

Roundtable Discussion

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

Speaker

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18 June 2019



MERGER FILING

- 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



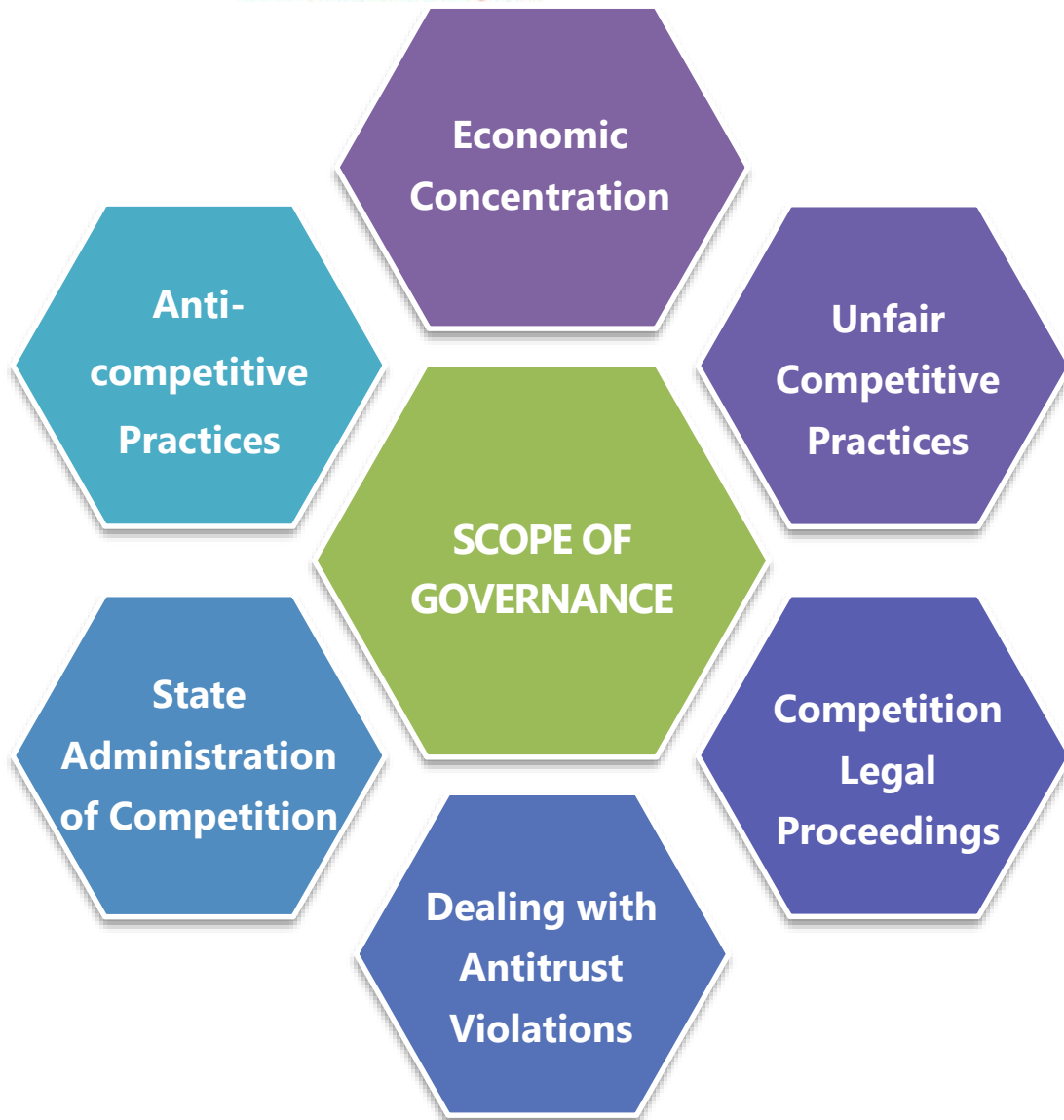
LENIENCY POLICY

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



OTHER CHANGES

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



WIDENED SCOPE

- 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

HORIZONTAL & VERTICAL

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

HARDCORE vs. NON-HARDCORE

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



- Self-reporting
- Assisting in investigation into cartels



MECHANISM



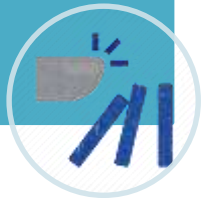
- **Having partaken** or **currently partaking** in a cartel
- Coming forward **before** an investigation is launched
- Providing **significantly valuable** evidence & **fully cooperating** with competition watchdog
- Not being **ring-leaders** or **coercers**

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



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

An enterprise has 30% or more of the market share or significant market force

Exploitative

→ Potentially cause loss to customers

- Imposing unreasonable prices, RPM
- Restraining production, limiting the market, hindering R&D
- Imposing conditions to the disadvantage of customers
- Unilaterally change or rescind contracts without justifiable reasons

Exclusionary

→ Potentially result in hindering or excluding competitors

- Predatory pricing
- Discriminatory practices
- Imposing unreasonable commercial conditions
- Hindering or excluding other enterprises

Prohibited acts under other laws

???

