# Competition Law in Vietnam

## *A Toolkit*

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# FOREWORD

Competition has been a backbone area in the work of the Vietnam Competition Administration Department (VCAD), especially since the adoption of the Competition Law by the National Assembly of Vietnam on December 03, 2004. With the major functions of assisting the Minister of Trade in state administration over competition and consumer protection issues, as well as trade remedies concerning imported goods, the VCAD has been making its best efforts towards:

- Promoting a fair competition environment in Vietnam;
- Protecting enterprises and consumer's interests against competition restrictive activities;
- Preventing unfair competition practices;
- Handling consumer protection;
- Establishing a more competitive and supportive environment for domestic industries; and
- Supporting domestic industries to prevent and deal with foreign anti-dumping, anti-subsidy and safeguard cases.

Vietnam has embarked on a comprehensive market-oriented economic reform programme, generally referred to as *Doi Moi*, since 1986, with significant achievements in terms of socio-economic as well as political and cultural development. Prior to that, Vietnam followed the model of a centrally planned economy, in which markets were underdeveloped and the concept of 'competition' was not much alienated. Since the opening up of the economy, together with gains as mentioned above, anticompetitive and unfair competition practices among enterprises have also become rampant, threatening the legitimate rights and interests of business and consumers alike, and hampering the business environment. In that context, VCAD has been playing an important role in building a healthy competition culture and promoting national economic growth.

Competition policy and law is a new field to Vietnam. Therefore, cooperation with and gaining knowledge from international institutions, as well as civil society organisations (CSOs) having expertise on the same, are amongst the foremost priorities of VCAD. We have been cooperating closely with the civil society to increase public awareness on the benefits of competition policy and law for consumers and for economic development in general.

In this regard, CUTS and VCAD have undertaken close collaboration on capacity building for VCAD staff as well as in various advocacy activities. It is, thus, a pleasure for me to commend this research paper, 'Competition Law in Vietnam: *A Toolkit'* published by CUTS. I personally find that the content is very profound and useful for studying of the subject in particular Vietnam context, and in general. I expect that this publication will be an active ingredient in the progresses towards establishing a healthy competition scenario in Vietnam and other countries as well.


**Dr Dinh Thi My Loan**
Former Director General
Competition Administration Department
Ministry of Trade of Vietnam

# PREFACE

I am pleased to write this preface for 'Competition Law in Vietnam: *A Toolkit*'. The purpose of this toolkit is to suggest ways to deal with all types of competition abuses. What we have tried to do in this toolkit is look at different types of anticompetitive practices in light of the competition law of Vietnam and juxtapose it with examples from the country and of similar cases from other jurisdictions, in particular from other developing countries.

CUTS Centre for Competition, Investment & Economic Regulation (CUTS C-CIER) has been working on competition regimes in this and other countries for many years since the mid-1990s, supported by a variety of development partners, such as the Department for International Development (DFID), UK; Swiss State Secretariat for Economic Affairs (seco); Norwegian Agency for Development Cooperation (NORAD); and International Development Research Centre (IDRC), Canada etc. In particular, DFID, UK which has been more than a funding support, but a comrade in arms.

This publication is the first in a series of toolkits being produced in 2007. The other countries that we are doing toolkits in this series in 2007 include:

- Botswana;
- Ethiopia;
- India;
- Malawi;
- Mauritius;
- Mozambique;
- Namibia; and
- Uganda.

This toolkit is an outcome of the work that we have been doing, specifically to help citizens in Vietnam to appreciate the problems and their solutions in order to promote an orderly market and economic democracy. It is a dynamic issue as the contours of competition practices and their regulation continue to evolve and change over time.

Another bit of extremely relevant literature is the Competition Assessment Framework developed by DFID, UK on which CUTS too has contributed actively. This should also be read to understand the issues better. It is available at: http://www.cuts-ccier.org/pdf/IRPDF-01.pdf

Implementing a competition law for the first time in any country, like Vietnam, is quite a difficult task. Firstly, there is a lack of understanding of the relevant issues, which this toolkit tries to address. Secondly, the political economy of the country. Quite often a competition law creates new strictures which can affect vested interests, and thus there is a resistance to the implementation of the law. Thirdly, the implementation is often poor due to:

- lack of political will;
- lack of human and financial resources;
- opposition from vested interests; and
- lack of a strong civil society movement which can be a good ally and a countervailing power to business interests.

The last factor is rather unfortunate, because an effective competition law brings in business welfare by curtailing anticompetitive practices of input suppliers of goods and services, unshackling entry barriers etc. For more on this, please see: http://www.cuts-international.org/pdf/Viewpoint-CompeRegBusinessWelfare.pdf .

In Vietnam, there is, however a strong political will, but lack of a strong civil society movement, which we are trying to build up through support from various development partners and the government itself.

I would also recommend that readers/users of this toolkit should have a look at an almanac that we have produced which takes stock of competition regimes around the world at www.competitionregimes.com. This would be of great help to readers to see how competition laws have evolved in over 100 jurisdictions and thus give an insightful comparative picture.

In many countries, new competition laws have been enacted after scrapping older ones, as it became irrelevant due to changes in the national and global economies. These include UK, South Africa and India. CUTS is currently engaged in another project to map out the causes and reasons as to why many countries are enacting new competition laws after scrapping their old ones, which can educate all of us on the reasons for the metamorphosis. However, this change which is taking place in many countries confirms the fact that a competition law is desirable and it needs to be updated as we move along in history.

In our experience, a new competition law has to be implemented gradually rather than with a bang, i.e. to say the authority has to run a marathon and not a sprint. It is, therefore, that we have evolved a matrix for different stages of implementation of competition regimes (please see Table 1 on page 87). Creating a healthy competition culture depends on effective implementation of the competition law and a supportive policy environment.

How does a competition law help the country's economy? There are few systematic studies done in Peru and South Korea, which have shown that the law has generated far greater benefits than the cost itself. In a study of the Peruvian competition agency, Indecopi, found that the first seven years of its operation yielded economic benefits amounting to US$120mn, which is significantly higher than the associated operating costs of US$20mn.[1] A study by the Korean Fair Trade Commission (KFTC) in 2003 found that the benefit (consumer welfare increases and income transfers) outweighed the costs (KFTC's budget) of competition law enforcement in 2000 and 2001 by 34 times[2].

A study carried out on the Australian economy estimated the expected benefits from a package of competition-promoting and deregulatory reforms (including improvements in the competition rules) would create annual gains in real gross domestic product (GDP) of about 5.5 percent, or AU$23bn (US$20bn), of which consumers would gain by almost AU$9bn (US$7.96bn) – in addition to increases in real wages, employment and government revenue[3].

In terms of acknowledgement, we must thank the Swiss State of Economic Affairs, who have supported this publication, and Kenneth Davidson, formerly with US Fair Trade Commission, to have commented extensively on the draft and helped us to develop this toolkit.

Finally, in conclusion, let us reiterate that a competition regime and its implementation is dynamic. Hence, this toolkit should be considered as such, rather than a final word. Readers are invited to share their views at c-cier@cuts.org.

**Pradeep S Mehta**
**Secretary General**

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1 See Caceres, A (2000), "Indecopi's first seven years" in Beatriz Boza, ed., *The Role of the State in Competition and IP Policy in Latin America: towards an academic audit of Indecopi*, Lima.

2 Chapter on Korea by Joseph Seon Hur in Competition Regimes in the World — A Civil Society Report, Pradeep S Mehta (Ed), CUTS and INCSOC, 2006

3 http://www.unctad.org/en/docs//c2em_d10.en.pdf

# ACRONYMS

| | | |
|---|---|---|
| ACCC | : | Australian Competition & Consumer Commission |
| AIOCD | : | All India Organisation of Chemists and Druggists |
| APCMA | : | All Pakistan Cement Manufacturers Association |
| BTAs | : | Bilateral Trade Agreements |
| CAD | : | Competition Administration Department |
| COL | : | Ceylon Oxygen Ltd |
| COPRA | : | Consumer Protection Act of India |
| CSOs | : | Civil Society Organisations |
| DoJ | : | Department of Justice |
| EC | : | European Commission |
| EU | : | European Union |
| EULA | : | End-User License Agreement |
| FDI | : | Foreign Direct Investment |
| FTC | : | Federal Trade Commission |
| GDP | : | Gross Domestic Product |
| HLL | : | Hindustan Lever Limited |
| IBC | : | International Broadcasting Corporation |
| ICN | : | International Competition Network |
| IGL | : | Industrial Gases (Pvt) Ltd |
| IPRs | : | Intellectual Property Rights |
| ITP | : | Independent Television Publications Limited |
| KFTC | : | Korea Fair Trade Commission |
| LPG | : | Liquefied Petroleum Gas |
| M&As | : | Mergers & Acquisitions |
| MCA | : | Monopoly Control Authority |
| MCOT | : | Mass Communication Organisation of Thailand |
| MDGs | : | Millennium Development Goals |
| MLM | : | Multi-level Marketing |
| MNC | : | Multinational Corporation |

| | | |
|---|---|---|
| MRTPC | : | Monopolies and Restrictive Trade Practices Commission |
| NUPH-HCM | : | National University Publishing House of Ho Chi Minh City |
| OECD | : | Organisation for Economic Cooperation and Development |
| OEMs | : | Equipment Manufacturers |
| PC/OS | : | Personal Computer Operating System |
| RBPs | : | Restrictive Business Practices |
| RTE | : | Radio Telefis Eireann |
| RTPs | : | Restrictive Trade Practices |
| SMEs | : | Small and Medium-sized Enterprises |
| SoEs | : | State-owned Enterprises |
| TNCs | : | Transnational Companies |
| TOMCO | : | Tata Oil Mills Company |
| TRIPs | : | Trade Related Aspects of Intellectual Property Rights |
| UBC | : | United Broadcasting Corporation |
| UTPs | : | Unfair Trade Practices |
| UTV | : | United Television Network |
| VINASTAS | : | Vietnam Standards and Consumers Association |
| VNPT | : | Vietnam Posts and Telecommunications General Corporation |
| WB | : | The World Bank |
| WIPO | : | World Intellectual Property Organisation |
| WTO | : | World Trade Organisation |

# 1. INTRODUCTION

Vietnam has maintained a relatively strong macroeconomic performance over the past 15 years. The Gross Domestic Product (GDP) expanded at a high and stable rate, averaged at around seven percent per annum, making Vietnam one of the fastest growing economies in the world.

