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THE RELATIONSHIP BETWEEN COMPETITION AUTHORITIES AND SECTORAL REGULATORS

Contribution from Vietnam

-- Session II --

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THE RELATIONSHIP BETWEEN COMPETITION AUTHORITIES AND SECTORAL REGULATORS IN VIETNAM

1. Vietnam Competition Authority: VCAD

1.1 Brief history

1. Going parallel with renovation process initiated in 1986, which transformed Vietnam's economy from a centrally-planned economy to a multi-sector, competition is gradually accepted to be the best vehicle to enhance social welfare and protect consumers' interest. The reason is fairly simple: when choices are available to consumers, firms would be put under pressure to reduce prices, to improve their product and service quality and to be responsive to customers' needs in order to gain an advantage over rivals and win more business. The acknowledgement urges an urgent need to build and enforce competition law and policy in Vietnam.

2. In February 2003, a Board for Competition Management was established under the Ministry of Trade. The main tasks of the Board is to participate in drafting Competition Law. Other tasks involve the handling of cases on trade remedies initiated by foreign trade agencies against Vietnamese exports since these issues remains new to Vietnamese businesses.

3. In March 2004, Vietnam Competition Administration Department (VCAD) is established as a statutory body directly under Ministry of Trade of Vietnam, pursuant to the Decree No. 29/2004/ND-CP of the Government on defining the functions, tasks, powers and organisational structure of the Ministry of Trade.

1.2 Major roles

4. VCAD is a statutory body directly under Ministry of Trade of Vietnam. Its function is to assist the Minister of Trade in state management of competition in order to promote an equitable and non-discriminative competition environment, and to protect and encourage fair competition:

- making regulations and providing guidelines on compliance with the Competition Act, particularly in respect of what constitutes restraint of competition, abuse of dominant position, prohibited mergers or acquisitions, etc.;
- dealing with breaches of competition regulations;
- determining whether conduct or a particular transaction falls within one of the allowed exceptions; and
- co-ordinating with sectoral regulators to carry out competition policy and determine compliance

5. The Competition Administration Authority has the following duties and powers:

- Control the process of economic concentration in accordance with this Law.

- Process dossiers for seeking for a grant of exemption; make proposals to the Minister of Trade for his decision of further submission to the Prime Minister for his decision.
- Investigate into competition cases relating to acts of restriction of competition and unfair competition.
- Deal with and impose penalties upon acts of unfair competition.
- Carry out other duties as provided for by law.

6. In addition, VCAD is expected to be in charge of implementing other four Ordinances on: Antidumping (2004), Safeguard (2002), Subsidies and Countervailing measures and Consumer Protection.

2. Major sector regulators in Vietnam

7. Some regulators to name are Ministry of Trade, Ministry of Planning and Investment, Ministry of Finance, Ministry of Industry, Ministry of Posts and Telematics, and Ministry of Transport. Hereafter, I will brief major functions of these institutions in turn.

2.1 *Ministry of Trade*

8. The Government Decree No. 29/2004/ND-CP on determining the functions, tasks, powers and organisational structure of the Ministry of Trade re-defined the Ministry of Trade is official body of the Government in charge of state management over trade, public services, and is presented as representative of state ownership in state-owned enterprises under the Ministry's management in accordance with laws. This applies to both foreign trade and domestic trade.

2.2 *Ministry of Planning and Investment*

9. The Ministry of Planning and Investment is a government agency which is charged with the role of state management over the domain of planning and investment, that consists of: providing comprehensive advice on the country-level socio-economic development strategies, programs and plans, on economic management mechanisms and policies for the national economy and for specific sectors, on domestic and foreign investments, industrial and export-processing zones, on management of official development assistance (in short ODA) sources, national-wide control of procurement, enterprises, business registration. The Ministry is also entrusted with exerting the role of state management over public services provided in sectors belonging to the Ministry's mandate under valid legislation (*Government Decree No. 61/2003/ND-CP*). In terms of competition, it administers the entry into and exit from market of enterprises.

2.3 *Ministry of Finance*

10. The Ministry of Finance is a Government agency which has the function of implementing the State management in finance, State budget, tax, fees and other revenues of the State budget, national reserve, State financial funds, financial investment, corporate finance and financial services (generally called as financial-budgetary fields), customs, accounting, independent auditing, prices nation-wide and public services in the fields; conducting the ownership rights to the State's investment capital in enterprises according to regulations of the Law.

