practices of multilateral bodies (i.e., ICN 2013 and OECD 2012).

⁵¹ ICN 2013.

⁵² This is widely accepted across the international anti-trust community, see for instance the ICN 2015 Guidance on Investigative Process "effective enforcement tools, procedural safeguards, and consistency of process and procedures within an agency contribute to efficient, effective, accurate and predictable enforcement by competition agencies".

⁵³ The report states that there is "a broad consensus on the need for, and importance of, transparency and procedural fairness in competition enforcement, notwithstanding differences between prosecutorial and administrative systems, and other legal, cultural, historical, and economic differences among members." The Report summarizes three roundtable discussions on transparency and procedural fairness held in 2010 and 2011 and draws from 82 written submissions.

⁵⁴ Jenny, 2013.

This is in stark contrast with best international practices, where most agencies publish, and regularly update, enforcement guidelines that articulate the respective agency's enforcement policy and approach with respect to various provisions of its Competition Act, including both substantive and procedural aspects. Guidelines can serve a number of different purposes, which can include interpreting and clarifying legal aspects of the Competition Law, help ensure consistency of enforcement, provide presumptions and safe-harbours for business conduct, as well as set out the agency's approach to issues that may yet not have been resolved. They therefore can create legitimate expectations for business, that the approach set out under the guidelines will be followed by the competition agency. Guidelines are often written on the basis of the experience with cases, both of the competition agency as well as of judicial decisions.

MyCC in Malaysia, for instance, has issued 6 sets of guidelines (on complaints, market definition, anti-competitive agreements, abuse of dominance, financial penalties and leniency). The Japan Fair Trade Commission (JFTC) has published guidelines on procedure and substantive application of Antimonopoly Act ("AMA") to strive to ensure fairness, transparency and to clarify the enforcement standards of the substantial provisions of its Competition Act⁵⁵. The ACCC in Australia has also developed guidelines to ensure that the public, and especially the parties whose interests are affected, understand their rights and obligations under the Competition Act as well as the ACCC's approach and procedures in exercising its statutory powers⁵⁶. It considers that this increases transparency, predictability and legal certainty, and is useful for business.

Whilst initially, the development of guidelines might not have been so relevant or so pressing in Viet Nam, over time the power to be able to establish such guidelines is a powerful tool to improve legal certainty for business.

⁵⁵ For example, procedural guidelines and rules explaining the investigative procedures are contained in the Rules on Administrative Investigations by the Fair Trade Commission, Rules on Reporting and Submission of Materials Regarding Immunity from or Reduction of Surcharges, and Rules on Compulsory Investigation of Criminal Cases by the Fair Trade Commission. Detailed explanation about how anti-competitive agreements are assessed is provided for instance in the Guidelines Concerning Distribution Systems and Business Practices, Guidelines Concerning Joint Research and Development under the Antimonopoly Act, and Guidelines for Exclusive Private Monopolization under the Antimonopoly Act.

⁵⁶ An example will be its Merger Guidelines 2008.

Guidelines have the advantage over laws and decrees in that they can be more easily developed over time to reflect changing jurisprudence and update know-how and accumulated knowledge of the application of the Competition Law by the Vietnamese competition agencies as well as by its court system.

As guidelines may affect a wide range of stakeholders that hold different perspectives and experiences, proposed guidelines are in many jurisdictions open to public consultation. Translation into English of such preliminary documents might attract the international commentary that would provide yet further perspectives and experiences.

The new competition law should thus provide for powers of the new agency to publish guidelines as an alternative to decrees of the National Assembly or government, and that such guidelines should be issued following an obligatory public consultation phase.

In addition, in the effort of providing legal certainty and guidance to the business community the enforcement agency should also have the obligation to publish final decisions, which should be fully reasoned and include all relevant findings of fact and conclusions of law, on the its webpage (respecting confidentiality of business secrets).

Case-related transparency and fair process ensure a better understanding of the facts underpinning an investigation and helps to improve the quality of evidence and the reasoning on which the competition agency bases its enforcement actions. In the context of the Procedural Fairness and Transparency Report (2012) the OECD states that many agencies engage with the parties to a proceeding to share knowledge of the facts underpinning the investigation and offer opportunities for the parties to present arguments and new facts⁵⁷.

The Viet Nam Competition Law provides for a number of rights of the parties to an investigation proceeding, even if more wide ranging rights are offered to those parties represented by lawyers by expressly setting out, for example, their rights to know the charges being made, to provide evidence and to object to evidence, to study documents in the case dossiers, and to participate in a hearing.

⁵⁷ These may be formal proceedings for meeting with officials, such as state of play meetings, which allow for parties to meet with the case team and senior managers within the competition agency at predetermined moments of the procedure, or informal meetings.

They also include provisions protecting the disclosure of confidential information from use by anyone for any purpose outside the limited purposes of the investigation or hearing. These could be more wide-ranging, by ensuring for instance, that parties not represented by lawyers have the same rights as those that have legal representation.

In single-agency administrative models, case specific transparency is even more critical than when there is a separation of investigative and decision-making functions. In almost all cases, the agencies concerned have adopted a process of issuing a report once the main investigation has concluded (usually called a “Statement of Objections”) that then provides an opportunity for all parties to dispute factual conclusions and analysis prior to a final decision.

7.2.5. Multiple roles

Another reason offered by stakeholders for the reduced number of cases is that the VCA deals with many sorts of different cases of consumer protection, trade and unfair competition, and that competition cases are not a priority. Some of those involved in competition law and policy in Viet Nam consider that given the reduced resources that unfair competition provisions should not be retained within the purview of the institution responsible for the enforcement of the competition provisions as it functions as a “distraction”.

A number of competition agencies have multiple roles, and whilst competition law and consumer protection powers may be seen by some as somewhat complements, *“other combinations of roles increase the risk of conflict where the policies contrast rather than complement, for example where competition law enforcement sits alongside a price regulation function”* (Fels and Jennings, 2016).

Removing the administration of trade safeguards leaving the VCCA to focus only on competition and consumer protection should assist in addressing the very poor competition law enforcement record. However, the agency remains responsible for a very substantial portfolio of competition law and policy functions as well as enforcing unfair competition prohibitions and consumer protection laws. There remains a danger that the agency would take a disproportionately high number of unfair competition cases (which are easier to enforce) than competition law cases (which are often more challenging to detect and prove).

The agency should target achieving a higher proportion of completed competition enforcement actions relative to its other functions than has occurred in the past.

7.3. Resources and staffing

7.3.1. Resources

The effective enforcement of the Law rests on a combination of factors and one of those is certainly the resourcing of the regulator as the commitment of Government from both a policy and a financial perspective is crucial – it is an investment that contributes to economic growth, productivity and a business environment that is conducive to foreign and domestic investment. Without sufficient resources the regulator, whether it is the current VCCA/VCC model, or a new model following amendments, will struggle to have any impact on markets and to help to deliver the efficiency benefits and productivity gains which are the main objectives of competition law. Faulty or inadequate enforcement of competition law will do more harm than good and will cost the national economy.

There is a perception amongst the competition policy community in Viet Nam that the resources devoted to competition enforcement functions in Viet Nam is reduced for the tasks at hand. While international comparisons are complex and should only be used as a broad indicator because they can be highly influenced by the legal system,⁵⁸ a comparison with the resource allocation to other countries in Asia and in economies that have transitioned from a centrally planned to a more market based system confirms that there is likely to be a significant shortfall in the optimal level of financial resources devoted to the competition law and policy system in Viet Nam.

⁵⁸

For example there are significant cost implications of whether or not cases must be brought in court or can be handled administratively and, if they are taken to court, whether the country has a split bar or whether agency lawyers present the case.

Table 3. Budget of selected competition authorities for 2016 and GDP context

Agency	GDP in USD million	Budget of competition authority in EUR in million
Australia	1,204,616	48
Indonesia	932,259	8
Japan	4,939,383	93
Malaysia	296,359	1
Korea	1,411,245	91
Romania	186,700	8
Singapore	296,966	11
Viet Nam	202,616	0.7

Source: GDP figures World Bank Notes: The source for the budget was the Global Competition Review Rating Enforcement 2017 for Australia, Japan, Romania, Singapore and South Korea. Viet Nam’s figure was provided by the VCCA and refers to the VCCA only. Malaysia’s MyCC budget refers to 2015 and is taken from its 2015 Annual Report. Indonesia’s budget figure is for 2014 as reported in its Annual Report to the OECD, conversion rate as of 18 October 2017.

As mentioned earlier the budget of both the VCCA and VCC depends on the MoIT, which is also responsible for industrial policy that can sometimes be at odds with competition policy. Another may be that the MoIT sees the other VCA’s functions as more important to its overall role within government (i.e. consumer protection). This may be one explanation for the reduced resources that are allocated to competition policy in Viet Nam.

The reduced budget reveals the relatively marginal place that competition matters had occupied within the context of the Viet Nam public policy agenda. This now seems to have changed as the 12th Party Congress (2016) resolution requires that priority be given to developing and perfecting “a modern and integrated market economy with diversified ownership - which should operate fully and efficiently in accordance with the principles of market economy”. Such a market economy would require a well funded competition authority.

Unless the institution in charge of competition in Viet Nam is provided with substantial additional resources, as well as sufficient autonomy to use them, it is hard to see how the Viet Nam could have a sound and effective competition policy that adequately meets the challenges of the Vietnamese economy.

At the same time this increased resourcing should ensure the independence of the competition agency.

Options may include the competition authority being funded directly from the government's budget, following a budget proposal by the authority submitted to a ministry to which it may be financially accountable, which then incorporates it in its own budget proposal without the possibility of amendment. The funds ultimately allocated to the agency would then result from the normal procedure for preparing and approving the Vietnamese central government's budget. Another possibility would be as in the UK, for example, where the CMA's budget is set three to five years in advance, to avoid the CMA being (or appearing to be) influenced or influencing its decision making.

7.3.2. Staffing

One of the most central components of a competition agency or agencies is its staffing. Given that competition law lies at the interface of law and economics a sound competition enforcement of competition law requires a sufficient number of well qualified staff with sophisticated skills.

By the VCA's own admission, it suffers from "limited resources and unsound regulations"⁵⁹.