The country's high economic growth is also accompanied by macroeconomic stability in terms of low inflation, small budget deficit, sound credit growth, and manageable external debts. International trade volumes have gone up rapidly. Vietnam's trade-GDP-ratio is among the highest in the world. The current deficit is at the controllable level and financed by a considerable increase in capital inflows, especially the foreign direct investment (FDI). As a result, there has been no strong fluctuation in the exchange rate. Economic growth helped to implement the social objectives and aided considerable progresses toward the Millennium Development Goals (MDGs).

The above achievements are attributed to the successful implementation of a comprehensive programme of economic reform called *Doi Moi* that was launched in 1986. Before this landmark, Vietnam followed the development model of a centrally planned economy, which was characterised by a significant level of State intervention in the operations of the market. In such an economic setting, markets were underdeveloped and the concept of "competition" was not even officially accepted. The economic reform programme started in 1986 has introduced a series of stabilising and restructuring economic measures for transforming the economy from centrally planned to a market-based one.

However, the advantages of a market economy have not yet been fully exploited in Vietnam because of flanking institutions and because regulations for the smooth operation of the markets remain absent or incomplete. Monopolistic structure still exists in some key sectors, while restrictive business practices (RBPs) and unfair trade practices (UTPs) are increasingly rampant and yet being effectively dealt with. An effective competition law is hence the answer to these problems.

On December 03, 2004, the XI$^{th}$ National Assembly of Vietnam, in its 6$^{th}$ session, passed a Law on Competition, which came into effect in July 2005, and has been administered since then by the Competition Administration Department (CAD) of the Ministry of Trade of Vietnam.

The adoption of the Competition Law in 2004 together with other related rules and regulations exhibits the Government's commitment to ensure a fair and competitive trading environment in the economy. However, there are challenges, which include the enormously difficult task of putting the law into force.

This paper, researched and compiled by CUTS and customised in the Vietnam context, is meant to provide a simple and concise handbook on various implementation issues surrounding the Competition Law 2004. It provides the definitions, characteristics of and ways to deal with all the major RBPs and UTPs, which are prevalent in the Vietnam markets currently, with real-life case studies. Wherever possible, similar cases from other developing countries have also been cited in the text, which can help the reader understand the issues through case studies.

Last but not the least, the paper will analyse the constraints and challenges that the competition authority of Vietnam may face towards building a healthy competition culture in the country, and suggest a desired framework for the same.

The paper is meant for competition authority officials and administrators. However, it can also be used by activists, journalists, and academics, etc. as an advocacy tool, and by the business community for compliance education and self-regulation. Last of all, it can also be used for enhancing the understanding on competition issues of other stakeholder groups interested in the matter.

## An Overview of the Competition Law 2004 of Vietnam

The Law applies to all business enterprises and professional and trade associations in Vietnam; overseas enterprises and associations registered in Vietnam; public utilities and state monopoly enterprises; and state administrative bodies. It has superseding power over all other enacted laws of Vietnam regarding RBPs and UTPs.

Two State authorities are to be established for the Law's implementation – the Competition Administration Department (with investigative powers), within the Ministry of Trade of Vietnam, and the Competition Council (with adjudicative powers).

The Law prohibits five broad types of anticompetitive practices:

- agreements that substantially restrict competition (Article 8);
- abuse of dominant or monopoly position (Article 13 & 14);
- 'concentrations of economic power' that substantially restrict competition (Article 18);
- acts of unhealthy competition (Article 39); and
- anticompetitive behaviour/decisions by officials or State administrative agencies, taking advantage of their authority (Article 120).

Anticompetitive agreements include price fixing, market sharing, restricting output, blocking investment or technological development; imposing coercive contracting conditions on other enterprises; restricting entries; excluding/foreclosing non-members from the market; and bid rigging.

Except for the last three, which are considered to be violations in all cases, other agreements are prohibited only if the parties to the agreements hold a combined market share of at least 30 percent of the relevant market.

The competition authorities will have the discretionary powers to grant exemptions where they consider that an anticompetitive agreement's harm to the economy and to the competitive process is outweighed by its potential benefits with regards to corporate restructuring, technological advances, increasing the competitiveness of small and medium-sized enterprises (SMEs), and increasing the competitiveness of Vietnamese firms in international markets, etc. (Article 10). Exemptions are available only if the enterprises apply for an exemption and could prove that they are entitled to the exemption.

The Law provides for a collective market dominant position of firms having a total market share of 50 percent (for two business entities); 65 percent (for three); and 75 percent (for four) of the relevant market (Article 11). A dominant market position would apply to firms holding at least a 30 percent market share, or firms that are 'capable of substantially restricting competition'. Dominant firms are prohibited from undertaking predatory behaviours with the intent of driving out competitors, discriminating amongst different firms for the same transaction, blocking entry, and engaging in 'other practices' in restraint of competition as stipulated by law, etc. (Article 13).

A monopoly market position would be deemed to apply to a firm if it has no competitors for goods it trades or for services it provides (Article 12). Monopoly firms are prevented from undertaking any of the abusive behaviours listed in the previous paragraph pertaining to dominant firms, as well as imposing disadvantageous conditions on consumers; unilaterally rescinding or replacing a contract with legitimate reasons; refusing to transact with or discriminating against a customer without legitimate reason; and any other prohibited practice stipulated by law (Article 14).

Economic concentration activities are defined as any conduct by a firm that aims to govern the activities of other enterprises, including, but not limited to, mergers, acquisitions and consolidations that have this aim (Article 16-17).

All concentration cases in which the combined market share of the relevant firms would be 50 percent or more are prohibited except where, (1) the result is still a small or medium-sized enterprise (a concept not defined in the law) or (2) the Prime Minister grants an exemption (Article 18-19).

A 30-day notification to the competition authorities is mandatory where the participating parties would have a combined market share of 30-50 percent.

As regard acts of unhealthy competition, the Law prohibits: falsification of commercial instructions; infringement of business secrets; acts of bribery, inducement or coercion; defamation of other enterprises; disrupting the lawful business practices of other firms; advertisements and promotions aimed at unhealthy competition; discrimination within or by an industry association; and illegal multi-level (pyramid) selling of goods (Article 39).

The Law also stipulates detailed rules and procedures governing complaints, investigations, interim orders by the competition authorities, consideration of alleged abuses, and penalties thereof. Either an affected party or the CAD can initiate a case, and where the Department determines that it has jurisdiction over an external complaint (within seven days from receipt of complaint), it must begin an investigation.

In proven cases of breach of the Law, the competition authorities can impose fines of up to 10 percent of turnover of the previous financial year of the alleged parties; issue warnings; revoke legal permits or certificates; confiscate physical proof or means used to carry out the breach; require restructuring of firms or contracts; or take any other coercive measures to remedy the inflicted harm.

*For downloading the Vietnam Competition Law, please visit: http://www.cuts-ccier.org/pdf/CLDC-Vietnam.pdf*

# 2. ABOUT THE MARKET ECONOMY

## 2.1. Markets and Prices – How they Work?

www.sxc.hu

In the business or economics world, the term '*market*' is usually used to refer to a mechanism which allows people to trade, which is normally governed by the theory of supply and demand, so allocating resources through a price mechanism and bid and ask matching so that those willing to pay a price for something meet those willing to sell for it.[1]

**Market = Products/Services + Suppliers + Customers**

Demand and supply are affected by various factors, for example, demand is affected by changes in the prices of related goods, changes in income, tastes, population or expectations, etc; whereas supply is affected by changes in input prices, changes in technology, number of suppliers, etc. In a simplified economics model, the demand and the supply curve can be put together to describe market behaviours.[2]

As a general rule, *markets move toward equilibrium*, a situation in which no individual will be better off taking a different action. In the case of a competitive market, we can be more specific: a competitive market is in equilibrium when the price has moved to a level at which the quantity demanded of a good equals the quantity supplied of that good. At that price, no individual seller could make herself better off by offering to sell either more or less of the good and no individual buyer could make himself better off by offering to buy more or less of the good.

The price that matches the quantity supplied and the quantity demanded is the *equilibrium price*, which is also known as the *market-clearing price* – the price that 'clears the market' by ensuring that every buyer willing to pay that price finds a seller willing to sell at that price, and vice versa.