2.4 *Ministry of Industry*

11. The Ministry of Industry is established by the Government and responsible to the Government for state management of the industrial sector namely mechanical engineering, metallurgy, new energy, renewable energy, oil and gas, minerals mining, chemicals (including pharmaceutical industry), industrial explosion materials, consumer-goods industry, foodstuff industry and other processing industries throughout the country; implements state management of public services and represents the state ownership in state shared enterprises in the industries managed by the Ministry under the law.

2.5 *Ministry of Posts & Telematics*

12. Government Decree No.90/2002/ND-CP dated November 11, 2002 promulgating the functions, duties, range of competence and organisational structure of the Ministry of Posts and Telematics assigned the ministry as a Government agency performing the functions of State management over the fields of posts, telecommunications, IT, electronics, the Internet, radio wave emission and transmission, radio frequency and national information infrastructure in the entire country; performing State management functions regarding public utilities services and will be the reprehensive of the State as the owner of State capital in enterprises in which the State deposits a share specializing in posts, telecommunications and IT as regulated by law.

2.6 *Ministry of Transports*

13. The Ministry of Transports is a government agency in charge of state management of land transport (highways, railways), inland waterway transport and maritime transport nation-wide.

14. In each sector, since competition law has not been promulgated, there are a number of sector regulations that apply within the sector. Together with the nature of natural monopolist in some sectors, it leads to a situation of complexity and difficulty in the enforcement of competition law. We will come back to the issue in the next part.

3. *Interaction between VCAD and sector regulators*

3.1 *Competition regulatory reform in Vietnam at a glance*

15. In parallel with the process of renovation, legal competition is step by step considered to be momentum for economic development, effectiveness improvement and social progress. Since 1986, the State has gradually loosened competition restrictions and shown respect to the objective operating principles, mechanism and laws of the market. By the 1992 Amended Constitution adopted by the National Assembly in December 2001, the State recognized the right to freely do business, to compete and to be treated fairly under the light of law.

16. Over the last decade, a number of regulatory reforms aiming at creating a smoother and more open business environment have been made, remarkably, the deregulation of accession to the market. The recently adopted Enterprise Law of 2000, replacing the Company Law and the Law on Private Enterprises, has loosened regulations on market access. In some areas, individuals who want to found enterprise can even register via computer network. As a result, there were 26,000 new enterprises registering from the beginning of 2000 to the August of 2001, equivalent to 58% of total registration in the 1991-1999 period. Certain areas, which used to be state monopoly e.g. electricity, telecommunication services are now being step-by-step deregulated and open up to all economic sectors. This is clearly reflected in a number of new and; or amended legal documents such as the Ordinance on Post and Telecommunication (2002) and pending Law on Electricity.

17. In short, both the State and enterprises have been fully aware of the role of competition in the market economy as well as in the integration into regional and global economy. Competition has brought about admitted advantages concerning speeding up renovation, effectively allocating resources, eliminating backward factors, and rationally redistributing incomes. The entire economy in general and enterprises in particular have step by step accepted competition as a fundamental principle and also nature of market-based economy. The introduction of Competition Law following the Government's Program for Building Laws & Ordinances, once again re-assure the Government's commitment to reform its legal system so as to promote socio-economic development based on market forces. Nevertheless, as Vietnam's legal system is in the process of reforming, there inevitably remain conflicts, overlaps and probably inconsistencies in and among legal texts.

3.2 *Interface of Competition Law and some sector regulations*

18. The Competition Law of Vietnam governing four areas of anticompetitive conducts such as Agreement in Restraint of Competition, the Abuse of Dominant Market Position and Monopoly Position, and Economic Concentration and Unfair Competition. This law is to be applicable to all individuals and organisations conducting business in the territory of Vietnam. The overall goal of the law is to protect interests of the State, and of enterprises and consumers; and to promote socio-economic development.

