OECD PEER REVIEWS OF COMPETITION LAW AND POLICY: VIET NAM 2018

Highlights from the report on the Peer Review of Competition Law and Policy in Viet Nam

Every competition authority can benefit from discussions with peers in other countries. Viet Nam is no exception which is why the Vietnamese government via the Central Institute for Economic Management (CIEM) asked the OECD to examine its competition law and policy at a moment when the country's current competition law is under review. This report provides Viet Nam with a roadmap to help align its competition law and policy with international standards and best practice.

The OECD's recommendations will, if implemented, provide a realistic path to success and address the need for: institutional reform, leading to increased resources and independence; more investigative tools and powers; an improved competition law framework that is more reflective of economics and effects-based; a competitive neutrality framework; as well as a competition assessment framework.

Institutional Design and Resources

The first critical step is to bolster the independence of the competition authority. There is wide recognition in the international community that agency independence is a key element in a competition regime. The current institutional design in Viet Nam does not guarantee enough independence to the existing two agencies. The proposed new law provides for one agency. This new entity should be independent from government and business and this should be enshrined in law. It would therefore benefit, as per the proposed new law, to be outside a Ministry.

The Review also proposes that the new competition law would prohibit government from giving directions on when to open an investigation, how it proceeds and the outcomes of its enforcement actions. Greater independence should not mean however that the competition agency should not be accountable, and to ensure accountability Viet Nam should consider making the new agency 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, for instance. The National Assembly might also be involved in the appointment of the Commissioners of the new agency, which should have a collegial structure, and dismissals should be only for limited, well-defined reasons in law.

The move provided in draft legislation towards a single-agency administrative model, increases the need to ensure case specific transparency and due-process. Adopting 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, is common practice internationally.

The second critical step is to increase the competition authority's resources as well as the effective use of those resources. A first step may be, as the draft new law sets out, to have one agency only, thus avoiding duplication of resources. The second step is to endow the new agency with sufficient budgetary and human resources to effectively enforce the competition law. The primary responsibility here lies with the government and/or National Assembly, which must align the competition authority's budget with its importance to the economy. The expected gains from stronger competition justify the relatively limited additional expenditures. Without such an investment, there is little possibility that the competition authority can fulfil its existing duties, much less the expanded role envisioned in this Review (competition assessment, role in competitive neutrality, more effects based analysis, etc.).

A budget coherent with its mandate would mean that the competition authority could recruit and retain talented staff, its most important asset. Once the budget is approved and to help bolster the independence of the new agency, it should have full autonomy regarding how it uses its budget. This would include autonomy to hire staff and to determine conditions of employment to attract and retain appropriate staff with the legal and economic expertise to handle the complexity of competition cases. .

Finally, the Review recommends that within the constitutional constraints that may exist, Viet Nam should reconsider which courts are assigned the first instance appeal jurisdiction so as to allow to the extent possible some specialisation and permit a designated group of judges to decide competition cases. Indeed, this is a technical and sometimes complex area of the law with a heavy economic component and courts play a major role in competition law and policy implementation and enforcement. In particular, the judiciary has the important function of ensuring not only that procedural due process is observed, but also of applying the underlying substantive principles of the competition law in a correct and consistent manner to ensure legal certainty and predictability.

Foreign governments and international organisations such as the OECD are now, and plan to continue, providing technical assistance projects to Courts. These projects are a remarkable opportunity to build capacity. It is vital that Viet Nam and its foreign partners seek to apply these resources effectively and efficiently, and thus Viet Nam should target for training those judges most likely to hear competition cases.

Reform the substantive provisions

In order to condemn only practices that are anticompetitive and to leave market mechanisms free otherwise, competition law needs to screen for enforcement only practices that undermine the market. As competition is an economic concept economics can and should be used to detect and prosecute the types of agreements and conducts, which under certain economic contexts, are likely to distort competition. Economic tools can be used to measure the significance/magnitude of the adverse price and output effects. Economic theory can also identify and measure the efficiencies that those agreements and/or conducts may create and the qualitative and quantitative evidence needed to verify and measure such efficiencies.

In Viet Nam the provisions of the current competition law are generally form based rather than effects based, meaning there is a reduced role for economics. 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. 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.

This Review considers that a number of reforms to the current law need to be introduced to provide a greater role for effects-based approach.

As regards abuse of dominance position, for instance, the market share threshold for dominance should be higher than 30%, possibly a more appropriate benchmark may be 50% and even then it should be a rebuttable presumption (such as, for example, in the case of the EU). There should also be a "catch all" provision whereby any other forms of conduct that involves exclusionary and harmful abuse should also be prohibited.