There are some markets where the same good can sell for many different prices, depending on who is selling or who is buying. For example, have you ever bought a souvenir in a tourists' shop and then seen the same item on sale somewhere else (perhaps even the next store) for a lower price? But in any market where the buyers and sellers have both been around for sometime, sales and purchases tend to converge at a generally uniformed price, so that we can safely talk about *the market price*. This is easy to understand. Suppose a seller offered a potential buyer a price noticeably above what the buyer knew other people to be paying. The buyer would clearly be better off shopping elsewhere – unless the seller was prepared to offer a better deal. Conversely, a seller would not be willing to sell for significantly less than the amount he knew most buyers were paying; he would be better off waiting to get a more reasonable customer. So in any well-established, active market, all sellers receive and all buyers pay approximately the same price – which is called *the market price*. If this price is above its equilibrium level, there will be a surplus that drives the price down. Similarly, if the price is below its equilibrium level, there is a shortage that drives the price up.

This is what essentially happens in a market economy, steered primarily by market forces, which allocate resources, presumably scarce, and goods and determine prices. A market economy, thus, is different from a centrally planned economy, one such as in existence in Vietnam before the reform process started in 1986, in that the aggregate interactions of buyers and sellers, producers and consumers in a society determine how different markets work in a market economy, whereas in a centrally planned system, this is decided by administrative decisions made by government bureaus.

### 2.2. Governments and the Rule of Law vs Free Markets

In the simplified model above, we have considered only two main actors of the marketplace, which are buyers and sellers, or consumers and producers. In all economies, whether follower of a system based on market forces or centrally planned, the governments' role is something which cannot be ignored. Governments can act as providers of public goods, or producers of many other goods and services. More important is their role as regulators. This is because markets left to its own have a lot of inefficiencies.

**A market economy is different from a centrally planned economy, one such as in existence in Vietnam before the reform process started in 1986.**

There are many causes of market inefficiencies. Commonly observed causes of market inefficiencies include monopoly power, externalities such as pollution, information asymmetry, uncertainty, and various forms of opportunistic/strategic behaviours. The governments can enforce laws and regulations, provide public goods, or obtain and disseminate information effectively.

Unfortunately, in many cases, the governments go beyond their role as regulators, or providers of public goods and services. Arbitrary interventions or over-intervention into the normal operations of the markets, favouritism over state-owned enterprises (SoEs), etc. are typically such instances. It is, therefore, important to make sure that the rule of law prevails.

The rule of law has two main economic functions. First, it regulates and limits discretionary interventions of the state into economic activities. Secondly, it regulates the economic behaviour of individuals and enterprises to create an orderly, stable environment with fair competition, clearly defined and well protected property rights, and effectively enforced contracts.[3]

The situation in Vietnam, despite the various reforms undertaken since 1986, is far from this ideal model. The legal framework is yet to be completed; regulatory institutions remain absent or are at an infant stage. Understanding of the markets and how they work is still tainted by the long history of a planned economy, as well as an agriculture-based economy. Politicians and policy-makers are still sceptical of the private sector; hence the state sector still enjoys overwhelming advantages and favours. A large informal economy is in place, information is lacking, database absent, making the task of fair economic regulation all the more difficult.

**Commonly observed causes of market inefficiencies include monopoly power, externalities such as pollution, information asymmetry, uncertainty, and various forms of opportunistic/strategic behaviours.**

# 3. MARKET AND COMPETITION

### 3.1. Competition


www.images.com

In an idealised model, market [or business] competition is a process of rivalry by which producers/suppliers strive to offer the most attractive price and quality options to gain new sales, and new clientele.

As already mentioned in Chaper 2: About the Market Economy, there are several factors which affect the consumption and supply decisions by consumers and producers in a free market. Demand by consumers, for example, is affected by price, i.e. if the price goes up, the quantity demanded goes down. As bread becomes more expensive, consumers turn to other goods, perhaps buying more muffins or sweet rolls instead. Similarly, demand for a certain good or service by consumers is under the influence of their income level, prices of related goods and their tastes. Supply decisions by producers are also affected by price. Typically, it is reasonable to assume that the higher the price per loaf of bread, the greater the quantity that firms are willing to supply, since higher prices make it profitable for firms to produce more output. Similarly, supply is affected by price of inputs, and conditions of production, etc.

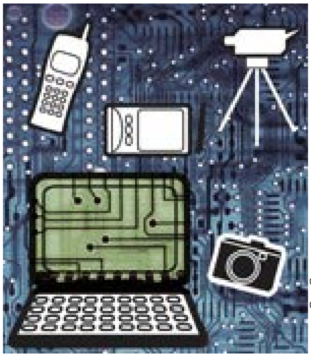
Accordingly, in a competitive market, where there are a wide range of products and services, which are substitutable for each other, available in the market at acceptable prices, consumers can always shift purchase to a more competitive product/service, which induces producers to compete with each other to satisfy consumer preferences. Therefore, competition is a natural trend between various producers, of same or related products, in terms of price, quality, or after-sale services, etc. most notably through prices.[4] However, in fact, there may be different scenarios, for instance, in case of a monopoly; there is only one producer/provider of a certain good and service in a market, with no substitute, which gives the only market player power beyond any market discipline.

**Competition is a natural trend between various producers, of same or related products, in terms of price, quality. or after-sale services, etc. most notably through prices.**

For example, Big C, Metro and Intimex are three supermarket chains currently operating in Hanoi. They all sell similar products, such as food, clothing, toys, etc. or products which are substitutable for each other, such as burgers and sandwiches, Coca Cola and Sprite or Nestle iced tea. They, therefore, have to compete for the patronage of customers/consumers in Hanoi by offering lower prices, better choices, providing better and faster cashier services, etc.

**3.2. Relevant Market**

Competition is not homogeneous in all markets. Two supermarkets in Hanoi compete with each other for customers in Hanoi, and not Ho Chi Minh City. Or two mobile service providers compete with each other to provide better phone service and not postal service. Competition between these businesses also varies according to time, for example, competition between two beer producers in summer, or during the World Cup Championship, will be fiercer than in winter.


www.google.com

'Relevant Market' is the first and foremost concept to understand any competition analyses. 'Relevant Market' identifies the extent of effective competitive constraints in the market, in terms of product/services, time and location.[5] To define the relevant market for a particular competition case, one usually looks at the 'Product Market' and the 'Geographic Market' in a specific 'Period of Time'.

**'Relevant Market' is the first and foremost concept to understand in almost any competition analyses, which identifies the extent of effective competitive constraints in the market, in terms of product/services, time and location.**

*Product Market:* A Product Market includes all products that are close substitutes for one another – both in consumption and production.[6]

In a simple example, one might attempt to determine if Glass Bottles are in the same product market as Plastic Bottles. In this scenario, one looks to see if this Glass Bottle price increase leads to significant changes in the consumption patterns of both the two types of containers. If, in response to the price increase, consumers switch a sufficient volume of Glass Bottle purchases to Plastic Bottles, then Plastic Bottles would be considered to be within the same product market as Glass Bottles.

*Geographic Market:* A Geographic Market, similarly, is determined on the basis of customers' or consumers' ability to switch purchase between suppliers of substitute products in case of a price hike. If the airfare between Ho Chi Minh City and Phnom Penh (Cambodia) provided by Vietnam Airlines is increased, and passengers are able to switch to travelling by Air Cambodia or Thai Airways International with least inconvenience, then all these airlines, though based in different countries, can be considered as competing in one geographic market, namely the Ho Chi Minh-Phnom Penh route.

In another case, even if it is otherwise convenient for a buyer to purchase a car from Singapore, the heavy import duty in Vietnam works as a disincentive for the Vietnamese consumers to buy a car from outside Vietnam. Therefore, from the viewpoint of Vietnamese car users, Vietnam is their geographic market.

In addition to import duties and explicitly protectionist measures, there are other factors, such as regulations protecting health and safety, or licensing requirements, or shipping costs, which establish barriers to competition, and thus, help define geographic markets.[7]

Relevant markets, therefore, are usually defined from the point of view of consumers. A simple example for relevant market would therefore be, to say: "Company A and Company B are competitors in the market for telephone services (mobile, fixed line, satellite, etc) in Hanoi".

The Competition Law 2004 of Vietnam (also referred to hereinafter as 'the Law') defines relevant market to be 'relevant market of products and relevant geographic market'; in which 'relevant market of products means a market of goods, services which are interchangeable in terms of characteristics, use purposes and prices'; and 'relevant geographic market means a specific geographical area in which goods exist, services which are interchangeable under similar conditions of competition, and which is considerably differentiated from neighbouring areas'.[8]

Further, the Decree No. 116/2005/ND-CP issued by the Government of Vietnam for detailed guidelines on the Law's implementation (hereinafter referred to as the Decree 116/2005) also provides for several factors to be taken into consideration while defining relevant product and geographic markets, including substitutability of products (Article 4 of the Decree), market structure and practices of consumers, market for products auxiliary to the relevant product (Article 5 of the Decree), capability of substitution in terms of supply (Article 6 of the Decree), competitive conditions and barriers to market access (Article 7 & 8 of the Decree). Consumer surveys might also be used during the process (Article 4(5) of the Decree).[9]

This is very much in line with the common concept of relevant market and common method of relevant market definition. However, it might be quite resource-intensive for a young competition regime like in Vietnam, which needs more human resources, not to mention other resources like finance, time, etc. Besides, the problems of information asymmetry and scarcity of data can also impose serious constraints.

*Time Period:* A third possible dimension to market definition is time. Examples of how the timing of production and purchasing can affect markets include:[10]

- Peak and off peak services: This can be a factor in transport services or utilities such as electricity supply.