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.

Infringing business secrets

Coercing in business

Providing untruthful information

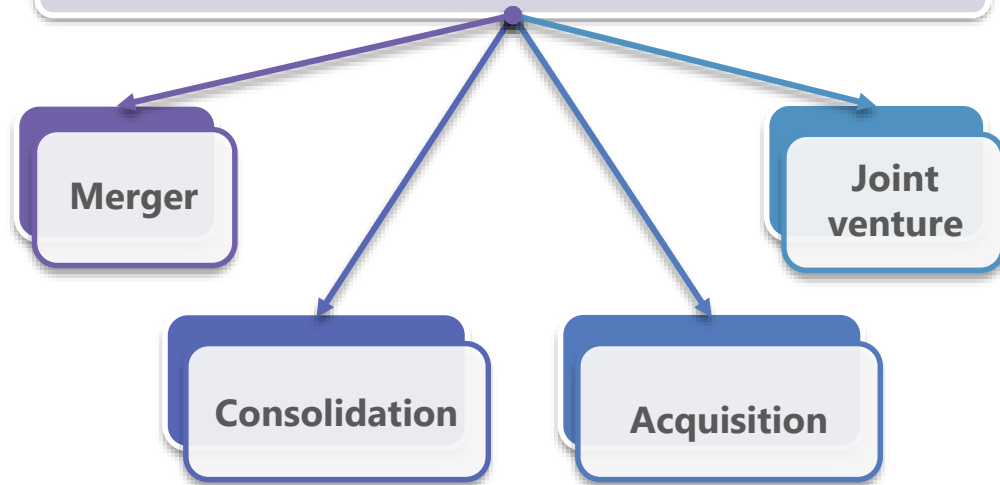
Causing disruption to the business activities of other enterprises

Improperly inducing customers

Predatory pricing



FORMS OF ECONOMIC CONCENTRATION

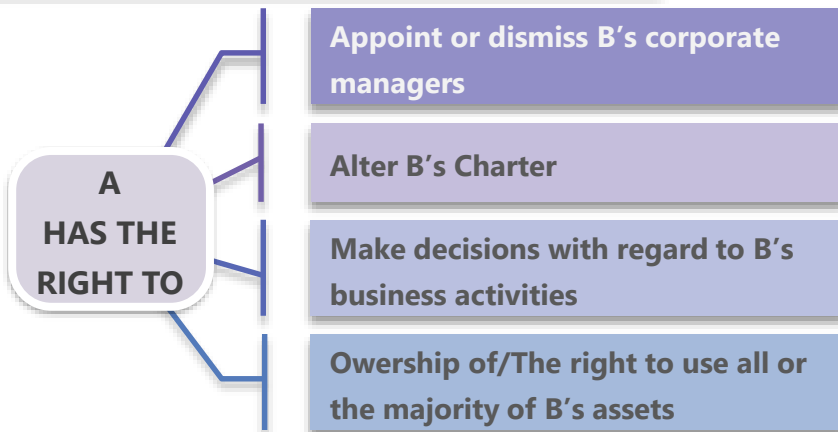
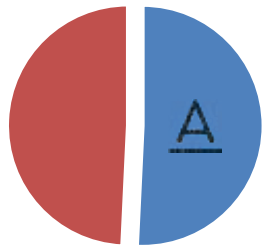


ECONOMIC CONCENTRATION NOTIFICATION THRESHOLDS

DETERMINATION CRITERIA	NOTIFYING THRESHOLD VALUE
Total assets in the market of Vietnam	≥ VND 2,000bn (~USD 90m)
Total sales or purchase turnover in the market of Vietnam	≥ VND 1,000bn (~USD 45m)
Transaction value (NOT applicable to off-shore transactions)	≥ VND 1,000bn (~USD 45m)
Combined market share of the enterprises intending to partake in the economic concentration	≥20%

How is "control" defined when A purchases the capital contribution/assets of B?