Regarding the control of economic concentrations, and following international best practices, the market share threshold should be changed to be based solely on more objective criteria such as revenue and/or transaction value thresholds. More importantly, the decision whether to approve or prevent a merger should not be whether or not a particular market share threshold is reached but rather whether the merger would substantially lessen competition.

The Review also recommends that the new law should grant the power to the competition authority to publish guidelines illustrating how it will implement the substantive provisions and the approach described. These guidelines may serve to interpret and clarify 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.

Leniency and Investigation Powers

The incentive to comply with the law is a function, principally, of two variables. Will prosecutors detect misconduct, and what punishments will be imposed for violations? Regarding, the prosecution of hard core cartels is at the top of the agenda of most competition authorities but prosecution requires effective detection tools.

One of the priorities in order to measure against international standards must be to increase the competition agency's investigatory powers, in particular to ensure effective and clear compulsory and unannounced inspection powers. Legislative reforms are necessary to allow the competition agency to enter, unannounced, the premises of those being investigated to search and seize relevant evidence, regardless of its format. At the same time 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.

More generally, the Review recommends that 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. This means that the Review recommends that any document that would limit the competition authority should appear in guidelines published by the authority rather than a mandatory direction to the authority provided in law.

Whilst the current law does not provide for leniency, the proposed new law provides for complete immunity (which would be appropriate for the first party only) or a "discount" for co-operation, which is supported by the Review. International best practices clearly demonstrate that a leniency programme needs to be detailed enough that it provides a high degree of certainty on the benefits and obligations of applying for leniency. Therefore whilst the draft new law must be commended for providing for leniency, it must also provide a solid legislative basis for the immunity whilst allowing the competition agency to promulgate subordinate instruments detailing, the benefits and obligations for applicants that can be drafted, adopted and adjusted over time based on its experience, or risk that no leniency applications will come forward.

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

Both the "dawn raid" powers and a comprehensive leniency programme is a very important reform that has the potential to substantially improve the ability of the competition authority to investigate cartel matters in particular.

Implement a 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 – in particular in the last few years.

Whilst these are encouraging steps in the right direction, 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 a well-equipped economic policy agency with competition policy skills 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

Many obstacles to competition in Viet Nam reside in public policies – statutes, regulations, customs, and practices – that discourage new business entry or the expansion of existing enterprises. 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.

The new competition authority can make a strong contribution to Viet Nam's economic performance by helping to identify and address anti-competitive barriers using instruments such as the OECD's Competition Assessment Toolkit.

Taking an active role in competition assessment and the promotion of pro-competitive reforms are logical complements to the enforcement of prohibitions on anti-competitive practices by private firms. This role could however be envisaged to be undertaken by another agency with the sufficient resources and expertise.

The Review thus recommends that two issues 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.

To ensure the effectiveness of this competition assessment review, 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.

Key Recommendations

1. **Increase the Competition Agency's financial resources and institutional independence and autonomy** coherent with its mandate and importance to Viet Nam's economy.
2. **Promote specialisation of competition law courts or judges** to the extent possible as well as ensure judge education in competition law and economics.
3. **Give the Competition Agency the power to enter premises unannounced and seize documents** from business premises, in any format.
4. **Implement a clear and transparent leniency programme** with clear protection in the Penal Code provisions.
5. **Reform the substantive provisions to be more effects based** and not form-based and market share centric.
6. **Fully implement competitive neutrality framework** and involve the competition authority or an economic policy agency in providing competition policy guidance on equitisations of SOEs.
7. **Implement competition assessment mechanisms** for new laws and institutionalise the role of the competition authority or other suitable agency and reviewing existing laws based on the OECD Competition Assessment Toolkit.

Peer Reviews of Competition Law and Policy

OECD peer reviews have proved to be a valuable tool for countries to reform and strengthen their competition frameworks.

The mechanisms of peer reviews vary, but they are founded upon the willingness of a country to submit its laws and policies to substantive questioning by other peers.

The process provides valuable insights into the country under study, getting to the heart of ways in which each country deals with competition and regulatory issues, from the soundness of its competition laws to the structure and effectiveness of its competition institutions.

Furthermore, these reviews incorporate recommendations for changes in government policy.

Argentina (2006)

Brazil (2010, 2005)

Chile (2004)

Colombia (2009)

Costa Rica (2014)

Czech Republic (2008)

Denmark (2015)

El Salvador (2008)

European Union (2005)

Honduras (2011)

Kazakhstan (2016)

Latin America (2006, 2007, 2012)

Mexico (2004)

Panama (2010)

Peru (2004)

Romania (2014)

Russia (2004)

South Africa (2003)

Chinese Taipei (2006)

Turkey (2005)

Ukraine (2008, 2016)

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