- Seasonal variations, such as summer vs winter months: This might have significant implication on the purchasing pattern of consumers when it comes to such goods as clothing, air-conditioners or heaters, etc.
- Innovation/inter-generational products: Customers may defer expenditure on present products because they believe innovation will soon produce better products or because they own an earlier version of the product, which they consider to be a close substitute for the current generation. Some examples are trendy garments, or computer software, etc.
- Possibility of new entry in the future: In addition to those producers who have already supplied the market (on the assumption they will do so in the future), some others can and would supply the market in response to an anticompetitive action.

To some extent, the time dimension is simply an extension of the product dimension: i.e., the product can be defined as the supply of train services at a certain time of day.

The Competition Law 2004 of Vietnam, while defining the relevant markets, does not mention the time dimension. However, Article 6 of the Decree 116/2005 does touch upon this when taking into account factors such as “duration of supply of goods or services onto the market when there is a sudden increase in demand”, or “use duration of the goods or services”, or “ability to replace supply”. Notwithstanding this, the future dimension remains unclear.

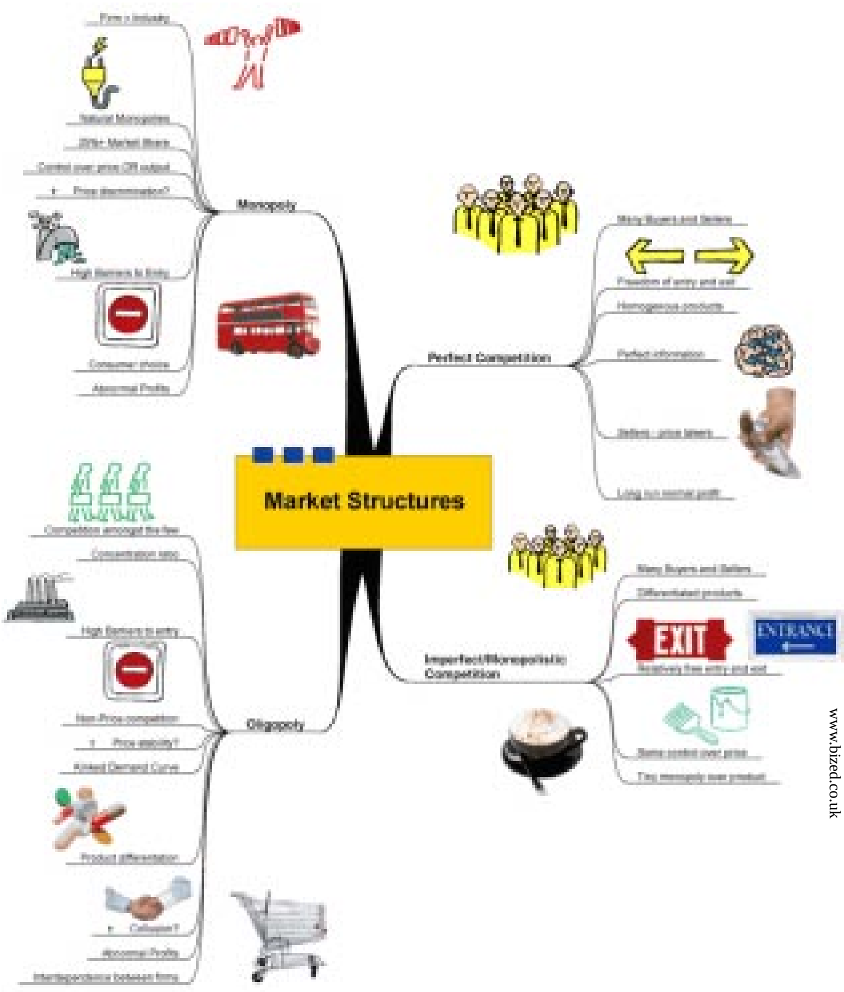
### 3.3. Market Share & Structure

Market share, in strategic management and marketing, is the percentage or proportion of the total available market or market segment that is being serviced by a company.[11] In the competition world, market share of a company will vary according to the definition of relevant markets. The smaller the relevant market defined for a particular case, the higher share a company may account for in that market.

According to the Competition Law 2004 of Vietnam, ‘an enterprise’s market share of certain kind of goods or service means the percentage between sale turnover of this enterprise and aggregate turnover of all enterprises dealing in such kind of goods or service on the relevant market or the percentage between purchase turnover of this enterprise and aggregate purchase turnover of all enterprises dealing in such kind of goods or service on the relevant market on a monthly, quarterly or yearly basis’.[12]

**Market share, in strategic management and marketing, is the percentage or proportion of the total available market or market segment that is being serviced by a company.**

In economics, markets are classified according to the structure of the industry serving the market. Industry structure is categorised on the basis of market structure variables which are believed to determine the extent and characteristics




of competition therein. Those variables which are most popular are the number of buyers and sellers, the extent of product substitutability, costs, ease of entry and exit, and the extent of mutual interdependence. In the traditional framework, these structural variables are distilled into the following taxonomy of market structures:

*Perfect competition:* A market structure in which all firms produce a homogeneous, perfectly divisible output; producers and consumers have full information, incur transaction costs and are price takers; and there are no externalities.[13] Since perfect competition is rarely, if ever, encountered in the real world, it is mentioned here only as an ideal against which to compare other types of market structures.

*Normal competition:* A market structure in which a large number of firms compete with each other by making similar but slightly different products.[14] Each of the firm has some control over the prices it charges since products are differentiated. However, since there are no significant barriers to entry and products are closely substitutable, the firm cannot affect the market as a whole. Such market structure is often referred to as 'normal' or 'workable competition'. Many markets can be cited as examples hereby, for example, the markets for books, clothing, films and service industries in large cities.

*Oligopoly:* A market structure in which the market is dominated by a small number of sellers or buyers (*oligopolists*[15] ). Because there are few participants in this type of market, each oligopolist is aware that it can affect market price and hence its competitors' profits: Ford cannot and does not ignore Honda when making decisions regarding automobile production. Oligopolistic markets, thus, can be said as being characterised by inter-relationship between market participants. A firm *must* consider rival firms' behaviours to determine its own best policy. The mobile phone service market in Vietnam is an example of oligopoly.

*Monopoly:* This is a market structure characterised by a single firm selling a product for which there are no close substitutes and by substantial barriers to entry.[16] In this case, the monopolist can maximise its profit by charging the highest price the market will bear.

### 3.4. Competition Law & Policy

Competition has increasingly been recognised as the cornerstone of thriving economies throughout the world.[17] It is essential for the efficient allocation of resources, helps to promote innovation, increases factor productivity, creates more employment and income earning opportunities, enables SMEs to participate in the market. It is thus a useful tool for growth and poverty reduction.[18]

**Competition policy refers to those government measures that directly affect the behaviour of firms and the structure of the industry.**

Competitive forces work best in the presence of markets that are free from distortions. However, perfect competition rarely exists in real life, so the full benefits of competition do not often materialise.[19] The competitive process is more than often discouraged and is not fair for reasons of special interests, big government, and citizens' weak economic understanding. When markets are not competitive, whether due to policy-induced distortions, technological characteristics, or anticompetitive behaviour by market participants, an economy may miss many potential benefits for its citizens. Furthermore, government deregulation efforts that are intended to benefit consumers might even have counter-effects.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Consequently, in addition to disciplines to eliminate non-competitive behaviours by market participants, other measures are needed to enforce policies that encourage firms to compete (or discourage or prevent firms from resisting rivalry), in order to improve the efficient allocation of resources. Thus, the benefits from competition are not only limited to keeping prices at marginal cost for the benefit of consumers, as in static efficiency, but also create a conducive environment for new businesses to enter and grow while at the same time compel existing firms to continuously improve and perform better.

**Competition law is a body of legal rules and provisions that ensures fairness and freedom in the marketplace.**

Competition policy refers to those government measures that directly affect the behaviour of firms and the structure of the industry. It is an integral part of economic policy, and may embrace several elements such as trade liberalisation, industrial, investment, and privatisation policies, which have the main objective of preserving and promoting competition as a means to ensure efficient allocation of resources in an economy, resulting in the best possible choice of quality, the lowest prices, and adequate supplies to consumers.

Competition law, on the other hand, is a body of legal rules and provisions that ensures fairness and freedom in the marketplace by regulating the conducts of firms, prohibiting anticompetitive arrangements and abuse of dominance, which impede the competitive process and hamper the legitimate rights and interests of other market players, including consumers.

**Competition Policy = Economic Policies Affecting Competition + Competition Law**

# 4. RESTRICTIVE BUSINESS PRACTICES

Restrictive business practices (RBPs), or anticompetitive practices, put simply, are actions by enterprises, whether in the private or public sector, designed to limit access to markets or restrain competition in the market in order to maintain or increase their relative market position and profits without necessarily providing goods and services at a lower cost or of higher quality.

According to the wording of the Competition Law 2004 of Vietnam, they are 'competition-restricting acts […] performed by enterprises to reduce, distort and prevent competition on the market, including entering into competition-restricting agreements, abusing the dominant position on the market, abusing the monopoly position and economic concentration'.[20]

There are various types of RBPs, each of which will be explained in a nutshell. Together with them there will be the relevant legal provisions and cases in Vietnam, as well as quoted cases from elsewhere in the world dealing with such practices.

### 4.1. Market Power

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A key concept in many competition analyses is that of 'Market Power'. Without market power, no anticompetitive practices by firms could achieve their intended goal.

'Market power' refers to the ability of an individual firm or a group of firms to raise and maintain price above the level which would prevail under competition.[21] The highest degree of market power is associated with a monopoly, although all firms; except for those operating in perfectly competitive markets; possess some degree of market power.