Together the staff of the VCC and VCCA working on competition cases amounts to 20 staff (this includes administrative staff, but excludes Council Members of the VCC), or 37 if one was to include unfair competition powers (see Section 7.1 Existing Competition policy institutions.

This is a very reduced number, in particular if compared with other agencies internationally. Again, comparisons should be treated with caution but they can provide useful indications when there are significant disparities. Wealthier countries both have more ability to pay for staffing but also staff wages are higher. On the other hand, the number of businessmen to supervise, and the number of central and provincial agencies to counsel, tend to be in proportion with the population of the country. Therefore, the overall population of the country may be useful in making comparisons.

⁵⁹

Table 4. International comparison of staff numbers in 2016

Agency	Population	No. of Staff members working on competition
Australia	24 million	351
Indonesia	260 million	358
Japan	126 million	779
Singapore	5 million	39
South Korea	51 million	482
Romania	20 million	202
Philippines	104 million	200
Viet Nam (VCCA & VCC)	93 million	27

Source: For staff numbers the source was the Global Competition Review Rating Enforcement 2017 for Australia, Japan, Romania, Singapore and South Korea. Viet Nam's figures provided by the Vietnamese authorities during the drafting of this report. Indonesia's budget figure is for 2014 as reported in its Annual Report to the OECD. The Philippines number refers to the target of the Philippines Competition Commission.

Further, the majority of the staff of the VCCA is young, inexperienced and does not have significant professional expertise and case handling skills. Reasons may be the recruitment policy of the MoIT, the relatively low salaries and the high staff turnover. Indeed, there is a perception among the antitrust community in Viet Nam that the staff are poorly remunerated, which may explain the inexperienced staff with relatively reduced qualifications. In its Annual Report of 2014 the VCCA itself points to several challenges in its investigations due to several limitations and the first to which it points to is to the lack of human resources.

Given that in all probability, since competition policy is a relatively new instrument in Viet Nam, the expertise will be found outside the public sector, it is important to have a degree of flexibility for recruitment that will allow the new agency to compete with the private sector. Further, public sector remuneration levels are limited and there is a recurring pattern of private sector law firms recruiting the most experienced VCCA officers. Indeed, in order to compete sufficiently to recruit and retain the highly qualified staff needed, the terms and conditions of employment and future remuneration prospects are fundamental.

The overall legislative framework should ensure that competition agency has sufficient autonomy regarding which staff to hire, when to hire them, and their employment and compensation conditions, including career progress. This may be done for instance by aligning the payment scale with a top performing regulator in

Viet Nam such as the State Bank of Viet Nam, or other top performing regulatory body.

Having two agencies exacerbates the problems of competition teams that are struggling with being active at a sub-scale level.

Therefore, despite Viet Nam's current stringent constraints on expanding the government both by the number of separate agencies and by head-count, additional resourcing for staffing should be provided, and the competition authority should have recruitment autonomy.

Although competition law is taught at university, teaching must remain at a conceptual level because Viet Nam has very few case decisions and scant reasoning is published. Consequently, the VCCA, VCC and international donors must provide extensive "on the job" training.

7.4. Summary of the main problems with the institutional set-up:

- the VCCA's status as an agency "under" the MoIT undermines the public perception concerning the level of authority it wields and its impartiality vis a vis the SOEs owned by that Ministry;
- the VCC suffers from having only part time Council members that must analyse dossiers prepared by the VCCA that are substantial, fact intensive and technically complex and that are appointed almost all from ministries that are owners of SOEs;
- the VCC necessarily involves a level of duplication and, in years when the VCCA has not referred any cases to the Council, its permanent staff are unused for their primary function;
- the VCC is not appropriately constituted or resourced to properly defend its decisions when challenged in the courts;
- neither the VCCA nor VCC is required to publish their reasoning (as distinct from the basic facts that they have considered in cases);
- the VCCA nor VCC can publish enforcement or procedural guidelines to provide additional clarification on the law as well as provide legal certainty on its practice;
- the VCCA and the VCC have scarce resources, including sufficient qualified staff.

- the administrative courts to whom challenges are made focus exclusively on procedural issues and avoid any engagement with the substance of competition law controversies. Further, the courts' decisions are not published which undermines accountability, deterrence/business compliance and the ability of educational institutions to contribute to a general awareness and capacity of graduates who may be recruited by businesses, governments legal advisors, the authorities and the courts.

7.5. Institutional issues: Proposed new law

Many participants in the Vietnamese antitrust community, including in the institutions themselves, academics, lawyers and practitioners agree that the present institutional structure is inadequate and needs to be improved to ensure that Viet Nam reaps the benefit of a suitable and efficient competition system.

The main change proposed in the Draft Law⁶⁰ is the creation of one institution for investigation and adjudication, now proposed to be called the National Competition Authority (“NCA”). This will be the entity that is responsible for application and enforcement of the Competition Law. The Government will retain power over the structure and organisation of the NCA. Operational control will lie with the Chairman of the NCA, who will be assisted in this task by the Vice-Chairman. The Chairman will take final decisions on competition restrictions cases, and retains almost complete control throughout the process (see below). Both are appointed and dismissed by the Prime Minister. There is no specific provision setting out the status of the NCA as an independent agency, nor setting out its budgetary sources.

Presumably, in order to decrease the possibility of prosecutorial bias the investigations are carried out by the Competition Investigation Agency that takes all the investigative steps and then the case is analysed by the Competition Case Handling Council specifically set up for that case. Under Article 43 of the Draft Law, the Competition Case Handling Council must have at least three members (part-time) whose remuneration is set out buy the government.

However, the decision to open (and close) the investigation, proceed to open a hearing, and ultimately the final decision as to whether there has been a violation of the Competition Law are to be taken by the Chairman. Indeed, in addition to

⁶⁰ Reference is made here to Draft nr. 2 of April 2017.

these already vast powers, the Chairman also has under articles 65, 67, 71, 80, 87, and 95 the power to select and appoint the Case-Handling Council, to authorise unannounced inspections or "dawn raids" (one of the most important investigative tools in the competition armoury against cartels, for instance) as well as other investigative steps and to make final decisions on whether to permit or block mergers, to issue findings of violations of the competition law, and to order parties to cease and desist from conduct and pay fines.

The Competition Case Handling Council will be chaired by the Vice Chairman of the NCA, and will have at least two other members, which may be changed at any time and for reasons not specified in the law by the Chairman until the hearing is considered open by the Chairman. Such members are remunerated for the task and must comply with minimum standards set out in the law, namely academic and professional experience in law, economics, finance or other "suitable" topics. It is unclear from the law whether the rules on conflicts of interest⁶¹ would apply to the Competition Case Handling Council or only to the investigators of the Competition Investigation Agency. There are no limitations set out in the law regarding possible conflicts of interest between this task and other employment or interests that such members may have.

This therefore seems to mimic to a considerable extent the current bipartite structure of the VCCA and VCC, even if within the same institution.

As in the current Competition Law, the Draft Law draws no limits to the Prime Minister's powers to remove the Commission Members, who is thus free to dismiss the Members at any time for any reason. Further, the Draft Law gives the NCA Chairman as shown above a great deal of power. It is, therefore, of particular importance that the Chairman's decisions are independently based on the law and free of political interference and that the Chairman is properly accountable. One of the ways therefore to ensure this, would be to limit the possibilities of the Prime-Minister to remove the Members from office for specified reasons and only for good cause. Examples, would be when found guilty of unethical conduct or

⁶¹ Article 69 of the Amendment Law provides that replacement should occur if an official is a relative of the investigative party or complainant, has rights or obligations related to the case, or for other obvious grounds of bias.

gross neglect of duty⁶². This has the advantage that the Chairman and Vice-Chairmen can take actions without fear of being terminated.

Additionally, whilst the minimum requirements for professional and personal character qualifications are set out for the Competition Case Handling Council members and investigators⁶³, but there are no minimum qualifications or requirements for the Chairman or Vice-Chairman of the NCA. It is common amongst competition authorities that the decision makers meet minimum qualifications criteria in order, relevant examples are Romania where commissioners are to be nominated on the basis of “high professional reputation and civic probity”⁶⁴ or Singapore where members of the Commission are appointed for their “ability and experience in industry, commerce or administration or their professional qualifications or their suitability otherwise for appointment”⁶⁵. Given the Chairman's authority to make final decisions (even by not taking heed of the recommendations from the Council composed of members with expertise in relevant fields) and the important role of the Vice-Chair it would be important that both the Chairman and Vice-Chairman possess minimum professional and personal qualifications criteria and that they would also be bound by rules on removal and self-recusal from decisions⁶⁶.

Therefore, the Draft Law would significantly benefit from the insertion of conditions of the appointment of the members of the decision-making body and/or its top management, the rules governing the conflicts of interest and incompatibilities of the board members, a set long duration of tenure of their mandates, and their removal only for due cause, as these can contribute to the independence of the new competition authority in Viet Nam.

Given the concerns widely expressed by the anti-trust community in Viet Nam with the current institutional framework and its (at least perceived) lack of

⁶² In Japan the AMA sets out that the chairman or commissioner may not be dismissed from office except in certain specified circumstances (e.g., has a decision to commence bankruptcy proceedings).

⁶³ Articles 44 and 48 of the Draft Law, respectively.

⁶⁴ Romania's contribution to the Global Forum on Competition, DAF/COMP/GF/WD(2016) 58, para 27.

⁶⁵ Singapore's contribution to the Global Forum on Competition, DAF/COMP/GF/WD(2016) 56, para 9.

⁶⁶ Articles 69, n 70 and 71 of the Draft Law.

independence from political interference, a decision-making body based on collegiality may mitigate such concerns⁶⁷. A collegial body may also seem to be likely to make its capture (by business interests or by government) more difficult than if all relevant decisions are taken by a single individual. Further, having a collegial body also allows for a wider range of expertise and therefore seems more legitimate to make competition decisions which require different sets of skills⁶⁸. The collegial model may, if the appointment of the board members is staggered, lead to more stability in its decision making whereas the change of the single decision maker or all of the decision makers at the same time may lead to significant changes in the decision making of the competition authority.

