COMPETITION LAW 2018: KEY CHANGES, IMPACT ON ENTERPRISES AND RECOMMENDATIONS

Roundtable Discussion

18 June 2019

Speaker
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Partner – LNT & PARTNERS
For the first time introduce a way out for whistle-blowers

**LENIENCY POLICY**

- Notifying thresholds: determined based on, *among other criteria*, combined market share
- 2-phased procedures for evaluation of concentration

**CHANGE OF APPROACH**

Shift from *form-based* to *effect-based* approach

**MERGER FILING**

- Off-shore cartels and transactions will be caught.
- Time-limit for lodging a complaint is 3 years

**OTHER CHANGES**

- For the first time introduce a way out for whistle-blowers
SCOPE OF GOVERNANCE

- Enterprises conducting business in State-controlled industries and sectors, public professional entities, industry and professional associations, and foreign enterprises, even without presence in Vietnam, are all covered by the Competition Law 2018 when engaging in cartels or economic concentrations which (may) cause a competition-restraining impact in Vietnam.

→ An investigation into antitrust violations launched in one jurisdiction may lead to an investigation into relevant firms in Vietnam.

→ Prior to conducting cross-border M&A transactions, MNCs should carefully check whether they are required by law to notify the proposed transactions.
Horizontal Cartels
Agreements among firms in the same relevant market

Vertical Cartels
Agreements among firms operating at different stages in the supply chain

Hardcore Cartels
- Bid-rigging
- Business restriction
- Exclusion
- Horizontal cartels: price-fixing, markets/customers division, quota restriction

Non-hardcore Cartels
Remaining cartels other than 04 hardcore ones

DEFINITION
An act of agreement between parties in any form which causes an actual or potential competition-restraining impact.

IMPACT
- Vertical cartels: prohibited when such agreements (potentially) cause a competition-restraining impact
- Hardcore cartels: prohibited per se without assessment of market share
- Non-hardcore cartels: permitted when such agreements are proven to have a pro-competition impact

EXEMPTION
- Not applicable to (i) bid-rigging, (ii) business restriction, and (iii) exclusion cartels
- Exempted (05 years max) if beneficial to consumers AND (i) improves the quality of goods/services, OR (ii) enhances the competitiveness of Vietnamese businesses, OR (iii) unifies the applicability of quality standards, or (non-price) conditions for contract performance
LENIENCY POLICY

MECHANISM
- Self-reporting
- Assisting in investigation into cartels

COMPETITION WATCHDOG
- Having partaken or currently partaking in a cartel
- Coming forward before an investigation is launched
- Providing significantly valuable evidence & fully cooperating with competition watchdog
- Not being ring-leaders or coercers

CONSPIRATORS
- Granting either full immunity from fines or a reduction of fines

CONDITIONS
- Incentivising co-conspirators to terminate and abandon cartels
- Increasing the number of cartels discovered and sanctioned
- Offering a “lifeline” for cartel members

IMPACT

LENIENCY LEVELS
- The 1st whistle-blower: Full Immunity
- The 2nd whistle-blower: 60% fine reduction
- The 3rd whistle-blower: 40% fine reduction

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**DEFINITION**

Conducts by a firm holding a dominant market position, or a monopoly position, which cause an actual or potential competition-restraining impact.

**IMPACT**

Focusing on the assessment of competition-restraining impact or ability to cause such impact.

- Widened scope: change from form-based to effect-based approach
- Conducts by an enterprise/a group of enterprises having market power may be permitted if it is proven that such conducts do not (potentially) cause a competition-restraining impact.

**ABUSE OF MARKET POWER**

<table>
<thead>
<tr>
<th>An enterprise has 30% or more of the market share or significant market force</th>
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<tbody>
<tr>
<td><strong>Exploitative</strong></td>
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<tr>
<td>➔ Potentially cause loss to customers</td>
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<tr>
<td>▪ Imposing unreasonable prices, RPM</td>
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<tr>
<td>▪ Restraining production, limiting the market, hindering R&amp;D</td>
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<tr>
<td>▪ Imposing conditions to the disadvantage of customers</td>
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<td>▪ Unilaterally change or rescind contracts without justifiable reasons</td>
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<tr>
<td><strong>Exclusionary</strong></td>
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<td>➔ Potentially result in hindering or excluding competitors</td>
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<td>▪ Predatory pricing</td>
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<td>▪ Discriminatory practices</td>
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<td>▪ Imposing unreasonable commercial conditions</td>
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<td>▪ Hindering or excluding other enterprises</td>
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<td><strong>Prohibited acts under other laws</strong></td>
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UNFAIR COMPETITIVE PRACTICES

**DEFINITION**
Conducts by a firm which are contrary to the principles of goodwill, honesty, commercial practices and other business standards and which cause actual or potential loss and damage to the legitimate rights and interests of other firms.