High market share is generally considered as a necessary, though not a sufficient, condition to establish market power.[22] Besides, as debate exists on what criteria best reflects potential market power; even the measurement of market share is a controversial issue. For example, market share can be measured by current sales, historical sales or even capacity (potential).

Some jurisdictions have established *de facto* or *de jure* benchmark market shares above or below which market power is presumed to exist or not exist.

**'Market power' refers to the ability of an individual firm or a group of firms to raise and maintain price above the level which would prevail under competition.**

Yet, it is not clear that there is an economic justification for pre-determining the existence of market power at any given market share. Alternatively, concerns about administrative efficiency sometimes justify a market share 'safe harbour', below which market power is deemed not to exist.

Determining whether a firm or group of firms have market power or not is the starting point for case analysis with regard to abuse of dominance. (This is a type of RBPs, which would be discussed in Section 4.6). Important factors that must be considered in measuring the market power of a firm or a group of firms, other than market share, include:

- number and market shares of competitors;
- nature of the relevant product;
- countervailing power of other market participants;
- intellectual property rights (IPRs);
- market characteristics such as regulatory environment, rate of technical change, existence of potential or poised competitors; and
- barriers to entry.

Though being last in the list, barriers to entry usually constitute the most important factor. Dominance does not exist if entry to a market is easy. A firm with a 90 percent share of the market is not dominant if, as soon as it raise the price of its goods, other firms would enter its market and sell their goods at more competitive prices. As a result, a definition of dominance requires an analysis of whether there are any barriers to entry.

Barriers to entry may be constituted by various factors, ranging from government regulation, IPRs, access to capital, considerable costs of entry, economies of scale necessary to penetrate the market, a well-organised distribution system, advertising, customer loyalty and brand recognition, etc. Sometimes, barriers to entry may include restrictive practices by the dominant businesses already operating in the field trying to protect their position.

According to the Competition Law 2004 of Vietnam, 'enterprises shall be considered to hold dominant positions in the market if they have market shares of 30 percent or more in the relevant market or are capable of restricting competition considerably', whereas 'groups of enterprises shall be considered to hold the dominant position in the market if they take concerted action to restrict competition and fall into one of the following cases: (a) two enterprises having total market share of 50 percent or more in the relevant market; (b) three enterprises having total market share of 65 percent or more in the relevant market; and (c) four enterprises having total market share of 75 percent or more in the relevant market'.[23] On the other hand, 'an enterprise shall be considered to hold the monopoly position if there is no enterprise competing on the goods or services dealt in by such enterprise on the relevant market'.[24]

While the Law follows the usual method of defining market dominance (and group dominance) on the basis of 'market share', it also set another filter for the dominance test, which is targeted at the capability of an enterprise to restrict competition substantially. The Decree 116/2005 further stipulates that this capability will be defined on the basis of either the enterprise's financial strength, or its technological strength, or its IPRs and the scale of the distribution network.[25] This is essentially the same as other factors that we have mentioned above about market power and barriers to entry.

### 4.2. *Per se* or Rule of Reason?

RBPs as well as other conducts that impose undue restraints on competition, such as mergers & acquisitions (M&As) which are to be analysed subsequently are regulated by competition law. Such regulation, however, may entail various approaches.

Some restraints are considered illegal *per se* in some jurisdictions. This means they are conclusively presumed to impose unreasonable restraint on the competitive process and thus anticompetitive,[26] or can be held as illegal by itself, without further defence.

**According to the rule of reason, some strategic behaviour by firms might have both restraining effects on competition and dynamic efficiency benefits.**

In other cases, it is established that only combinations and contracts unreasonably restraining trade are subject to actions under the competition laws and that size and possession of monopoly power were not illegal. In these cases, the RTPs (as well as other competition concerns) is said to be subject to the 'rule of reason'.

According to the rule of reason, some strategic behaviour by firms might have both restraining effects on competition and dynamic efficiency benefits. In case the latter consequences override the former effects, then that behaviour could be allowed to pass the scrutiny of competition statutes. A practice may be held as efficiency-enhancing if:

(i) it can be found to be pro-competitive (for example, in promoting innovation and technological advance, promoting exports or the country's international competitiveness, etc), or

(ii) it has been undertaken in public interests (for example, by avoiding unemployment or protecting the environment, etc).

Getting exemption on these grounds means that an agreement is accepted to be trade-restrictive, but the gain from it would outweigh the loss caused by its anticompetitive nature.

The entire Competition Law 2004 of Vietnam requires rule of reason analysis except a below 30 percent "safe harbours" created for anticompetitive agreements that would otherwise violate its Art 8 (Sections 1-5), see Section 4.3 for a more detailed discussion on this. This is similar to Article 81 of the European Union (EU) Treaty, which states that the prohibitions on anticompetitive agreements are *per se* violations in Section 2 but then provides in Section 3 that there are further defences that may make the actions of Section 2 lawful. Accordingly, the entire consideration of the lawfulness or unlawfulness of business practices includes the defences (or in the language of the Vietnamese competition law – the exemptions).

The Competition Law 2004 of Vietnam gives exemption (for a definite term) to 'competition-restricting agreements' if they meet one of the following conditions in order to reduce costs to benefit consumers:

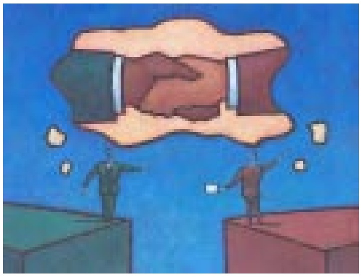
- rationalising the organisational structure, business model, raising business efficiency;
- promoting technical and technological advances, raising goods and service quality;
- promoting the uniform application of quality standards and technical norms of products of different kinds;
- harmonising business, goods delivery and payment conditions, which have no connection with prices and price factors;
- enhancing the competitiveness of SMEs; and
- enhancing the competitiveness of Vietnamese enterprises in the international market.[27]

The interesting point is that the Vietnamese law proclaims the RBPs listed in its Article 8 to be unlawful unless the parties have previously obtained an exemption. This essentially means that the business entities may not proceed with a transaction that literally violates the prohibitions even if the transaction is pro-competitive. There may be an exception to this procedure in Art 85(d) of the Decree 116/2005 which provides that the adjudicator may treat as an "extenuating circumstance" proof that the violation has a "positive effect on the economy". This obscure provision could radically alter the clear assumption that the businesses, which would violate the competition law, must not only await the decisions of the agency that can grant an exemption but also apply for the exemption and make the application public.

The requirement of a prior public request for an exemption could have huge practical consequences. Forcing companies to reveal their business plans could remove much of the competitive desire to innovate. Moreover, the delay could make it impossible to respond to a competitive challenge from others.

### 4.3. Anticompetitive Agreements

Agreements between competitors concerning price, customer allocation, etc. are the RBPs that have the most obvious potential for harming competition and consumers. Parties to those agreements may not be in possession of market power individually. However, they might enter into an understanding, written or verbal, implicit or explicit, which will help to exercise their collective market power in order to seek unjust economic rents for all members.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Such agreements may either be between firms, which are in a horizontal relationship (i.e. all parties are at the same level of production or marketing in a chain to bring a product/service to the end consumers, such as between different producers of gas burners or cars, or between various sellers of soft drinks, etc), or between those, which are in a vertical relationship (i.e. one party is the supplier of inputs to the other party's business activity, such as distribution agreements between the manufacturers and the distributors).

**4.4. Horizontal Agreements among Competitors**

Horizontal anticompetitive agreements, or cartels, as they are usually called in competition jargon, have traditionally been considered the most serious of all anticompetitive practices and constitute that category of violations most susceptible to criminal penalties in many jurisdictions in the world.

Being horizontal anticompetitive agreements by nature, cartels are arrangements between groups of firms that produce and sell the same product for the purpose of exacting and sharing monopolistic rents. Most commonly, they accomplish this by agreeing on a relatively high common asking price for their product that none of the member firms will be permitted to underbid (i.e. price-fixing cartels). Alternatively, the member firms may simply agree to divide the market by geographic territory or by customers and grant each other local monopolies without necessarily enforcing a uniform price structure (i.e. market allocating or customer sharing cartels).

Cartels are considered as cancers of market economies. They are quite prevalent, ranging from the global agreement between huge multinational vitamin manufacturers, to maybe the understanding between four or five departmental stores in a small town in Central Vietnam. Cartels are secretive by nature, and hence are very difficult to detect and investigate. However, it is said that industries or markets, which have the following characteristics are more prone to cartelised behaviours:

(i) Markets where there are a relatively small number of firms and a large number of customers;
(ii) Market demand is not too variable;
(iii) Products/services are generally homogeneous, and there are no substitutable products; and

**Agreements may either be between firms, which are in a horizontal relationship or between those, which are in a vertical relationship.**

(iv) Individual firms' outputs, asking prices and sale turnovers can be easily monitored by the cartel organisations, for example in the retail petrol market, where the retail prices are displayed all the times at all gas stations (so as to discourage cartel members from cheating and breaking up the cartel).

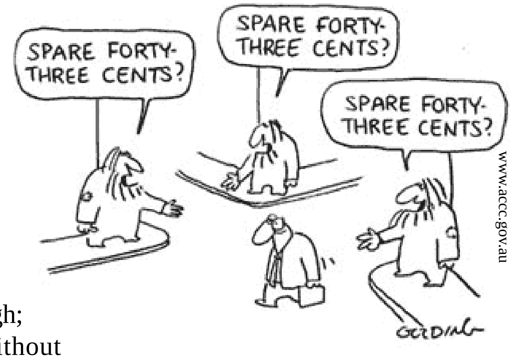
Cartel agreements on price-fixing, market sharing or output restriction are forbidden under Section 1-3 of Article 8 of the Competition Law 2004 of Vietnam, however, only when the combined market share of all the parties to the agreements is 30 percent or more on the relevant market.[28] This provision of a 'safe harbour' leads to the significance of defining the relevant markets as well as assessing market power of firms in the process of case analysis. If the definition of market is too loose, the 30 percent trigger point for exemption will exempt almost all agreements other than those between oligopolists.