Regarding the length of time of the appointment(s), it should also be noted that the board members should be appointed for a period sufficiently long so that they can acquire the required skills to deal with competition law cases that deal law and economics. This may also go beyond the term of the National Assembly (five years). Many jurisdictions have mandates of 5 or more years, such as is the case for instance in Indonesia, Mexico, Romania amongst many others.

The issue of allowing for mandates to be renewed should also be carefully analysed as it may reduce the independence of the top management. The possibility of renewed mandates poses an increased risk that the top management may have increased incentives to take decisions based not on purely technical grounds but on what makes it more likely that they will get themselves reappointed.

Fairness in decision making is even more important in legal systems where the right of appeal is not a practical substitute. As mentioned above, foreign investors and international entities have identified the judicial system in Viet Nam

⁶⁷ Competition authorities may be organised in many different ways, so that the competition authority may consist of a single Commissioner only (as in Canada or in the Antitrust division of the Justice department) or be a collegial body (such as the US FTC, KPPU of Indonesia, MyCC of Malaysia, CC of Romania, etc..). The Secretariat note on the Optimal Design of a Competition Agency for the OECD Global Forum on Competition in 2003 stated that: “Out of the around 90% of Competition Authorities that have competence to take certain kinds of decisions on individual competition law cases, around two thirds have a specific collegiate body for decision-making. In the remaining third the power to take such decisions is assigned to the Head of the Authority.

⁶⁸ Frédéric Jenny 2013.

with concerns of “perceived lack of independence of the judiciary, lack of efficiency of the legal framework in settling disputes”⁶⁹. This is on top of the usual additional time, costs, commercial and reputational damage of an appeal that business in every judicial system have to contend with.

Should the choice of the Vietnamese legislator rest in having one sole institution (even if a collegial body) it is important to ensure vigorous scrutiny and independent decision-making to avoid the risk of confirmation bias between the stages of investigation and decision making. Indeed, beyond the importance of ensuring that decision-makers should be independent of political influence, it is important for a fair process that there be a clear separation between the roles of those responsible for conducting the investigation and those responsible for taking enforcement decisions in order to avoid prosecutorial bias (perceived and/or actual). The Draft Law and its centralisation of power with the Chairman (and not a collegial body) would not combat or minimise such a perception, indeed might even deepen this concern.

Further steps should also be considered to increase the fairness or perceived fairness in decision making by ensuring that the system has a number of internal structures, safeguards and checks and balances that can help ensure a high quality of decision making. An example of a system with many in-built safeguards could be the EU. It has developed and made transparent best practice manuals and guidelines for how its proceedings are undertaken but that also contains a number of other safeguards that ensure there is adequate review and/or supervision of competition cases by, namely, having a case support team sitting outside the case team (with a view on policy consistency as well as ensuring quality of the investigation), the Chief Economist (with an independent mandate) and his team, peer review panels (with experienced case handlers from outside the original investigation team acting as a second pair of eyes at the proposed decision and corresponding evidence on which it is based), the Commissioner for Competition, the legal service or department, the Member State's competition experts in the Advisory Committee, other Commission departments responsible for economic policy and the relevant sector and ultimately the plenary of Commissioners. Also built into the framework are a series of rights of defence and procedural guarantees safeguarded by the Hearing Officer in specific legislation.

⁶⁹ EUCham Whitebook - whitebook 2017 | TRADE & INVESTMENT ISSUES AND RECOMMENDATION, Page 17.

Other than considering introducing further internal safeguards in its investigation and decision making functions, the Draft Law should also reflect further procedural safeguards regarding the hearing of the parties. The 5 day notification period for the parties to the hearing is too short and does not allow the parties to adequately prepare what will be complex legal and economic facts and arguments.

Recommendation 7.1:

The NCC's status as an agency that is independent from government and business should be enshrined in Law. The law would prohibit completely the government from giving directions on when to open an investigation, how it proceeds and outcomes of enforcement actions. Market studies may be initiated upon request of the government but it should not be permitted to direct the outcome and recommendations of the study carried out by the NCC. The terms of any such requests should be published and transparent.

The NCC should be accountable directly to the National Assembly, by obliging the head of the agency to go to the Assembly once a year and answer written or oral questions.

The NCC should be collegial in nature and have several Commissioners with a wide range of experience in business, economics and law. Viet Nam might wish to follow the example of Thailand and some OECD countries (e.g. Mexico) of a "public selection procedure" to ensure that the Commissioners possess the necessary expertise and independence, that the selection process is transparent, and based on merit.

The appointment of the NCC Commissioners should then involve a state body where a wider consensus is required (e.g. the National Assembly).

Although a limited number of part-time Commissioners to contribute particular expertise could be desirable, the majority of the Commissioners should be full-time, have fixed terms and such terms should be lengthy enough to allow for skill build up and beyond the length of the duration of the legislature of the National Assembly to further insulate from the political process.

Commissioners should be dismissed only for limited, well-defined reasons set out in law. This would provide more legal security, objectivity and reduce political influence over the body.

There should be either no reappointments or limits to the number of terms, for instance the possibility of only one extension term, since the possibility of reappointment may alter the incentives and independence of commissioners.

Commissioners should not serve beyond their terms and there should be a specific rule obliging the government to appoint a new member within a reasonable time in case of vacancy. Ensuring a full board of fixed-term commissioners helps maintain the competition authority's independence and functionality in decision-making.

Commissioners should have staggered terms so that there are always commissioners with experience sitting on the Board. This would help retain experience and enhance consistency in decision making and legal certainty.

Recommendation 7.2:

The NCC should be endowed in practice with sufficient budgetary and human resources to be able to effectively enforce the competition provisions in the Competition Law. This means there should be a significant increase in the budget that has previously been allocated to the VCCA and the VCC, both to properly perform functions that it already has and adapted and in proportion to the allocation of the following new tasks:

- conducting merger assessments using the competition test;
- contributing to and advising on the design of the privatisation programme (as recommended above); and
- undertaking competition assessments of existing and new legislation (as recommended above).

Independence stemming from budget allocation should be reinforced to guarantee sufficient and stable resources. One possible solution might be for the budget of the NCC to be determined by the National Assembly after hearing the Head of the NCC on its proposed budget. This would enable the NCC to present its budget directly to the National Assembly rather than to a Ministry. If the executive branch considered the NCC's request to be excessive, it would need to make that argument to National Assembly rather than cutting the NCC's request unilaterally. This will also serve to enhance the NCC's stature.

Once the budget is approved the NCC should have full autonomy regarding how it uses its budget.

The NCC should be fully and adequately staffed in numbers and expertise and have autonomy to hire, including whom, when and under which employment and compensation conditions, including career progress, in the course of the management of its own budget. The need to attract and retain appropriate staff with the legal and economic expertise to handle the cases and make reasoned recommendations should be recognised. The recruitment process should not face undue constraints such as civil service exams or

compliance with civil service quotas. A strong secretariat would result in efficiency and effectiveness.

The pay scales for NCC staff should reflect that (a) the work is highly specialised; and (b) the NCC competes with private sector law firms or other consultancies to retain quality staff.

Recommendation 7.3:

Internal checks and balances should be built in to the functioning of the NCC, such as peer review panels, opinions from chief legal officer and economic officers or equivalent.

Recommendation 7.4:

A handbook of compulsory internal procedures, including procedures for handling cases, could be very helpful. This measure could enhance predictability, and result in fewer procedural errors. It may also help reduce the effect of high staff turnover as there are clear procedures for all staff to follow.

Recommendation 7.5:

The NCC should have the power to publish guidelines that may offer more legal certainty to the business community on how it applies the procedural and substantive provisions of the competition law. These should be subject to public consultation and open to international commentary by being made available at that stage in the English language.

Recommendation 7.6:

The NCC should publish all its decisions, whilst protecting confidentiality and business secrets.

Recommendation 7.7:

Annual reports should be mandatory and publicly available.

7.6. Judicial review

As noted above, interested parties can appeal decisions of the VCCA (in unfair competition cases) or VCC (in competition cases) initially to any of the 63 Provincial Courts and, from those courts, to one of the three regional Courts of Appeal/High

Courts. The ultimate court is the Supreme Court. For VCCA's decision on how to proceed once an official investigation has commenced the involved parties may appeal to the Minister for Industry and Trade, who may cancel the competition case handling decision and request that a new decision be taken. Hence, competition law enforcement involves the VCCA, VCC and ultimately the judiciary.

Court systems play a major role in competition law and policy implementation and enforcement in all jurisdictions. Indeed, the role of courts is crucial for creating an environment of certainty and predictability in market economies, more generally well-functioning courts guarantee the security of property rights and enforcement of contracts. Specifically, regarding competition policy, the judiciary has the important function of ensuring not only that procedural due process⁷⁰ is observed, but also of applying the underlying substantive principles of the competition law in a correct and consistent manner.

The latter requires that the courts be equipped and ready to engage with economics. The underlying economic nature of competition laws means that for an adequate adjudication of competition cases economic facts and concepts must be brought into legal reasoning so as to be subject to the rule of law. To do so, courts need to interpret a competition law which has at its core concepts which are economic in nature, such as the notions of "market", "market power" and "significant lessening of effective competition" (or similar/equivalent concepts). They will then need to apply these notions to complex business situations, by assessing economic evidence and witnesses, and review the findings of the competition authority that is specialised and has expertise in applying such concepts. At the same time decisions need to be expedite, since competition deals with the business conduct of firms in markets that do not standstill. A decision that takes too long may have significant and permanent consequences for markets, and thus negate the benefits of intervention by the competition authority in the market in question and to the economy more generally.

It is widely accepted in the international community that independent judicial review of decisions of a competition authority or authorities is desirable to ensure fairness and integrity of the decision making process (e.g., OECD 2012).

According to some of the stakeholders consulted, the administrative courts in Viet Nam shy away from engaging with the substance of matters and are wholly

⁷⁰ The protection of fundamental procedural rights, such as the right of privacy, to a fair and impartial hearing, and confidentiality of information).

process driven. This could be even more the case regarding competition matters as provincial court judges are unfamiliar with such matters. This process driven approach is the reason why the jurisdiction for the procurement laws has been shifted to the commercial courts.