19. As mentioned above, Vietnam has both competition law and a complicated sector regulations. Clearly, some sector regulations are complement to competition law however some other may contradict. Take the Vietnam's Civil Code as an example. Pursuant to article 7 of the Civil Code, individuals and organisations have the right to freely and voluntarily make commitments and agreements. This means the involving parties could establish an anticompetitive agreement e.g. agreements to share consumer markets or sources of supply of goods and services, agreements either directly or indirectly fixing the prices of goods and services, including agreements to fix resale price among parties operating in different levels of a manufacture or distribution chain, etc. Indeed, it appears there is no articles or provisions throughout the Civil Code that inhibits this sort of agreements. In this regard, it contradicts to the Competition Law as these agreements are to be prohibited by articles 7, 8 of the Competition Law.

20. Ordinance on price 2002 is an example of the potential overlap among competition law and other regulations. By law, this ordinance codifies and consolidates a number of items of legislation on competition and monopoly pricing. Detailed regulations on pricing were issued under Decree 170-2003-ND-CP of the Government dated 25 December 2003 and became effective as of 14 January 2004. By this Decree, agreement between businesses to fix prices, control prices, change prices for sale of goods and services aimed at restraining competition, infringing the legal interests of other businesses or of consumers; agreement between businesses to change prices of sale and purchase of goods and services in order to eliminate or force other enterprises to co-operate with them or become their affiliates, etc are expressly prohibited. These are consistent with the Competition Law. However it is unclear that when such conducts exist, the Ministry of Trade (VCAD) or the Ministry of Finance would be the one in charge to perform the state management task the case and whether to take the Competition Law or the Ordinance on Price into consideration as handling the case. The ambiguity predicts up-coming difficulty in enforcement of Vietnam and earnestly urges the need for interaction between competition policy authority and sector regulators.

3.3 *The interaction between VCAD and sector specific regulators*

3.3.1 *Division of task between VCAD and sector specific regulators*

21. The division of task between VCAD and Sector Specific Regulators is somewhat similar to recommended regime referred to before. Obviously *competition protection* is to be in charge of VCAD.

Other tasks of *technical regulation* and *economic regulation* are those of sector regulators. For instance, regarding Telecommunication standards and quality, State's authority of post, telecommunication, which is the Ministry of Posts and Telematics announce types of equipments, telecommunication networks, telecommunication construction and services required to apply standard (Ordinance on Post and Telecom, 2002). The remaining task of *access regulation* however is unclear. To be efficient, a close connection between of VCAD and Sector Specific Regulators is necessarily required.

3.3.2 *Interaction between VCAD and sector specific regulators in the formulation of competition law and policy*

22. In formulating competition law and policy, between VCAD and Sector Specific Regulators there exists a certain degree of interaction. Take the drafting of Competition Law as an illustrating example. In April 2000, the Minister of Trade issued a decision for establishing Competition Law Drafting Board. Members of the board include those from Ministry of Trade, Vietnam Center of International Arbitration, Vietnam Lawyer Association, Vietnam Chamber of Commerce and Industry, Foreign Trade University, Office of National Assembly, Office of the Government, Ministry of Justice, Ministry of Planning and Investment, and the Economy and Budget Committee of National Assembly. The idea of inviting several members from various sectors is to set ground for co-ordination and to ensure transparency and consistency in between competition law and other regulations.

23. The relationship between VCAD and sectors regulators is regarded and defined as involving, continuous and simultaneous process of closely co-ordination and co-operation. At the earlier stages, the process of co-ordination and co-operation would include intensive communication to achieve a common understanding of each responsibility. Under the mechanism of policy harmonisation and competition advocacy, VCAD has already initiated discussions, public workshops and seminars, which involved sectoral regulators, including Ministry of Ministry of Posts & Telematics (telecommunication sector); Ministry of Industry (electricity sector); Ministry of Planning and Investment (procurement and tendering sector); Ministry of Finance (Control of price monopoly co-operation sector); Ministry of Health (Medicine sector); Ministry of Construction and Ministry of Transportation.

24. In addition, before submitting the Competition Law to the National Assembly for promulgation, the draft has been sent to relevant Ministries/ Industries for suggestions. The Competition Law submitted is the 10th draft, which means there were at minimum 10 times of taking relevant sector regulators' suggestions into law. Nevertheless, there still remains obstructing issues of overlap and conflicts as previously mentioned. Perhaps, this interaction between those respective institutions was not close enough. In order to disseminate and implement competition law and policy in regulated sectors, VCAD need to develop and enhance co-ordination and cooperation closely and tightly with sectoral regulation through harmonisation mechanism and competition advocacy programs.