



LEGAL UPDATE

DRAFT LAW ON COMPETITION

The fifth draft of the Law on Competition (**Draft Law**) has recently been published. The Draft Law is currently being discussed by the National Assembly and is expected to be adopted in the first semester of 2018.

Hereafter you will find the most significant changes compared to the current Competition Law which dates from 2004 (**2004 Law**). Please note that the Draft Law may be further revised, and further guidance may be needed from the relevant authorities of Vietnam.

1. Market share or significant market power

Currently the market power or market share will be determined based on various criteria such as technology power, financial capacity, IP rights, infrastructure, etc. The Draft Law supplements ways to determine an enterprise's market share and introduces a new term 'significant market power'. Now also the following criteria can be taken into consideration:

- a. the capability of accessing and controlling the consumption/ supply market;
- b. the financial capacity of the company;
- c. the technological capacity of the company; and/or
- d. the facilities of the company.

In the Draft Law, the market share is not just based on turnover of the enterprises, but a market share will also be defined by sales figures, turnover or total units of goods and services sold and bought by all enterprises in the relevant market. The Draft Law further stipulates the ways to identify sale figures and turnover of some specific enterprises including insurance companies and credit institutions.

2. Agreements restricting competition

Under the Draft Law certain agreements can be deemed to restrict competition. Unlike the 2004 Law, the Draft Law removes the specific market share thresholds to determine and regulate the agreements restricting competition. Instead, it puts a general prohibition on the following agreements in restraint of competition:

- a. Agreements which are concluded between competitors on for example the following:
 - i. fixing the sale or purchase price of goods and services;

- ii. dividing distribution outlets; sources of supply of goods; and provision of services;
 - iii. restricting or controlling production; purchase or sales of quantities or volumes of goods or services; and
 - iv. colluding to enable one or all of the parties of the agreement to win bids for supply of goods or provision of services.
- b. Agreements which are concluded between competitors and that cause or may potentially cause a significant impact on competition, for example:
 - i. restricting technical or technological developments or investment;
 - ii. imposing on other enterprises conditions for signing contracts for the sale and purchase of goods and services or forcing other enterprises to accept obligations which are not related in a direct way to the subject matter of the contract;
 - iii. fixing re-sale price of goods and services;
 - iv. not transacting with other organisations or individuals;
 - v. restraining/restricting product supply and services supply of other individuals, organisations and enterprises, and
 - vi. restriction of competition in general.

The Draft Law distinguishes explicitly between horizontal and vertical anti-competitive agreements which existed already in many other countries including in the European Union. A vertical agreement is deemed to be anti-competitive if it causes or may potentially cause a significant impact to the market.

3. Dominant position

Currently an enterprise shall be deemed to be in a dominant market position if the enterprise has a market share of more than 50% in the relevant market or has a significant market power. In the Draft Law, this has been reduced to having a market share of 30% or more.

4. Economic concentration

4.1 Definition

Under the 2004 Law an economic concentration of enterprises is prohibited if the enterprises have a combined



market share of 50% or more in the relevant market. The Draft Law has narrowed the scope and stipulates that an economic concentration will be prohibited if it causes or potentially can cause significant impact to competition in Vietnam, and this impact cannot be remedied. This means that not just horizontal transactions will be covered by the Competition Law, but also vertical and mixed transactions.

4.2 Impact

The Draft Law will have a broader impact than the current law. Reason for this is that anti-competitive activities that are performed abroad but have an impact on the Vietnamese market will also be governed by the Draft Law. There will also be an impact on M&A deals between offshore entities and indirect equity interests in a Vietnam-based entity as these deals will fall under the oversight of the Vietnamese competition authorities.

5. Notification economic concentration

5.1 New thresholds

Currently, notification is required if the parties have a combined market share between 30-50% in the relevant market. Under the Draft Law the thresholds for notification will be flexible as the Government will be responsible to provide and adjust the thresholds for:

- a. Total assets in Vietnam of either of the enterprises entering into the transaction;
- b. Total revenues in Vietnam of either of the enterprises entering into the transaction; and
- c. Total value of the transaction.

5.2 Consequence of non-compliance

Failure to comply with the notification requirement could mean a fine up to 5% of the total turnover. Moreover, in case the authorities determine that the M&A deal results in a prohibited economic concentration, changes to structures will need to be made. The notification requirement could therefore impact the timeline in which M&A transactions can be finalised.

6. Leniency policy

There is also good news, as a leniency policy is introduced in this Draft Law. This means that in case an enterprise has engaged in an anti-competitive agreement (cartel for example) it may be entitled to leniency if it voluntarily reports this participation to the competent authority. The

competent authority decides if leniency will be applied and the enterprise will be exempted from or be entitled to reduction of sanctions based on guidelines in the Draft Law.

7. Penalties

The 2004 Law regulates a general penalty for acts violating the law. The penalty is 10% of the total turnover of the violator in the financial year preceding the year in which the prohibited practice took place. In the Draft Law, the maximum fine imposed to a breach in economic concentration will be 5% instead of 10%. The maximum fine imposed to a breach in unfair competition is VND500 million and a maximum fine imposed for agreements in restraint of competition or abuse of dominant market position or monopoly position remain 10%.

8. Competent Authority

The Competition Council and the Competition Authority shall be transformed into the National Competition Authority (**NCA**) which shall be the authority to receive, resolve and appraise an application dossier of exemption.

9. Publication of decisions of the NCA

Some major decisions of the NCA (such as decision on granting and exemption or decision on settlement of a competition case) will be published on the NCA's website within 90 days after the decision has become effective. State secrets and trade secrets shall be edited prior to publication to protect the parties' interests.

The idea of more transparency in settlement of competition cases is welcomed and could improve compliance with the law. However, it is not clear what the meaning will be of these decisions for future cases and if old decisions will still be published.

For more information, please contact:

Mark Oakley / Managing Partner
mark.oakley@acsvlegal.com

Hieu Pham / Associate
hieu.pham@acsvlegal.com