**Horizontal anticompetitive agreements, or cartels have traditionally been considered the most serious of all anticompetitive practices and constitute that category of violations most susceptible to criminal penalties in many jurisdictions in the world.**

### *4.4.1. Price fixing*

As mentioned before, the most common practice undertaken by cartels is price-fixing. This is the term generically applied to a wide variety of concerted actions taken by competitors having a direct effect on price. The simplest form is an agreement on the price or prices to be charged on some or all customers. In addition to simple agreements on which price to charge, the followings are also considered price-fixing, such agreements:[29]

- on price increase;
- on a standard formula, according to which prices will be computed;
- to maintain a fixed ratio between the prices of competing but non-identical products;
- to eliminate discounts or to establish uniform discounts;
- on credit term what will be extended to customers;
- to remove products offered at low prices from the market so as to limit supply and keep prices high;
- not to reduce prices without notifying other cartel members;
- to adhere to published prices;
- not to sell unless agreed on price terms are met; and
- to use a uniform price as starting point for negotiations.



**Box 1: Cartel of Cement Manufacturers and the Action by the MCA**

In October 1998, cement manufacturers in Pakistan increased the price of 50-kg bag by Rs 100 from Rs 135/bag to Rs 235/bag. Taking a note of this situation, the Monopoly Control Authority (MCA) initiated a special enquiry into the causes of the price increase. The All Pakistan Cement Manufacturers Association (APCMA) informed the MCA that the price increase was due to higher taxes and cost of inputs.

However, the MCA enquiry found that there was no increase in the costs of inputs, except a marginal increase in electricity tariffs, whereas the level of taxation had actually been reduced. The enquiry established that the price was increased to reap undue profit, under a tacit agreement among the manufacturers through cartel formation against the public interest.

The Authority passed an order to break the cartel and revert to the price level which preceded the price increase. The cement manufacturers were also directed to deposit Rs 4.25bn, as earned through the unfair price increase, in the Baitul Mal, so that it could be reimbursed to consumers against verifiable claims. Furthermore, it imposed a fine of Rs 100,000 on each individual unit, and in case of continued non-compliance, another Rs 10,000 per day.

***Source:*** *Mukhtar Ahmad Ali (2006), Pakistan, Competition Regimes in the World – A Civil Society Report, CUTS, p.137.*

These are also the detailed description of the conducts by a price-fixing cartel given in the Decree 116/2005.[30]

It is important to note, in this regard, that though price-fixing cartels are normally deemed as illegal *per se* in most jurisdictions, in the case of Vietnam, it may be possible to establish the grounds for an exemption even for this type of anticompetitive agreement (see Section 4.2).

***4.4.2. Market allocating and customer sharing***

Next on the list are cartel agreements that divide markets by territory or by customers among competitors. If anything, such arrangements are even more restrictive than the most formal price-fixing agreement, since they leave no room for competition of any kind, and hence are often held illegal *per se*. This, however, is not the case in Vietnam.

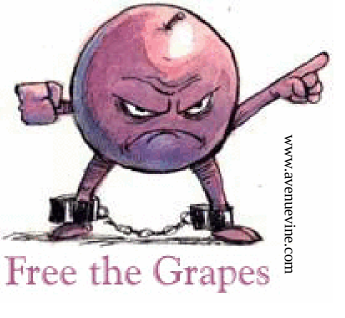
In developing countries like Vietnam, a prevalent form of market sharing is unspoken/unwritten understanding between provincial monopolists, which has the same effects as cartels. A firm selling construction materials in Hoa Binh province may not venture to cater to the demand of a customer located in Vinh Phuc province. A courier company in Hanoi may refuse to serve a consumer from Haiphong. This conduct may not have anything to do with collusion, and might only be an independent decision taken with due consideration to business efficiency, and therefore is both lawful and strategically rational. However, the competition authorities should keep a watchful eye on them, in case they are sham covers for market allocating agreements.


Market allocating and customer sharing agreements are defined in details under Article 15 of the Decree 116/2005 of Vietnam, as an explanation of the prohibition towards such agreements in the Competition Law 2004.[31]

***4.4.3. Output Restriction***

Under this agreement, enterprises producing/supplying the same products/ services agree to limit their supplies to a lower proportion of their previous sales. The effect of limiting supplies is to create scarcity in the market, which makes it possible for sellers to raise prices of products/services.[32]

In Vietnam, output coordination has been quite a common feature activity of associations between manufacturers. Justifications given include to avoid the 'supply-over-demand' situation, to eliminate 'cut-throat' competition between small producers, or to reduce the level of resources wasted, towards stabilising the market and benefiting consumers with stable prices and good quality. Many sectoral laws or regulations in Vietnam, as thus, legalise the formation and operation of cartels, which is against the letters and spirits of the Competition Law 2004. This law prohibits this type of anticompetitive horizontal agreement, under its Article 8, which is explained in greater details in Article 16 of the Decree 116/2005. It is supposed to have superseding power over competition issues. It is, therefore, difficult to see how this conflict is going to be resolved.




At least, similarly as the case of market sharing agreements, the competition authority should make sure that this is not a 'sham' to cover an anticompetitive intent. Inquiries could be made into the actual market demand, in correlation to individual firms' capacity and quotas enforced on them by the association. Further, output coordination does not mean shared distribution channels,

**Box 2: Syndicate System in Surface Transportation**

Majority of transport entrepreneurs in Nepal have formed local syndicates, which allow none other than syndicate members to ply their vehicles on the designated long routes. They have not only prevented other entrepreneurs from entering the transport business, but were also involved in vandalising buses which trespass on the demarcation of different syndicates.

Syndicate operators claimed that they did not allow non-members/buses to ply on 'their' highway, and if they did ply, they would be fined heavily. Companies outside the syndicate system felt that it created problem for their operations. They blamed the Government for being a mute spectator of the system and held it responsible for perpetuating near monopoly, thereby rewarding inefficiency and carelessness.

The Nepalese Government has adopted a liberalised and free economy about a decade ago. Even though in its Transportation Act, the Government still recognises the role of bus syndicates, there is no question of allowing for artificial maintenance of monopoly. Enforcement, however, remains weak, and the unstable political situation recently does not help much, if not worsening the situation.

Nepal is in the process of adopting a competition law, in view of its accession commitments to the World Trade Organisation (WTO). However, even this process has been greatly delayed.

***Source:*** *Anticompetitive Practices in Nepal, Adhikari and Regmi, CUTS and SAWTEE, 2001.*

identical charging prices or allocation of markets or customers. Any such additional 'coordination' may point to the existence of a cartel.

### *4.4.4. Bid Rigging (or Collusive Tendering)*

Another type of cartel behaviour is bid rigging. It is prohibited by Article 8 of the Competition Law 2006 of Vietnam regardless of the market share of the colluding bidders.[33]

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Bid rigging usually involves competitors collaborating in some way to restrict competition in response to a tender, regardless of whether the tender is issued by a public authority or a private entity. It is universally viewed as one of the worst 'hard-core' cartel-type offences alongside price-fixing, output restriction and market allocation, and is often a combination of these practices.[34]

**Box 3: Bloc Calendar – Cartel or an Efficiency-Enhancing Agreement**

Until 2006, an association of 48 publishing houses in Vietnam were coordinating the output of bloc calendars for a decade, when they fell apart. Bloc calendars are the every day tear-off calendar, and produced and sold around the time of a new year.

In 2005, the association had agreed to produce a total amount of 13.5 million bloc calendars to cater to the demand for the 2006 New Year of the whole country. These calendars were then produced and kept in stock with the Vietnam Book General Corporation, ready for distribution. Towards the end of 2005, however, the National University Publishing House of Ho Chi Minh City (NUPH-HCM) suddenly withdrew their participation from the association and at the same time, announced that they would produce and market, all by themselves, a total amount of 2 million bloc calendars.

The association and its other members were very agitated with this sudden move. Since the NUPH-HCM was supposed to produce only 200,000 calendars, the amount of calendars they then produced would overwhelm the market. The association, therefore, lodged a complaint with the General Department of Publication (Ministry of Culture and Information). However, due to the introduction of the Law on Publication 2004 and a document No. 1187 on opening up the publishing business, the General Department could neither find any fault with the decision of the NUPH-HCM, nor forced them to rejoin the association.

While the old association accused the NUPH-HCM of not honouring their commitment, which caused supply to exceed demand, creating loss for all, the latter argued that they were only following the spirit of liberalising the publishing sector. On the other hand, the NUPH-HCM accused the association of output restricting, and fixing prices at a level higher than should be, causing loss to the consumers.

Bid rigging, as all other cartel-type behaviours, can be difficult to detect and prosecute. However, as most competition laws broadly prohibit anticompetitive agreements and concerted practices between competitors, there need be no legally binding or formal agreement or any punishment or other enforcement mechanisms envisaged for a bid rigging offence to be established. As in the case of other cartel types, circumstantial, rather than direct evidence is often enough to infer violations.[35]

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Authorities are increasingly recognising the market conditions that make bid rigging more likely to occur. These include, for instance: (i) the presence of a few sellers or of a small leading group of sellers that control most of the market; (ii) lack of ready substitution with other products; and (iii) standardised products. This is also quite similar to the case of other cartel types. While recent research shows that the building and civil engineering sector is at most risk of cartel activity, bid rigging cases have also been found in numerous other industries.