The comments received by the stakeholders are borne out by the findings of the World Economic Forum which classifies the Vietnamese courts system poorly relatively to some of its ASEAN partners, by classifying it as 88 out of 144 countries regarding the independence of the judicial system from influences of the government, individuals or companies, and 92 out of 138 countries when measuring the efficiency of the legal and judicial systems for companies in settling disputes.

Table 5. Judicial effectiveness in 2016-2017 according to the World Economic Forum in ASEAN countries⁷¹

Year	Judicial independence	Efficiency of the Legal Framework in Settling Disputes
Brunei	# 61 out of 140	# 54 out of 140
Cambodia	# 123 out of 140	# 115 out of 140
Indonesia	# 60 out of 144	# 52 out of 144
Laos	# 77 out of 140	# 48 out of 140
Malaysia	# 45 out of 140	# 19 out of 140
The Philippines	# 80 out of 140	# 110 out of 140
Singapore	# 23 out of 140	# 1 out of 140
Thailand	# 64 out of 140	# 54 out of 140
Viet Nam	# 92 out of 138	# 72 out of 138

Source: K. Schwab, World Economic Forum, K. Schwab, ‘The Global Competitiveness Forum 2016-2017’, World Economic Forum, 2016, pp. 363. Available at http://www3.weforum.org/docs/GCR2016-2017/05FullReport/TheGlobalCompetitivenessReport2016-2017_FINAL.pdf.

A feature of the law enforcement system that significantly undermines the achievement of the aims of competition law (and indeed all other laws) is that court decisions are not published. This is one of the main concerns of potential international investors:

⁷¹ Myanmar is not included in this Report as the survey was not completed to minimum requirements.

“In the World Economic Forum’s Annual Global Competitiveness Report, Viet Nam constitutently ranks low (with limited progress) on both judicial independence and on the efficiency of the legal framework in settling disputes. ... One of the reasons that may explain this negative perception of the Vietnamese judiciary is the lack of transparency. Judgments of the Vietnamese courts are generally not published or reported and, therefore, investors and their legal advisors, do not have access to a body of precedents and case-law that could provide guidance and predictability on the likely outcome of individual disputes.”⁷²

A system that fails to publish its judicial decisions concerning competition law also suffers many more negative consequences than simply creating sovereign risk that discourages foreign investment. Other significant negatives include:

- It contributes to a poor understanding within the business community of, and therefore compliance with, the law. Indeed even the best funded competition authorities in wealthy western economies rely heavily on media reporting of the outcome of court cases to gain compliance leverage: The reporting of one significant fulling investigated and litigated case with a high penalty will usually discourage multiple future contraventions.
- It undermines the effectiveness of formal education in universities with the result that graduates recruited by the competition agencies, businesses, government departments and private legal advisors.
- It facilitates corruption within enforcement agencies and the courts.
- Discouragement of local investment by Vietnamese investors (just as it discourages foreign investment) and it means that Vietnamese businesses who might wish to expand internationally are handicapped in that they do not have the same level of understanding of international competition law norms.

Indeed, although the authors of this report requested a copy of the relevant court decisions applying competition law from a broad range of governmental and

⁷² European Chamber of Commerce in Viet Nam 2017 “Whitebook, Trade & Investment Issues and Recommendations”.

non-governmental entities in Viet Nam. A variety of non-committal responses were received from Vietnamese agencies. The Ministry of Justice stated clearly that an entity who held a copy of the decision was definitely permitted to provide it. The competition agencies, on the other hand, either declined to respond at all or stated that they were not clear on whether it was permissible to provide a copy.

On the other hand, a very broad range of actors knew the essential details of what was decided and did not consider themselves constrained from passing on those essential details.

Concerning specifically the application of competition law by the courts in Viet Nam, there are few instances. In the Vinapco case the provincial court affirmed the VCC's decision in full; the Supreme People's court ruled that the VCC had erred in its hearing process but that this did not undermine the correctness of the final decision which was upheld.

In another case involving allegations that a brewery had engaged in exclusive dealing the VCC had accepted commitments from an accused party and suspended the enforcement process for the matter. A complainant who was dissatisfied with the outcome made an application to the HCMC provincial court. In that case the court rejected the case on at the interlocutory stages prior to any full hearing on the merits.

In neither case, however, are the decisions published and available to the general public.

Viet Nam has, however, committed to the WTO and some of its bilateral free trade agreement counterparties that trade-related court decisions will be made public and the OECD has been advised that this will include all competition law decisions (including where all the parties are domestic Vietnamese parties). These commitments are to be found in the Law on Access to Information of 2016. In addition, the Supreme Court has just launched a website upon which its decisions should in future be visible.

In January 2018, the OECD reviewed the Supreme Court's website⁷³ and it indeed appears to constitute a major advance with respect to access to court decisions. At that time 47,017 decisions drawn from all four levels of Vietnamese courts were available. The four levels are: the Supreme People's Court (toà án nhân dân (TAND) tối cao), the superior people's court (toà án nhân dân cấp cao),

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<https://congbobanan.toaan.gov.vn/>.

the provincial-level people's court (toà án nhân dân cấp tỉnh), and the district-level people's court (toà án nhân dân cấp huyện).

The majority are not business related but a significant minority are. The breakdown by category of law is as follows: Criminal (10,770), Civil (7696), Marriage and Family (23,642), Business (1007), Labor (245), Bankruptcy (11), Administrative (524), and Administrative Applications as to Sanction (3122).

The database is not perfect. Although some cases are listed as early as 2001, correcting for typographical errors, the earliest decision appears to be from 2011 which is the year of the Supreme Court's Vinapco case discussed above. The OECD was, however, unable to find that particular case on the website.

Further, the written decisions appear to be quite conclusory when compared with those found in many other countries. That is, it's written in the format of: facts, applicable law, then conclusion – without listing the court's reasoning. Nevertheless, there has clearly been a major step forward with respect to access to court decisions.

A different kind of weakness of the current law concerns what role the VCC should play in relation to Court appeals from its decisions and whether it is properly equipped to play the role required. In particular, when the VCC's decisions have been appealed, the Courts have addressed their summons to the Chairman of the VCC. Understandably neither he, nor the other part time VCC appointees, consider it incumbent upon themselves to appear in Court to defend their decision. The permanent staff have been instructed to do so but do not have a budget that extends to procuring legal representation. Consequently, the VCC has not been represented by professional litigators.

At the same time as the current law has severe weaknesses as to the effective role of the courts and ensuring the accountability of the competition agencies, there is concern amongst the Viet Nam antitrust community that the proposed centralisation of powers in a single agency which will be responsible for all competition enforcement will mean that that agency will have unchecked power, given the current situation where courts have limited expertise and no desire to engage with competition law and economics. Whilst this concern may be somewhat diminished by the role of procedural safeguards and transparency in the decision making process of the competition authority (see above section), it is beyond doubt that, ultimately, only a well-functioning and effective court system would ensure a sound competition enforcement regime.

The need of expertise of the courts regarding competition law means that the courts may be even more ill prepared to adjudicate on competition cases than in other cases. In practice, there is a variety of ways of dealing with this difficulty that a system may choose between.

One way, is to attempt to concentrate expertise in a court or courts. This may occur naturally as business naturally concentrates in certain urban areas, but this concentration should be encouraged to the full extent permitted by the Vietnamese constitution.

Whilst experience across countries demonstrates that effective judicial enforcement of competition law does not necessarily require either specialised or generalist courts or judges⁷⁴, given its complexity, it is often argued that the specific requirements of competition law enforcement may benefit from the introduction of specialist competition law courts (ICN, 2015). There are advantages in having specialised courts or judges, as they do not approach each new case with a steep learning curve on the relevant law and economics of competition. This steep learning curve, and its costs, are a difficulty that has been felt even in well-developed systems where competition law is dealt with by generalist courts, since absent specialisation a judge may only see one or two competition cases in his/her whole career. Specialist judges – either in the context of specialist courts or as part of a “competition list or chamber” of judges belonging to a generalist court – will, after some training and faced with a more regular stream of competition cases, become familiar with the economic concepts at the root of the competition law. They would thus be better prepared than a purely generalist judge to identify the issues, identify and put due weight on the more relevant evidence and economic testimony, and thus not dwell or concentrate on purely administrative or procedural matters.

A number of possible solutions for specialisation of judges exist, such as the bifurcated model between the Competition Commission and the Competition Tribunal in South Africa, for instance (and a number of other such examples exist such as UK, Portugal, etc...) or the specialised first instance review with more generalist appellate review set out in the Hong Kong system. Another example, this time of a partially specialised court, is the French system where there are commercial courts specialising in commercial matters, which include acts of trade encompassing

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OECD (1996) ‘Judicial enforcement of competition law. Policy Roundtables’, available at www.oecd.org/daf/competition/prosecutionandlawenforcement/1919985.pdf, p. 10.

economic competition matters. It also has the Paris Court of Appeals, which has a mixed competence, with civil and criminal chambers. In particular, this Court has a chamber specialising in competition. On the other hand, the Court of Cassation is the highest civil and criminal instance in the French judicial order, having also specialised chambers – one of them being the commercial chamber, which reviews economic competition cases. As mentioned above, a similar solution has already been adapted in Viet Nam for the shifting of the procurement laws to the commercial courts, and perhaps this might be a solution also for Competition Law matters.

Another way, which can be undertaken whether competition law benefits from specialised jurisdictions or is subject to generalist judges, is to build up competition expertise through a programme of ongoing judicial education for judges based on best practices from other, more experienced jurisdictions. Judicial education can of course be provided to more generalist judges without the need to create specialist divisions or courts, although this would require more trainings to ensure an adequate level of expertise across the judiciary. This requires that funding be made available for judges likely to hear and adjudicate on competition cases to regularly attend such education programmes. The OECD already undertakes such trainings in Asia since 2010 within the context of the OECD/Korea Policy Centre and we encourage Viet Nam to organise and participate in more such events with the OECD or other organisations.

Finally, a specific issue that has been identified in Viet Nam is that courts need to start publishing their decisions (with due respect for confidentiality and commercially sensitive decision) in order to enhance the courts' accountability as well to provide guidance for business. Recently an effort has been made by the Supreme Court to publish some of its decisions, and this should be extended to a widespread efforts to publish all competition court decisions in order to increase the transparency of the Vietnamese courts.