**IMPACT**
- Whether a conduct is a violation is determined on the basis of its form rather than impact.
- “Misleading indication” is no longer a separate offense under Competition Law → more difficult for a firm to protect its legitimate rights and interests since Intellectual Property Law sets out more onerous burden of proof.
FORMS OF ECONOMIC CONCENTRATION

- Merger
- Joint venture
- Consolidation
- Acquisition

**How is “control” defined when A purchases the capital contribution/assets of B?**

- A **HAS THE RIGHT TO**
  - Charter capital/Voting right of B
  - Appoint or dismiss B’s corporate managers
  - Alter B’s Charter
  - Make decisions with regard to B’s business activities
  - Ownershi of/The right to use all or the majority of B’s assets

**MERGER CONTROL**

**ECONOMIC CONCENTRATION NOTIFICATION THRESHOLDS**

<table>
<thead>
<tr>
<th>DETERMINATION CRITERIA</th>
<th>NOTIFYING THRESHOLD VALUE</th>
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<tr>
<td><strong>Total assets</strong> in the market of Vietnam</td>
<td>≥ VND 2,000bn (~USD 90m)</td>
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<tr>
<td><strong>Total sales</strong> or <strong>purchase turnover</strong> in the market of Vietnam</td>
<td>≥ VND 1,000bn (~USD 45m)</td>
</tr>
<tr>
<td>Transaction <strong>value</strong> (NOT applicable to off-shore transactions)</td>
<td></td>
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<tr>
<td><strong>Combined market share</strong> of the enterprises intending to partake in the economic concentration</td>
<td>≥20%</td>
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**ASSESSMENT OF ECONOMIC CONCENTRATION**

- Market share of the relevant parties before and after the economic concentration
- Competitive advantages
  - Ability of a firm to increase prices/limit the competitiveness of others
- Other factors
  - Ability of a firm to increase prices/limit the competitiveness of others

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CONCENTRATION ASSESSMENT PROCEDURE

MERGER FILING

07 business days

IS THE FILE VALID?

PRELIMINARY APPRAISAL

OFFICIAL APPRAISAL

AMEND OR SUPPLEMENT THE FILE

07

Yes

30 days

No

Notifying thresholds: more apparent but still low → Increasing the number of merger filings, which may overburden the NCC’s workload.

Two-tier notification process → shortening the timeline for concentration assessment

Assessing concentration on the basis of competition-restraining impact → Economic concentration carried out by enterprises having combined market share of 50% or more is not prohibited per se.

Official appraisal is not required

Request to supplement info (if any)

(02 times at maximum)

GREENLIT

SUBJECT TO CONDITIONS

PROHIBITED

90 days

(+60 days at maximum)

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**SANCTIONS**

**CRIMINAL PUNISHMENTS**
- **INDIVIDUALS**
  - Fine btw. VND 200 m and VND 3 bn; OR
  - Imprisonment for up to 05 years
- **ORGANIZATIONS**
  - Fine btw. VND 1 bn and VND 5 bn; OR
  - Suspension for up to 02 years

**ADMINISTRATIVE PENALTIES**
- **CARTELS & ABUSE OF MARKET POWER**
  - 10% of the violator’s total turnover*
- **MERGER CONTROL VIOLATIONS**
  - 5% of the violator’s total turnover
- **UNFAIR COMPETITIVE PRATICES**
  - Max fine VND 2 bil. (~USD 86,000)
- **OTHER BREACHES**
  - Max fine VND 200 mil. (~USD 8,600)
- Remedial measures
  - Restructuring
  - Removal of illegal T&Cs
  - Compulsory divesture
  - Subject to State control on sale/purchase prices...

**WARNING**
- Time-limit for lodging a complaint is 3 years from the date on which the breach was committed

**DAMAGE COMPENSATION**
- Consumer Class Actions

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INTERNATIONAL CO-OPERATION

CONSULTATION

INFORMATION EXCHANGE

OTHER ACTIVITIES
WHAT THE NCC PUBLICLY ANNOUNCES

- Decisions granting exemption for cartels (i.e. restrictive agreements)
- Decisions on economic concentrations
- Decisions dealing with competition cases
- Decisions staying resolution of competition cases
- Decisions resolving complaints against decisions dealing with competition cases

WHAT THE NCC KEEPS CONFIDENTIAL

- Contents related to State secrets and trade secrets in the published decisions
- Information relating to or arising out of
  - Competition legal proceedings,
  - Evaluation of economic concentrations,
  - Leniency procedure, and
  - Other information as requested by owners
NEXT STEPS

Check and review contracts and deals with partners as well as cooperation with competitors.

Review, adjust and update policies and internal rules on competition law compliance.

Equip employees with competition law knowledge and conduct internal training sessions → Raising risk awareness.