Charter capital/
Voting right of B



Market share of the relevant parties before and after the economic concentration

Competitive advantages

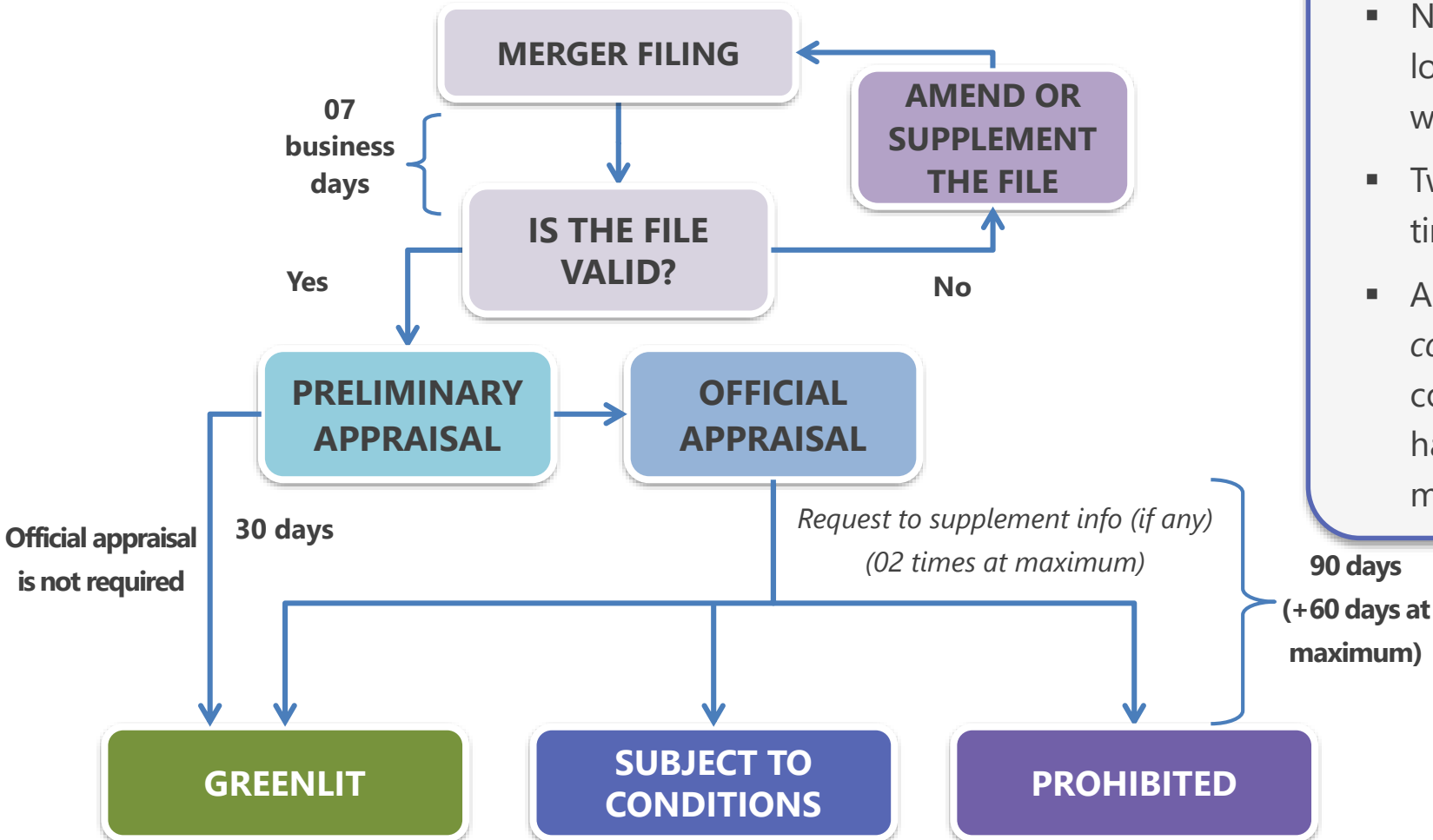
ASSESSMENT OF ECONOMIC CONCENTRATION

Other factors

Ability of a firm to increase prices/ limit the competitiveness of others



CONCENTRATION ASSESSMENT PROCEDURE



IMPACT

- 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*.