Recommendation 7.8:

The Vietnamese government should reconsider which courts are assigned the first instance appeal jurisdiction, noting that competition law is a technical and sometimes complex area of the law with a heavy economic component.

Whichever court is given jurisdiction to hear competition law appeals, the Vietnamese government should ensure that the judges most likely to hear the relevant cases have financial and other support to access specialised domestic and/or international training on how to apply these laws - such as the OECD's judge workshops.

8. Conclusion and recommendations

8.1. Strengths and weaknesses concerning competition with the state-owned sector

Viet Nam has made a great deal of progress in its journey from a centrally planned, developing, socialist economy towards a rapidly industrialising market economy.

When the process started, almost all major enterprises were government owned. These entities were major sources of revenue and political influence for the various ministries that controlled them and they received a broad range of benefits *vis-à-vis* commercial entrants. For many years international agencies such the OECD pointed to how these, often dominant, favoured entities dragged down Viet Nam's full economic potential.

Successive waves of reforms have substantially reduced the size of the SOE sector, improved governance and reduced competitive distortions. Indeed, one indicator of the country's resolve to make progress in relation to levelling the competitive playing field that competition specialists would observe is notable is that the best known competition law enforcement case was taken against a well-connected SOE (a subsidiary of Vietnam Airlines).

Despite having made a great progress on addressing competition related issues concerning SOEs, much remains to be done. Decisions have been taken to adopt most of the elements of an international best practice competitive neutrality

framework that includes further privatisations, separation of the ownership and regulatory functions of the state and rules to prohibit favouritism.

Important work remains to be done to implement those SOE reform decisions fully, effectively and on time. Additionally, Viet Nam would benefit from an enforcement mechanism for instances in which there are disputes on whether the principle of competitive neutrality has been properly implemented.

One area that is a particular priority with the current major round of planned privatisations is to ensure that the assets are sold in packages that promote competition in markets rather than perpetuating competition issues as the assets move into private hands. This is an important “one off” opportunity because once the assets have been privatised any further intervention to restructure the businesses to achieve competitive improvements raises sovereign risk issues.

The competition authority or an economic policy agency such as CIEM could play a valuable part in providing guidance on future equitisations of other SOEs to ensure that anti-competitive legacy issues are not left behind in markets where SOEs held significant market power.

Recommendation 1:

The work of implementing clear and comprehensive competitive neutrality framework should be pursued until it is fully and effectively implemented. This includes implementing the recommendations of the OECD SOE Guidelines including: level playing field in the legal and regulatory framework for SOEs, separating state ownership function from other state functions, high standards of transparency and disclosure, high quality of accountability, separate accountancy for SOEs' economic and non-economic activities, monitoring and assessing of SOE's performance and their compliance with corporate governance standards. *Note: For further guidance on implementing competitive neutrality, reference should be had to the OECD's generic competitive neutrality recommendations.*

Recommendation 2:

The legal provisions that provide that state owned businesses do not (vis a vis privately owned entities) have preferential rights, for instance access to land or other resources available to the state; pay below commercial rates for access to capital nor be exempted from taxes and charges, should be put into full effect.

Recommendation 3:

Each SOE should be constituted in the same way as a privately owned company or, if that is not possible, the corporate governance arrangements should mirror those of a privately owned company as closely as possible.

Recommendation 4:

The Competitive neutrality principles should apply to all levels of government including central, provincial and municipal governments.

Recommendation 5:

Under the Competition Law, central and local public authorities should be prohibited from acting in a way that limits competition or discriminates between market players, and the competition authority should have the power to take action against public entities at central and local levels that adopt/adopted acts that limit competition or discriminate among market players.

Recommendation 6:

Viet Nam should ensure that the decision that all the equity in all state owned enterprises should be transferred to the SCIC (or other such body whose sole responsibility is to manage the government's investment in the business) is put into full effect. That agency should to the maximum extent possible ensure that the businesses are structured and managed in a profit making, commercial manner.

Recommendation 7:

Policy and line agencies (e.g. the Ministries responsible for making policy in telecommunications, energy and transport or the agencies responsible for enforcing laws in those areas) should perform their functions without favour or discrimination between businesses that are state owned or privately owned.

Recommendation 8:

When the government decides to sell assets in the industries where SOEs are dominant or are oligopolistic operators, advice should be sought from the competition authority (or another suitable independent body with competition

law and policy know-how) about how to ensure that the relevant market after the sale is subject to the maximum competitive dynamic.

The opinion would include advice on the optimal structure for the sale – whether the entity should be sold as a single entity or as multiple entities, whether regulatory or other barriers to entry could be removed and whether any form of regulation may be required to deal with market power issues after the sale. The competition authority should be adequately resourced to enable it to give thorough and considered advice on these issues. Unless there are compelling public interest reasons to disregard the advice of the competition authority it should be followed. If advice is not followed and the privatised or equitised entity has dominant or substantial market power consideration should be given to introducing regulatory controls that address that market power. This may include for example rules for provision of access to essential facilities on reasonable terms.

8.2. Strengths and weaknesses concerning eliminating competitive impediments in regulations

Viet Nam has made considerable progress in improving the quality of its regulation making processes generally. There is extensive and generally effective consultation with affected stake-holders both within and outside government and, for principal legislation, multiple stages of quality checking from different perspectives at the policy formation, drafting and enactment stages.

The competition authority has long had a role (or at least potential role) of advocating for unnecessary impediments to competition to be removed or reformed but, with so many tasks to be done with so little resources, the number of occasions in which it has been invited to participate in regulatory debates is very limited.

From the viewpoint of a competition law and policy peer review, two significant issues remain to be addressed:

- First, the contribution of the competition authority to regulation making needs to be increased significantly by number and intensity of interventions and the process by which the competition authority becomes involved in such debates needs to be institutionalised.
- Second, attention needs to be given to the vast array of regulation that was passed before the current quality controls were implemented.

Recommendation 9:

The NCC (or another suitable agency with a broader economic mandate such as CIEM – this applies to the rest of the current section) should be tasked with addressing the issue of competitive impediments to competition in existing legislation or regulation.

The NCC should have the power to issue public recommendations or inter-departmental recommendations concerning the re-establishment of the competitive environment if public authorities at the central and local levels have put in place/adopt acts that limit competition or discriminate among market players.

The first step should be to identify the sectors that are in most need of a detailed assessment. A list of priority candidate sectors should be established drawn from:

1. the top 20 most important sectors of the Viet Nam economy in terms of contribution to GDP, employment, exports or other criteria considered relevant for Viet Nam; and
2. any other sectors that after a wide consultation or a consultation with e.g. the Viet Nam Chamber of Commerce and Industry proposes as a candidate.

The second step should be to undertake assessments in a targeted number of sectors per year according to the OECD Competition Assessment Toolkit making appropriate recommendations for reforms to facilitate competition.

The third step would be for the agency to evaluate the progress of the programme and to decide whether to proceed with further reviews and how to identify candidates based on maximizing the contribution of this reform work to Viet Nam's national economic wellbeing.

Recommendation 10:

A mechanism should be implemented that alerts the NCC of all proposed new laws affecting business at an early stage and the NCC should be provided with an opportunity to provide its opinion based on a competition assessment checklist. The NCC should perform this work using the principles and methodology described in the OECD Competition Assessment Toolkit.

8.3. Strengths and weaknesses concerning the substantive provisions of the competition law

Viet Nam was one of the earliest countries in ASEAN to adopt a comprehensive competition law. From the outset, that competition law covered all three major areas that a competition law should address: anticompetitive agreements; single firm abuses and anticompetitive mergers.

The provisions of the current competition law are, however, generally form based rather than effects based. For example, mergers must be filed if the merged entity will have 30% of the market and mergers are prohibited if the merged entity would gain a 50% market share unless an exemption is sought.

Similarly, certain conduct by a firm with a relevant market share is out-right prohibited regardless of whether in fact there is an anticompetitive effect. There is also a unique Vietnamese two-tier set of prohibitions in this area, one for abuse of monopoly and the other for abuse of dominance.

When it comes to the prohibition of what other countries would regard as a “hard core” cartel that should be strictly prohibited, in Viet Nam, such cartels are generally only prohibited if they affect 30% of the market.

Even if these features had advantages when the country’s transition to the market economy was just starting and competition law was new, for Viet Nam’s economy to reach its full potential, the substantive provisions of the competition law need to be adapted and to evolve. The government has recognised this and an advanced draft of a new law sits before the National Assembly.

Recommendation 11:

Hard core cartel conduct (i.e. price fixing, market sharing and agreements to limit capacity) is inherently harmful and should be illegal regardless of what proportion of the market is affected. In other words, the cartel prohibitions in both the Competition Law and the Penal Code should not be subject to a 30% market share requirement.

Recommendation 12:

Exclusive dealing should be removed from the list of ‘per se’ illegality and should only be illegal if it substantially lessens competition.

Recommendation 13:

A “catch all” prohibition should be enacted that prohibits any agreements that have a substantial anticompetitive effect.

Recommendation 14:

The NCC should have an effective compulsory inspections power (i.e. “dawn raid” power). This means that it should be able to enter, unannounced, the premises of those being investigated to search and seize relevant evidence, regardless of its format. There needs to be a balance between having a degree of procedural safeguards (e.g. the requirement to seek judicial authority or warrant) without the requirements being too burdensome for the NCC as to diminish the efficacy of such investigation powers.

Recommendation 15:

The law should provide for a leniency policy including complete immunity for the first party to report a cartel. The principal legislation should provide a solid legislative basis for the immunity but the details of the programme should be set out in subordinate regulations that can be drafted, adopted and adjusted over time with experience by the NCC or the government without the need to return to the National Assembly for new legislation concerning those details.

Recommendation 16:

Importantly, there needs to be a parallel reform to the Penal Code (or some other kind of mechanism such as an arrangement between the NCC and Procurate) by which a party who reports a cartel would clearly *neither* be

exposed to penalty under the competition law *nor* the competition provisions of the Penal Code.