### *4.4.5. Boycott or Joint Refusal to Deal*

An illegal boycott or joint refusal to deal is a joint action by competitors that has the purpose of using the combined market power of those competitors to force a supplier, a competitor or a customer to agree to an action that harms competition, which would not be agreed to, absent the joint action. For example, by threatening to stop buying from a supplier, two very large retailing customers might be able to force a supplier to agree not to sell one or more of its products to other retailers. If the supplier agreed, other retail stores would be losing sales if no other business was available to supply the product to them. Further, the public would probably be hurt both by the inconvenience of finding the product only at two stores. The use of this kind of threat is usually designed either to put the other retailers out of business or to limit competition in the sales of the item to two stores to make it easier to raise the price to the public.


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The Competition Law 2004 of Vietnam prohibits such practices and hold them illegal irrespective of the combined market share of the parties to the agreement,

**Box 4: A Case of Bid Rigging in Vietnam**

Bid rigging in Vietnam was discovered in many projects funded by the State budget. For instance, in Van Lam – Son Hai II road construction project, there were four companies participating in the bidding for this project and 'Company 98' was awarded the contract. It was later discovered that all four participants belonged to the same business group which Company 98 controlled. Company 98 had arranged for three shell companies to submit insincere bids at inflated prices in order to create the illusion of a competitive process. Having made these arrangements in advance, Company 98 was ensured, and indeed, awarded the contract at a price within ten millionths of a percent of the published government estimates (141 VND difference on a 1.56bn VND contract).

***Source:*** *Tendering in Construction: Real Competition or not? - Ninh Thuan Newspaper, December 17, 2002, as cited in CUTS (2006), Fairplay Please! p.118.*

**Box 5: Complementary Bidding in Printers**

Four major printers used to supply manifold business forms used for computer printout paper, snap-set forms, and similar products. Historically, the government tendered original orders but placed repeat orders with the firm that had supplied the first order. After concluding that it could improve prices by tendering all orders, the government began to do so from a list of qualified printers, including four major firms. The resultant price decline became a concern to the major companies and their sales managers.

The sales managers of the four companies met and agreed on a bidding strategy. The price book of the market leader, available to all, was used to determine benchmark prices for each product for all the companies. It was agreed that when a tender was called, the previous supplier of the particular form would bid at or below the benchmark price, whereas all others would bid higher. After a while, the companies concluded that this method was too difficult and agreed that the former supplier would simply tell the competitors how much it was bidding and others would bid higher or not at all.

During the conspiracy, about 300 separate tenders were called by the government, and bidding patterns were consistent with the agreements. The arrangement started to break down after the entry of new competitor, which began winning bids. The new firm was approached to join the existing agreement. The new competitors, instead, complained to the authorities and provided initial information that led to the start of the investigation.

***Source:*** *Khemani, R. Shyam, A Framework for the Design Implementation of Competition Law and Policy, World Bank and OECD, as cited in CUTS (2001), Competition Policy and Law Made Easy, p.10*

under its Article 8(6) and 8(7), which are further explained by Article 19-20 of the Decree 116/2005.

***4.4.6. Other Horizontal Agreements between Competitors***

Many non-cartel horizontal agreements may be efficiency-enhancing by promoting research and development, create new or improved products or methods of distribution or improve information flow. Many, on the other hand, may eliminate competition, restrict output and raise prices.

One example of such agreements is the case of standard-setting organisations. Efficiency justifications happen when, for instance, some trade association or testing company says this kind of electrical socket will safely fit in this kind of socket, or this quality, grade, or whatever is safe to eat or safe to use in construction. These standards usually do not forbid the use of alternatives (unless they are put into a building code or health code) but buyers are generally afraid to use uncertified products so the effect is similar to a refusal to deal.

**Box 6: India's Pharma Retail Cartel**

In India, though there are 20,000 pharma manufacturers, there are nearly 800,000 retailers. These retailers are said to dictate to the pharma companies what number of stockists a company should appoint; how many brands or its combinations should be available in the market; what should be the free samples policy and so on. Liberal margins are demanded and offered by the pharma companies on generic drugs, going up to 2000 percent.

In 1984, the Retail and Dispensing Chemists Association, Bombay, was brought before the Monopolies and Restrictive Trade Practices Commission (MRTPC) after it directed all wholesalers and retailers to boycott a company's product till the Association's demands were met by the company. The MRTPC observed that the impact of the chemists' boycott could by no stretch of imagination be considered negligible. The boycott represented an attempt to deny the consumers certain products to which they are accustomed and, therefore, the hardship to such consumers was patent. The MRTPC then passed a 'cease and desist' order.

Even before that, in 1982, the All India Organisation of Chemists and Druggists (AIOCD) had to face a similar fate. The AICOD was hauled up before the Commission in 1983 when it issued a circular to various pharmaceutical companies threatening that if they dealt with the State cooperative organisations and appointed them as stockists granting them sale rights, it would expose the companies to a boycott by its members. The case was decided in 1993 and the Commission struck it down as a restrictive trade practice of 'refusal to deal'.

***Source:*** *Mehta, Pradeep S (2005), Competition Breaks Cartels, The Hindu Business Line on January 12, 2005, available at <http://www.thehindubusinessline.com/2005/01/12/stories/2005011200330900.htm>*

And the standard setting process can be abused to keep out competitors or keep up prices which can be a violation of competition law.

In another instance, plumbers were able to discourage the building safety association from approving the use of plastic sewage pipes because the plumbers could charge more for welding metal sewage pipes than they could for gluing plastic ones. Similarly, doctors groups have been sued on a number of occasions for refusing to allow their members to cooperate with nurse midwives or nurse anaesthetists, which generally makes it unlawful for those nurses to practice their specialties by themselves.

The Competition Law of Vietnam, as mentioned above, adopts a rule of reason approach towards all such agreements. However, it fails to give the competition authority the pro-active power to examine the pro-competitive effects of such practice, leaving them waiting for the parties to the case to file an application for exemption. A typical investigation over such practices, according to the

Law, shall include definition of relevant market for the case, verification of the parties' market share in the relevant market already defined, and collection and analysis of evidence on the violative acts.[36] This method, by itself, is rather rigid, despite being incomprehensive, and might prove ineffective in certain cases. Five other questions, which should be analysed to complement the investigative process, include:[37]

- whether the restraint is inherently likely to restrict output and raise prices?
- whether the restraint is naked or obviously related to some pro-competitive integration of economic resources?
- whether the restraint will restrict outputs and raise prices, or otherwise create or facilitate the exercise of market power?
- whether the restraint is necessary to achieve the asserted pro-competitive goals?
- whether the restraint's pro-competitive benefits outweigh its anticompetitive risks?

## 4.5 Vertical Agreements in the Distribution/Sale of Products

**Vertical anticompetitive agreements, which come under competitive scrutiny, are usually contractual arrangements between suppliers (manufacturers) and distributors (retailers), which extend beyond simple arms-length pricing.**

Vertical anticompetitive agreements involve businesses operating at successive stages of a production process. Simply put, in a vertical arrangement, for example bilateral, one party is the supplier of inputs to the other party's business activity. Vertical agreements are, generally speaking, treated less severely than horizontal ones, often under the rule of reason by competition authorities. However, to be sure, certain vertical agreements, which have adverse impact on competition in the market, have been uniformly condemned, such as that of tied sale, exclusive dealing or resale price maintenance.

Vertical anticompetitive agreements, which come under competitive scrutiny, are usually contractual arrangements between suppliers (manufacturers) and distributors (retailers), which extend beyond simple arms-length pricing. They are usually motivated by the desire for vertical control within a principal-agent relationship, where the principal (the manufacturer) imposes contractual obligations on its agent (the retailer) when delegating responsibility for selling its good.[38] This is in distinction from vertical restraints based upon dominance, which will be dealt with separately under a section on abuses of dominance.

Such agreements may have a benign effect, e.g. by removing pricing distortions, optimising investment levels and eliminating avoidable transaction costs. They may also have an adverse effect not only by foreclosing markets to new entrants (which is the standard criticism) but also by dampening competition between existing rivals through restrictions on inter-brand and/or intra-brand competition.[39]

Similarly as horizontal restraints, it is often viewed that market power at one or both levels is a necessary condition for vertical restraints to have a substantial adverse effect on competition. With market power present, a number of other factors, notably the effects on competition of the subject agreement, and any indicator of efficiency, which might offset the agreement's adverse effect on competition, should also be taken into account while dealing with these types of vertical restraints.[40]

The Competition Law 2004 of Vietnam does not deal with vertical restrictive agreements in a direct manner. In fact, only three sections of Article 8 (which lists out various competition-restricting agreements prohibited by the Law) could be interpreted in this direction, which are Section 5-7. Accordingly, it is prohibited to have 'agreements on imposing on other enterprises conditions on signing of goods or services purchase or sale contracts or forcing other enterprises to accept obligations which have no direct connection with the subject of such contracts' (Article 8(5) of the Law), 'agreements on preventing, restraining, disallowing other enterprises to enter the market or develop business' (Article 8(6) of the Law), and 'agreements on abolishing from the market enterprises other than the parties of the agreements' (Article 8(7) of the Law). Interestingly, these sections can apply for both the cases of horizontal and vertical relationship, as will be discussed later.