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



WARNING

DAMAGE COMPENSATION

Consumer Class Actions

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 PRACTICES
Max fine VND 2 bil. (~USD 86,000)

OTHER BREACHES
Max fine VND 200 mil. (~USD 8,600)

*Not exceeding the minimum fine stipulated in the Penal Code

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

Remedial measures

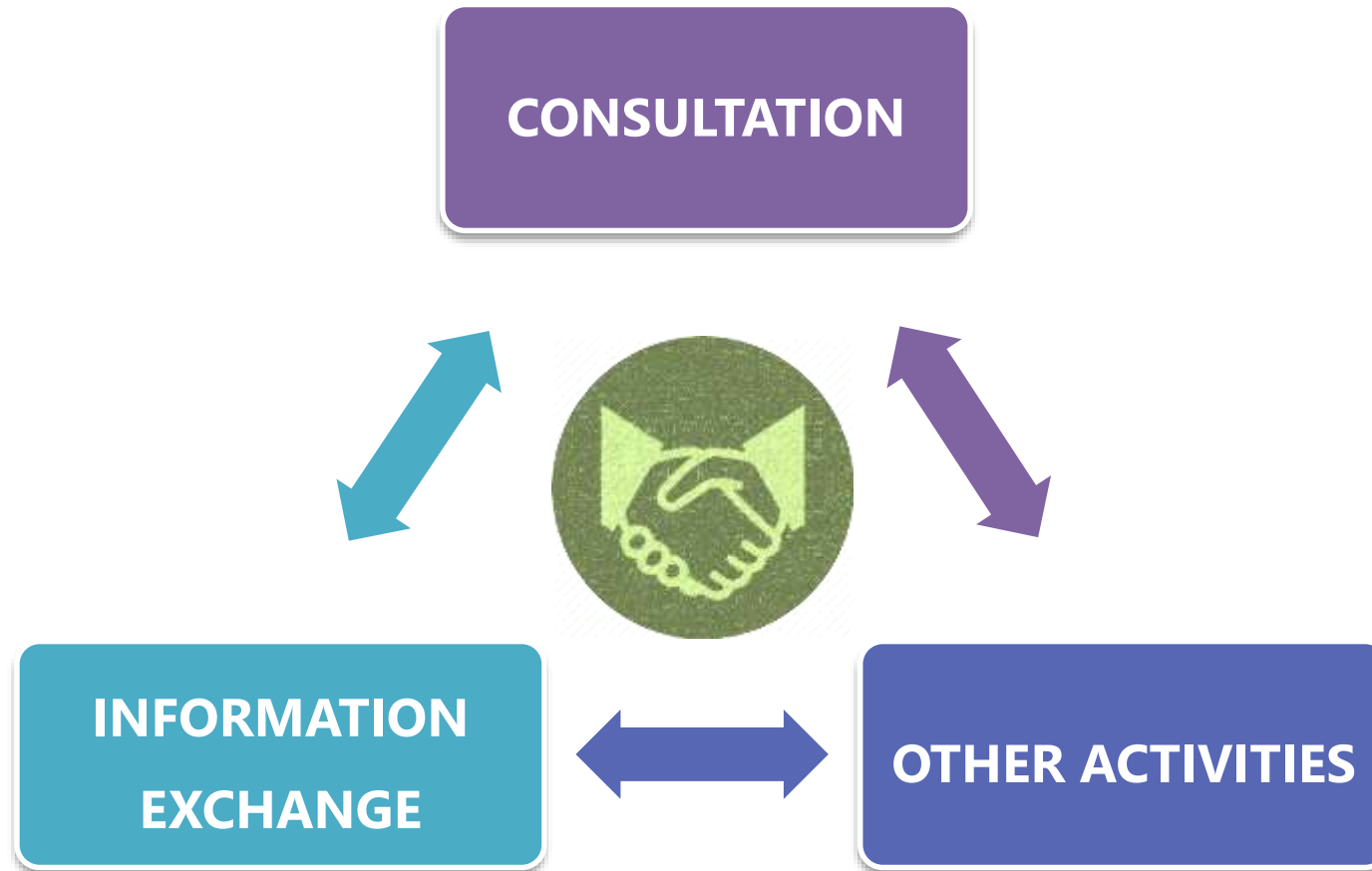
- Restructuring
- Removal of illegal T&Cs
- Compulsory divesture
- Subject to State control on sale/purchase prices...



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INTERNATIONAL CO-OPERATION





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

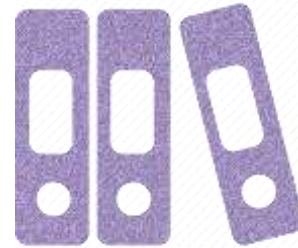
WHAT THE NCC KEEPS CONFIDENTIAL



- 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*



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*



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DISCUSSION