Recommendation 17:

Detailed consideration should be given to whether the abuse of monopoly prohibitions should be removed so that the abuse of dominance prohibitions would be the only prohibitions concerning unilateral conduct. The concept of abuse of dominance is one that has been extensively debated and honed in most major countries around the world.

The additional abuse of monopoly concept is not recognised in other countries and there does not seem to be a unique Vietnamese rationale for having such an additional prohibition.

The market share threshold for dominance should be higher than 30%, possibly a more appropriate benchmark may be 50% (such as, for example, in the case of the European courts that have set a rebuttable presumption that market shares above 50% amount to dominance).

This market share threshold should be a rebuttable presumption and thus the law should provide a clear avenue for firms that have more than the threshold to be able to demonstrate that they are not in fact dominant.

Recommendation 18:

All of the specifically listed forms of prohibited conduct by dominant firms should have a consistent element of competitive harm (such as, for example, selling goods or providing services below the total prime cost of the goods aimed at excluding equally efficient rivals to the detriment of consumers”).

Recommendation 19:

There should also be a “catch all” provision whereby any other forms of conduct that involves exclusionary and harmful abuse should also be prohibited.

Recommendation 20:

The merger filing thresholds should be based solely on revenue and/or transaction value thresholds.

The decision whether to approve or prevent a merger should not be whether or not a particular market share threshold is reached. Rather it should be whether the mergers would substantially lessen competition.

Recommendation 21:

The law should require that the Vietnamese Competition Authority publish guidelines illustrating how the authority will implement the provisions and the approach described should adhere to international merger administration standards.

8.4. Other strengths and weaknesses concerning the administration of competition law and policy by the competition agencies

Viet Nam's competition authorities have undertaken a large number of investigations and made a limited number of important final decisions in respect of some breaches of competition law. There has been just one major private litigation case.

There are a number of other important legal provisions that tend to undermine the effectiveness of both public and private enforcement.

Recommendation 22:

Arrangements should be put in place to: (i) harmonise the substantive requirements across the different laws that have competition provisions, (ii) 'direct traffic' in relation to which agency is to undertake investigations and (iii) ensure that the leniency policy will provide immunity from competition law prohibitions in sectoral legislation.

Recommendation 23:

Additionally, Viet Nam could consider shifting all prohibitions against anticompetitive agreements, abuse of dominance and merger control to the competition agency and repeal competition law prohibitions in sector specific legislation.

Recommendation 24:

Viet Nam should consider providing an explicit recognition that private litigants can take action to enforce the competition law to seek compensation for the consequences of breaches of the competition law both:

1. following a finding of breach by the NCC under the civil law or after a Penal Code prosecution; and
2. on a stand-alone basis even when the public enforcement agencies have not investigated or found there to have been a breach.

Such a provision would also be accompanied by a provision that enables complainants with a reasonable *prima face* complaint to obtain access to evidence.

Recommendation 25:

Special care should be afforded to leniency applicants to ensure that they are not worse off in private damage actions than companies that decided not to co-operate, whilst at the same time not absolving them of their civil liability for damages caused by their anti-competitive conduct. Fostering a private enforcement regime should reinforce a strong and effective public enforcement system and not serve to undermine it.

Recommendation 26:

Viet Nam should move towards providing the competition authority with greater flexibility and autonomy in how it conducts investigations, what information it seeks and uses and how it conducts analysis in competition law enforcement matters. In passing a new law, none of the current provisions of Decree 116 should be “hard wired” or set out in the principal law and the equivalent of Decree 116 should provide additional investigatory and analytical autonomy to the competition authority.

Wherever possible the substantive content of Decree 116 (for example on how to arrive at the appropriate market definition) should appear in a non-binding descriptive guideline published by the authority rather than a mandatory direction to the authority. The equivalent of Decree 116 should be reviewed each five years with a view to further reducing prescription as a body of case precedent develops to provide guidance on the exercise of discretion.

To the extent that it is necessary to have a new decree of this sort, care should be taken to consult with all relevant stake-holders (the national competition authority, the business community, consumer organisations and the legal profession) to avoid the ambiguities that exist in the current decree.

Recommendation 27:

If the competition law (or an implementing decree) contains a deadline for the national competition authority to make a determination, there should be a “clock stopper” where an alleged perpetrator has failed to provide information

needed for the investigation within the timeframe required for the production of that information.

Recommendation 28:

To combat circumvention, the Vietnamese competition law should apply to any conduct that has a material effect on the Vietnamese market regardless of where the business actors are domiciled or whether they may travel to engage in anticompetitive conduct.

8.5. Strengths and weaknesses concerning the institutional arrangements for the competition authorities

Despite having undertaken a significant number of investigations and having concluded several difficult enforcement matters, there are a range of institutional issues that significantly undermine the effectiveness of the competition law agencies as follows:

- Viet Nam is one of the few countries that still have separate investigatory and decision making authorities for general competition law enforcement. This has resulted in double-handling or situations in which the investigatory agency has been over-stretched while the decision making agency has not had enough concluded investigations to process at the decision making phase – both of which mean that the already very limited resources are not used to their maximum potential.
- Lack of autonomy and independence of the competition agencies – particularly at the VCA (or investigatory agency) level.
- Under-resourcing and under-staffing of the competition agencies.
- A lack of transparency of process.

Recommendation 29:

The NCC's status as an agency that is independent from government and business should be enshrined in Law. The law would prohibit completely the government from giving directions on when to open an investigation, how it proceeds and outcomes of enforcement actions. Market studies may be initiated upon request of the government but it should not be permitted to

direct the outcome and recommendations of the study carried out by the NCC. The terms of any such requests should be published and transparent.

The NCC should be accountable directly to the National Assembly, by obliging the head of the agency to go to the Assembly once a year and answer written or oral questions.

The NCC should be collegial in nature and have several Commissioners with a wide range of experience in business, economics and law. Viet Nam might wish to follow the example of Thailand and some OECD countries (e.g. Mexico) of a “public selection procedure” to ensure that the Commissioners possess the necessary expertise and independence, that the selection process is transparent, and based on merit.

The appointment of the NCC Commissioners should then involve a state body where a wider consensus is required (e.g. the National Assembly).

Although a limited number of part-time Commissioners to contribute particular expertise could be desirable, the majority of the Commissioners should be full-time, have fixed terms and such terms should be lengthy enough to allow for skill build up and beyond the length of the duration of the legislature of the National Assembly to further insulate from the political process.

Commissioners should be dismissed only for limited, well-defined reasons set out in law. This would provide more legal security and objectivity, and reduce political influence over the body.

There should be either no reappointments or limits to the number of terms, for instance the possibility of only one extension term, since the possibility of reappointment may alter the incentives and independence of commissioners.

Commissioners should not serve beyond their terms and there should be a specific rule obliging the government to appoint a new member within a reasonable time in case of vacancy. Ensuring a full board of fixed-term commissioners helps maintain the competition authority’s independence and functionality in decision-making.

Commissioners should have staggered terms so that there are always commissioners with experience sitting on the Board. This would help retain experience and enhance consistency in decision making and legal certainty.

Recommendation 30:

The NCC should be endowed in practice with sufficient budgetary and human resources to be able to effectively enforce the competition provisions in the Competition Law. This means there should be a significant increase in the

budget that has previously been allocated to the VCCA and the VCC, both to properly perform functions that it already has and adapted and in proportion to the allocation of the following new tasks:

1. conducting merger assessments using the competition test;
2. contributing to and advising on the design of the privatisation programme (as recommended above); and
3. undertaking competition assessments of existing and new legislation (as recommended above).

Independence stemming from budget allocation should be reinforced to guarantee sufficient and stable resources. One possible solution might be for the budget of the NCC to be determined by the National Assembly after hearing the Head of the NCC on its proposed budget. This would enable the NCC to present its budget directly to the National Assembly rather than to a Ministry.

If the executive branch considered the NCC's request to be excessive, it would need to make that argument to National Assembly rather than cutting the NCC's request unilaterally. This will also serve to enhance the NCC's stature.

Once the budget is approved the NCC should have full autonomy regarding how it uses its budget.

The NCC should be fully and adequately staffed in numbers and expertise and have autonomy to hire, including whom, when and under which employment and compensation conditions, including career progress, in the course of the management of its own budget. The need to attract and retain appropriate staff with the legal and economic expertise to handle the cases and make reasoned recommendations should be recognised. The recruitment process should not face undue constraints such as civil service exams or compliance with civil service quotas. A strong secretariat would result in efficiency and effectiveness. The pay scales for NCC staff should reflect that (a) the work is highly specialised; and (b) the NCC competes with private sector law firms or other consultancies to retain quality staff.

Recommendation 31:

Internal checks and balances should be built in to the functioning of the NCC, such as peer review panels, opinions from chief legal officer and economic officers or equivalent.

Recommendation 32:

A handbook of compulsory internal procedures, including procedures for handling cases, could be very helpful. This measure could enhance predictability, and result in fewer procedural errors. It may also help reduce the effect of high staff turnover as there are clear procedures for all staff to follow.

Recommendation 33:

The NCC should have the power to publish guidelines that may offer more legal certainty to the business community on how it applies the procedural and substantive provisions of the competition law. These should be subject to public consultation and open to international commentary by being made available at that stage in the English language.

Recommendation 34:

The NCC should publish all its decisions, whilst protecting confidentiality and business secrets.

Recommendation 35:

Annual reports should be mandatory and publicly available.

8.6. Other strengths and weaknesses concerning the judicial review of competition law cases

The courts have played their part in providing legal checks and balances in the review of competition law cases.

However, it does not appear that there has been much of a focus on how best the law courts could best contribute to competition law enforcement. Further consideration is warranted concerning which courts should have jurisdiction, how best to train judges on specialist competition law concepts and how best to ensure that cases are adjudicated by the judges that received the relevant training.

Recommendation 36:

The Vietnamese government should reconsider which courts are assigned the first instance appeal jurisdiction, noting that competition law is a technical and sometimes complex area of the law with a heavy economic component.

Whichever court is given jurisdiction to hear competition law appeals, the Vietnamese government should ensure that the judges most likely to hear the relevant cases have financial and other support to access specialised domestic and/or international training on how to apply these laws - such as the OECD's judge workshops.

Annex I - Industries Requiring Licenses

No.	LINES OF BUSINESS
1.	Manufacture of seals
2.	Sale (and repair) of combat gear
3.	Sale of fireworks other than firecrackers
4.	Sale of camouflaged software and equipment used for audio and video recording and positioning;
5.	Paintball gun business
6.	Sale of military equipment and military goods for the use of the armed forces, military weapons, specialised military equipment and vehicles for the use of the army and police; special military components, accessories, materials and equipment and military engineering
7.	Pawning services
8.	Massage services
9.	Sale emergency signaling devices
10.	Debt collection services
11.	Security services
12.	Fire safety services
13.	Lawyer's practice
14.	Notary's practice
15.	Judicial assessment in the fields of finance, banking, construction, antiques, relics, copyrights
16.	Auctioneering services
17.	Commercial arbitration services
18.	Bailiff's practice
19.	Liquidation and safeguarding of assets of enterprises and co-operatives in the pending time of bankruptcy
20.	Accounting services
21.	Auditing services
22.	Tax agent services
23.	Customs brokerage services
24.	Sale of duty-free goods
25.	Bonded warehouse and container freight station business
26.	Premises for conducting customs procedures, customs gathering, inspection and supervision for rent.
27.	Securities trading
28.	Securities registration, depository, offsetting, and liquidation services by Viet Nam Securities Depository/organizations trading in listed securities and other securities.
29.	Insurance business
30.	Reinsurance business
31.	Insurance brokerage
32.	Insurance agents
33.	Property assessment service
34.	Lottery business
35.	Casino video games for foreigners
36.	Debt trade services
37.	Ratings services
38.	Casino business
39.	Betting business
40.	Voluntary pension fund management services
41.	Oil and gas business
42.	Gas trading
43.	Manufacture and repair of liquefied petroleum gas (LPG) bottles

No.	LINES OF BUSINESS
44.	Commercial assessment services
45.	Sale and destruction of industrial explosives
46.	Sale of explosive precursors
47.	Industrial explosives and explosive precursors –based business
48.	Blasting services
49.	Sale of chemicals other than prohibited chemicals stipulated in the International Convention on prohibition of development, production, stockpiling and use of chemical weapons on their destruction
50.	Alcohol business
51.	Sale of tobacco, cigarette, machinery and equipment for tobacco industries
52.	Sale of foods under the administration of the Ministry of Industry and Trade
53.	Commodity exchange operation
54.	Electricity generation, transmission, distribution, wholesale, retail, import, export and consultancy
55.	Rice export
56.	Temporary import and re-export of goods subjected to special excise duty
57.	Temporary import and export frozen foods
58.	Temporary import and re-export of goods on the List of used goods
59.	Franchising
60.	Logistics services
61.	Sale of minerals
62.	Sale of industrial precursors
63.	Commodity trading and business activities directly related to commodity trading by foreign investors and foreign-invested business entities
64.	Multi-level marketing business
65.	E-commerce business
66.	Petroleum business
67.	Energy audit
68.	Vocational training
69.	Assessment of the quality of vocational education
70.	Occupational skill assessment services
71.	Occupational safety inspection services
72.	Occupational safety and health training
73.	employment agencies
74.	Overseas employment services
75.	Voluntary drug detoxification services
76.	Outsourcing
77.	Road transport services
78.	Automobile maintenance
79.	Manufacture, assembly and import of automobiles
80.	Motor vehicles inspection services
81.	Driver training services
82.	Traffic safety inspector training services
83.	Driving test services
84.	Traffic safety inspection services
85.	Waterway transport services
86.	Building, repair and renovation of watercraft
87.	Inland watercraft crewmen and operator training services
88.	Training, recruitment and supply of marine crews
89.	Maritime safety services
90.	Shipping services and shipping agencies
91.	Towage services
92.	Import and demolition of used ships

No.	LINES OF BUSINESS
93.	Building, renovation and repair of ships
94.	Seaport operation business
95.	Air transport business
96.	Design, manufacture, maintenance and testing of aircrafts, their engines, propellers, avionics and equipment thereof in Viet Nam
97.	Airport operation business
98.	Aviation service at airports
99.	Air navigation services
100.	Flight crew training services
101.	Rail transport business
102.	Rail infrastructure business
103.	Urban railway business
104.	Multimodal transport
105.	Transport of dangerous goods
106.	Pipeline transport business
107.	Real estate business
108.	Provision of training in real estate brokerage and property exchange operation
109.	Provision of training in apartment building operation.
110.	Construction management consulting services
111.	Construction surveying services
112.	(Construction) design and assessment services
113.	Construction supervision services
114.	Construction services
115.	Construction activities by foreign contractors
116.	Construction cost management services
117.	Construction quality assessment services
118.	Construction experiment services
119.	Apartment building operation services
120.	Cremation facility operation services
121.	Construction planning services
122.	Urban planning consulting services provided by foreign entities
123.	Sale of white asbestos of Serpentine group
124.	Postal services
125.	Telecommunications services
126.	Certification of digital signatures
127.	Publishing
128.	Printing services, except for printing of package
129.	Publication services
130.	Social networking services
131.	Online game business
132.	Paid radio and television services
133.	News website development services
134.	Processing, recycling, repair and renovation of used IT products of foreign owners which are on the List of used IT products banned from import
135.	Provision of information via telecommunications and internets
136.	".vn" domain name registration and maintenance services
137.	Cybersecurity products and services
138.	Civil cryptography services and products
139.	Sale of potable jamming devices
140.	Preschool education business
141.	Secondary school education business

No.	LINES OF BUSINESS
142.	Higher education business
143.	Operation of foreign-invested education institutions, representative offices of foreign education institutions in Viet Nam and branches of foreign-invested education institutions
144.	Continuing education business
145.	Operation of special schools
146.	Association in education with foreign countries
147.	Education quality assessment
148.	Overseas study consulting services
149.	Fishing
150.	Sale of aquatic products
151.	Sale of aquatic feed and animal feeds
152.	Animal feed and aquatic feed testing services
153.	Sale of biological preparations, microorganism, chemicals and environmental remediation agents used for aquaculture
154.	Building and renovation of fishing vessels
155.	Breeding, raising, artificial propagation of wild animals and plants according to CITES Appendix
156.	Breeding, raising, artificial propagation of wild, endangered and rare animals and plants according to CITES Appendix
157.	Breeding and raising of normal wild animals
158.	Export, import, re-export, transit and introduction of marine specimens stipulated in CITES Appendix
159.	Export, import and re-export of specimens bred, raised and artificially propagated according to CITES Appendix
160.	Sale of forest animals and plants restricted from use for commercial purposes
161.	Sale of plant protection products
162.	Processing of items subjected to undergo plant quarantine
163.	Pesticide testing services
164.	Plant protection services
165.	Sale of veterinary medicines, vaccines, biological preparations, microorganisms and chemicals used in veterinary medicine
166.	Veterinary technical services
167.	Animal testing and surgery
168.	Provision of vaccination, diagnosis, prescription, treatment and healthcare services for animals
169.	Veterinary medicine testing and assay (including veterinary medicines, aquatic veterinary medicines, biological preparations, microorganisms and chemicals used for veterinary medicines, aquatic veterinary medicines)
170.	Concentrated husbandry
171.	Slaughtering
172.	Sale of foods under the administration of the Ministry of Agriculture and Rural Development
173.	Animals and animal product quarantine services
174.	Sale of fertilizers
175.	Fertilizer testing services
176.	Sale of plant varieties and animal breeds
177.	Sale of aquatic breeds
178.	Testing of plant varieties and animal breeds
179.	Aquatic breed testing services
180.	Testing and assay of biological preparations, microorganism, chemicals and environmental remediation agents used for aquaculture
181.	Sale of genetically modified products
182.	Medical treatment and examination
183.	HIV testing services
184.	Tissue banking services


No.	LINES OF BUSINESS
185.	Reproduction assistance, sperm and embryo cryopreservation
186.	Testing of microorganisms causing infectious diseases
187.	Vaccination
188.	Opioid substitution therapy
189.	Plastic surgery
190.	Surrogacy service
191.	Pharmaceutical business
192.	Cosmetics production
193.	Sale of chemicals, pesticides, germicides for the use in medical appliances
194.	Sale of foods under the administration of the Ministry of Health
195.	Sale of medical equipment
196.	Medical equipment classification services
197.	Medical equipment testing services
198.	Appraisal of intellectual property (including appraisal of the copyrights and others relevant, appraisal of industrial properties and plant breeder's rights)
199.	Radiological services
200.	Assistance in application of atomic energy
201.	Assessment of conformity
202.	Testing, calibration and inspection of measuring instruments and measurement standards
203.	Manufacture of biker helmets
204.	Technology assessment and evaluation services
205.	Intellectual property presentation services
206.	Film production and distribution
207.	Antique appraisal services
208.	Development of project planning, construction, project supervision, maintenance, renovation and restoration of relics
209.	Karaoke and nightclub business
210.	Travel services
211.	Sport business and professional sport clubs
212.	Business involving art and fashion shows, model contests and beauty pageants
213.	Sale of art performance video and audio recording
214.	Accommodation services
215.	Advertising
216.	Trading in national relics, antiques and treasures
217.	Export of relics and antiques other than those under the ownerships of the Government, political organizations and political-social organizations; import of cultural products under the administration of the Ministry of Culture, Sports and Tourism
218.	Museum services
219.	Video game business (other than casino video games for foreigners and online casino video games)
220.	Land assessment and survey consulting services
221.	Land use planning services
222.	Information technology infrastructure and land information software system development services
223.	Land database development services
224.	Land pricing services
225.	Geodesic and cartographic services
226.	Meteorological and hydrological forecasting services
227.	Groundwater drilling and exploration services
228.	Extraction and use of water resources, discharge of wastewater into water sources
229.	Basic survey and consulting services for preparation of water resource planning, schemes and reports

No.	LINES OF BUSINESS
230.	Mineral exploration
231.	Mineral extraction
232.	Transport and treatment of hazardous wastes
233.	Import of scraps
234.	Environmental monitoring services
235.	Sale of biological preparations from waste treatment
236.	Commercial bank business operations
237.	Non-credit institution business operations
238.	Business operations of co-operatives, people's credit funds and microfinance institutions
239.	Payment intermediary services
240.	Credit information services
241.	Foreign exchange activities by non-credit institutions
242.	Gold trading
243.	Money printing and minting

Annex II - OECD Competition Assessment Materials

The Principles explain the ways in which key kinds of restrictions can be harmful that are summarised in the following checklist. The Principles also identify alternative, less harmful ways to achieve policy objectives.

Figure 2. Competition Assessment Checklist

COMPETITION ASSESSMENT CHECKLIST Competition assessment should be conducted if a legal provision has any of the following effects. 	
<p>A Limits the number or range of suppliers</p> <p>This is likely to be the case if the provision:</p> <ul style="list-style-type: none"> <input type="checkbox"/> A1 Grants exclusive rights for a supplier to provide goods or services <input type="checkbox"/> A2 Establishes a license, permit or authorisation process as a requirement of operation <input type="checkbox"/> A3 Limits the ability of some suppliers to provide goods or services <input type="checkbox"/> A4 Significantly raises cost of entry or exit by a supplier <input type="checkbox"/> A5 Creates a geographical barrier for companies to supply goods, services or labour, or invest capital 	<p>B Limits the ability of suppliers to compete</p> <p>This is likely to be the case if the provision:</p> <ul style="list-style-type: none"> <input type="checkbox"/> B1 Limits sellers' ability to set prices for goods or services <input type="checkbox"/> B2 Limits freedom of suppliers to advertise or market their goods or services <input type="checkbox"/> B3 Sets standards for product quality that provide an advantage to some suppliers over others, or are above the level that some well-informed customers would choose <input type="checkbox"/> B4 Significantly raises costs of production for some suppliers relative to others (especially by treating incumbents differently from new entrants)
<p>C Reduces the incentive of suppliers to compete</p> <p>This may be the case if the provision:</p> <ul style="list-style-type: none"> <input type="checkbox"/> C1 Creates a self-regulatory or co-regulatory regime <input type="checkbox"/> C2 Requires or encourages information on supplier outputs, prices, sales or costs to be published <input type="checkbox"/> C3 Exempts the activity of a particular industry, or group of suppliers, from the operation of general competition law 	<p>D Limits the choices and information available to customers</p> <p>This may be the case if the provision:</p> <ul style="list-style-type: none"> <input type="checkbox"/> D1 Limits the ability of consumers to decide from whom they purchase <input type="checkbox"/> D2 Reduces mobility of customers between suppliers of goods or services by increasing the explicit or implicit costs of changing suppliers <input type="checkbox"/> D3 Fundamentally changes information required by buyers to shop effectively

Source: OECD Competition Assessment Toolkit, Vol. 1 Principles

The Guideline provides the detailed conceptual tools for undertaking assessments. For example, it explains how different kinds of regulations can affect the degree to which participants obtain market power, how different kinds of regulation affect barriers to entry (or exit) or how regulation can hinder innovation or efficiency.

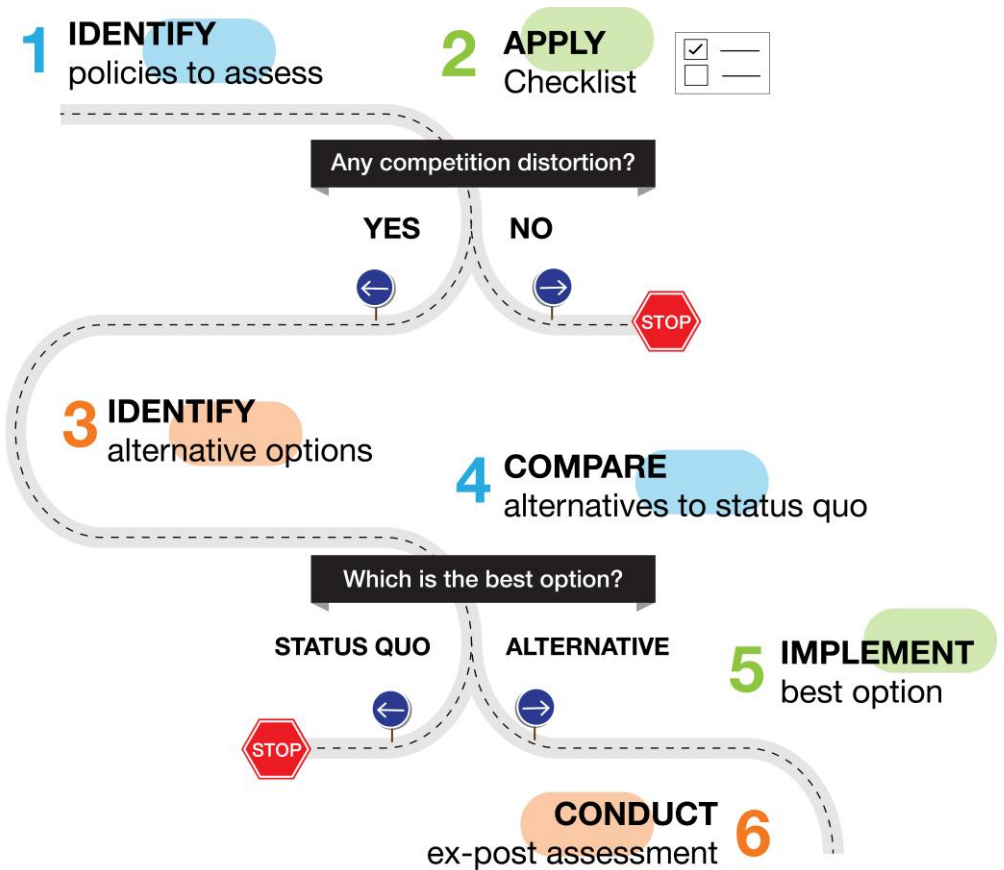
The Guideline also provides extensive guidance on the various public policy aims that regulations are commonly designed to achieve and provides actual examples and hypothetical case-studies concerning how particular types of regulations can be re-designed to best achieve these policy goals while simultaneously reducing the harm to competition.

The Operational Manual outlines the practical steps in designing and undertaking reviews. For example, it discusses separately why and how to apply competition assessment to:

- new regulatory proposals;
- undertaking focused market studies on industries that have been identified as suffering from a lack of competition;
- a sectoral review in which the regulations applying to an important economic sector are reviewed not because there is an *a priori* suspicion that there is a competition problem but rather that the sector is of such importance that there is a priority attached to ensuring its regulations are performing well.

The Manual then sets out the following stepped process for undertaking the reviews:

Figure 3. Steps in Competition Assessment



Source: OECD Competition Assessment Toolkit, Vol. 1 Principles

Annex III - Penal Code

Article 217. Offences against regulations of law on competition

Any person who participates in or commits any of the following violations against regulations on competition and earns an illegal profit of from VND 500,000,000 to under VND 3,000,000,000 or causes damage of from VND 1,000,000,000 to under VND 5,000,000,000 shall be liable to a fine of from VND 200,000,000 to VND 1000,000,000 or face a penalty of up to 02 years' community sentence or 03 - 24 months' imprisonment.

1. Reaching an agreement on preventing another enterprise from participating the market or developing its business;
2. Reaching an agreement on eliminating another enterprise which is not a party to such agreement from the market;
3. Reaching an agreement on limited competition while the parties to such contract has a total market share of 30% or over, including: agreement on directly or indirectly pricing goods/services; agreement on division of market, goods/services supply; agreement on restriction or control of quantity of goods/services; agreement on restriction on technological development or investment; agreement on imposition of conditions upon other enterprises for conclusion of sale contracts or forcing other enterprises to assume obligations that are not related to the contracts.

This offence committed in any of the following cases shall carry a fine of from VND 1,000,000,000 to VND 3,000,000,000 or a penalty of 01 - 05 years' imprisonment:

1. The offence has been committed more than once;
2. The offence involves the use of deceitful methods;
3. The offender takes advantage of its dominant position or monopoly on the market;
4. The illegal profit earned is VND 5,000,000,000 or over;
5. The damage incurred by other enterprises is VND 3,000,000,000 or over.

The offender might also be liable to a fine of from VND 50,000,000 to VND 200,000,000, prohibited from holding certain positions or doing certain works for 01-05 years.

Punishments incurred by a corporate legal entity that commits any of the offences specified in this Article:

1. A corporate legal entity that commits this offence in the case specified in Clause 1 of this Article shall be liable to a fine of from VND 1,000,000,000 to VND 3,000,000,000;
2. A corporate legal entity that commits this offence in the case specified in Clause 2 of this Article shall be liable to a fine of from VND 3,000,000,000 to VND 5,000,000,000 or has its operation suspended for 06 - 24 months;
3. The violating corporate legal entity might also be liable to a fine of from VND 100,000,000 to VND 500,000,000, prohibited from operating in certain fields or raising capital for 01 - 03 years.

Article 222. Offences against regulations of law on bidding that lead to serious consequences

A person who commits any of the following acts and causes damage of from VND 100,000,000 to under VND 300,000,000, or causes damage of under VND 100,000,000 but was disciplined for the same offence, shall face a penalty of up to 03 years' community sentence or 01-05 years' imprisonment:

1. Illegally interfering bidding activities;
2. Colluding with other bidders in bidding;
3. Commit frauds in bidding;
4. Obstructing bidding activities;
5. Committing regulations of law on assurance of fairness and transparency of bidding;
6. Holding contractor selection before capital sources are determined that result in inability to pay contractors;
7. Illegally transferring the contract.

This offence committed in any of the following cases shall carry a penalty of 03-12 years' imprisonment:

1. The offence is committed for self-seeking purposes;
2. The offence is committed by an organised group;
3. The offence involves the abuse of the offender's position or power;
4. The offence involves the use of deceitful methods;
5. The offence results in damage from VND 300,000,000 to under VND 1,000,000,000.

If offence results in damage of VND 1,000,000,000 to over, the offender shall face a penalty of 10-20 years' imprisonment.

The offender might also be prohibited from holding certain positions or doing certain works for 01-05 years, or have all or part of his/her property confiscated.

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