### *4.5.1. Resale Price Maintenance*

Resale price maintenance is the practice whereby a manufacturer and its distributors agree that the latter will sell products of the former at certain prices (resale price maintenance), at or above a price floor (minimum resale price maintenance) or at or below a price ceiling (maximum resale price maintenance).[41]

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Resale price maintenance sometimes might have benign effect, or help promote business efficiency, and would accordingly be treated under the rule of reason. It is most often an instrument for encouraging services of all types at the retail level. These services are things like providing advice to customers, keeping enough staff so that cashier lines are short, keeping inventory organised, even being enthusiastic, anything that a retailer does apart from setting the price.

However, in the early days of competition law, resale price maintenance was considered to be nothing more than an attempt to fix retail prices at a monopoly level by a monopolist. The principle of *per se* illegality, therefore, was generally applied to deal with this practice, which is still applicable today in many countries' competition law. This is, however, more a unilateral conduct rather than a vertical concerted action or agreement.

**Box 7: South Africa Tribunal Puts Brakes on Minimum Resale Price Maintenance**

The Competition Tribunal of South Africa imposed a penalty of three million rand (approx. US$419,000) on Federal Mogul Aftermarket South Africa (Pty) Ltd, for having contravened the Competition Act. This is the largest penalty levied by the Competition Tribunal. It follows an earlier finding by the Tribunal that Federal Mogul had engaged in resale price maintenance by obliging distributors to sell Ferodo brake pads at a determined price and penalising those distributors who did not comply.

Federal Mogul initially argued that the Tribunal's power to impose an administrative penalty was unconstitutional. However, the Tribunal found that a respondent in prohibited practice cases was not in an analogous position to a person accused in criminal proceedings, and that the Act provided adequate procedural mechanisms. Hence, the constitutional attack failed.

Whilst the maximum penalty (i.e. 10 percent of annual turnover) the Tribunal was entitled to impose amounted to just over Rand 6mn (approx. US$838,000), the Tribunal found, after closer analysis of the factors specified in section 59(3) of the Competition Act, Rand 3mn (approx. US$419,000) was an appropriate penalty. As per the South African Competition Act, resale price maintenance is a species of price fixing, and cannot be justified on the grounds that it may result in any technological, efficiency or pro-competitive gains.

***Source:*** *Prabhala (2006), South Africa, Competition Regimes in the World – A Civil Society Report, CUTS, p.282.*

As a unilateral conduct, resale price maintenance is forbidden under Section 2 of Article 13 (on Abuse of dominance) of the Competition Law 2004 of Vietnam. In the event that it serves to protect a dealer cartel's members against new entry by more efficient firms, it is mentioned Article 8(6) of the Law, and is forbidden if the combined market share of all members equals or exceeds 30 percent of the relevant market.[42]

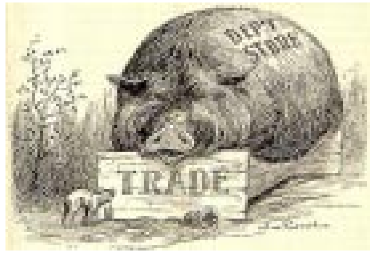
One of the most common areas of resale price maintenance is branded products. Manufacturers wishing to maintain a certain brand image often pressure retailers not to discount their goods, fearing that it may diminish the 'exclusive image' of their goods.

Another area where resale price maintenance routinely occurs is franchising. In this case, the franchisers may maintain a high degree of control over franchisee businesses, for example dictating what products they can buy and sell, and how all the operations of the business are to be conducted, and in some cases, even dictating the minimum prices for resale of goods, below which their franchisees must not sell, depending on the content of the franchising agreement. In Vietnam, as well as in most other countries, franchising is an absolutely lawful way of doing business. Therefore, the application of Article 8(6) towards such agreements ought to be undertaken with caution.

### *4.5.2. Exclusive Dealing*

Exclusive dealing is a vertical agreement by which a retailer or wholesaler is 'tied' to purchase from a supplier on the understanding that no other distributor will be appointed or receive supplies in a given area.

It is frequently argued that exclusive dealing agreements help a firm organise their distribution more efficiently. In such cases, where these agreements result in cost reduction or some other efficiency dividend, there might not be any competition problems associated with them, or only some minimal ones.[43]



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On the other hand, such agreements also tend to have adverse effect on competition, since they may restrict the access of upstream rivals to distributors. Rivals may be foreclosed from the market altogether or, more commonly, forced to use higher cost, or less effective, methods to bring their products to market. In either case, competition can be reduced through either reducing the number of manufacturers serving the market or by artificially raising the costs of some manufacturers.[44]

Due to this dual nature, in some jurisdictions, the conduct is prohibited outright (*per se*), while it is subject to an effect test (whether it has substantially lessened competition in a market) in others. In the US, for example, exclusive dealing was *per se* unlawful. However, a few years after making this announcement, the US Supreme Court reversed itself in the *GTE Sylvania* case and declared that, in general, exclusive dealing agreements are lawful.[45] There might be limitations to this ruling if it could be shown that the exclusive dealing requirements were, in a particular case, an effective method for monopolisation.

Various forms of exclusive dealing agreements are prohibited under Sections 5 and 6 of Article 8 of the Competition Law 2004 of Vietnam, though the term 'exclusive dealing' is not mentioned specifically therein.

Article 8(5) of the Law prohibits those 'agreement on imposing on other enterprises conditions on signing of goods or services purchase or sale contracts or forcing other enterprises to accept obligations which have no direct connection with the subject of such contracts' if the combined market share of the parties to agreement equals or exceeds 30 percent of the relevant market (read in combination with Art. 9(2) of the Law). The Decree 116/2005 further explains, under its Article 18, such agreements in the light of either full-line

**Box 8: Hungarian Book Publishers in Trouble**

The Hungarian Association of Book Publishers and Book Retailers has been found guilty of competition violations by the National Competition Council.

In a decision on April 11, 2006, the Council decided that certain rules of the Association were intended to introduce resale price maintenance, by restricting independent retailers from selling books below a certain price. The Hungarian Competition Code contained provisions prohibiting 'resale at a loss' – prices lower than the purchase price. This is illegal, if the seller is not an agent of the publisher.

The code also prohibited the sale of big quantities on lower prices between March 01 and June 15 and between October 01 and December 31, 2005. Big quantities are books worth more than €192,300 (US$281,059). According to the Council, this was not only restricting inter-brand but also intra-brand competition.

The Council has not imposed a fine but has prohibited the use of these provisions and obliged the association to notify its members within 15 days.

***Source:*** *http://www.globalcompetitionreview.com/news/news_item.cfm?item_id=3891*

forcing or third-line forcing, as mentioned above. However, instead of prohibiting them *per se*, the Vietnam law and regulation instead subject these agreements to the 'substantial lessening of competition test'.

A combined reading of Article 8(6) and Article 9(2) of the Competition Law 2004 of Vietnam shows that exclusive dealing agreements aimed at foreclosing other enterprises to enter the market or develop business are prohibited in Vietnam irrespective of the combined market share of the parties to the agreement. In particular, Section 2a) of Article 19 of the Decree 116/2005, which explains in further details Article 8(6) of the Competition Law, mentions that the act of forming an exclusive network with distributors and retailers to create difficulty for rivals is unlawful.

### *4.5.3. Tied Selling*

Tied selling is the practice of making the sale of one good (the tying goods) to customers on the conditions of the purchase of a second good (the tied goods). Some kinds of tying, especially by contract, have historically been regarded as anticompetitive as it is implied in this that one or more components of the package are sold individually by other businesses as their primary product, and thereby this bundling of goods would hurt their business. It is also implied that the company doing this bundling has a significantly large market share so that it would hurt the other companies who sell only single components.

Tying has been defended as maximising overall welfare in a variety of circumstances. If the main product works better with the tied product than with others, the manufacturer may tie the products to avoid quality problems that could lead to product liability lawsuits or loss of reputation. Tying may also be used with or in place of intellectual property to help protect entry into a market, encouraging innovation.


Tying is often used when the supplier makes one product that is critical to many customers. By threatening to withhold that key product unless others are also purchased, it is said; the supplier can increase sales of less necessary products.

**Box 9: Ceylon Oxygen Escapes Exclusive Dealing Charge**

Ceylon Oxygen Ltd (COL) held approximately 80 percent market share in the production and distribution of oxygen gas and related products from its inception in 1936 until 1993 in Sri Lanka. Industrial Gases (Pvt) Ltd (IGL) commenced operations in this market in December 1993. In 1994, IGL objected to the behaviour of COL on the grounds of UTPs that were detrimental to IGL.

It was alleged that in the aftermath of IGL's entry into the market, COL had resorted to predatory pricing tactics, which were evidenced by a reduction in the deposit fee on oxygen cylinders from LKR 8,500 to LKR 3,000. In addition, there was a decrease in the maintenance charges from LKR 75, to a range of LKR 55 to LKR 35 after IGL's entry.

Further, allegations were made of discriminatory discounts and exclusive dealing, whereby COL had entered into written agreements with its bulk purchasers that made it compulsory for them to purchase their total requirements from COL for an agreed time period. It was also established that substantial discounts were given on different types of gases and cylinder charges.

On this matter, the Federal Trade Commission (FTC) identified three courses of conduct that would constitute anticompetitive practices, namely predatory pricing, discriminatory rebates, and exclusive dealing. However, the Court of Appeal held that the FTC did not have the jurisdiction to investigate such practices under Section 11 of the FTC Act, and therefore, did not recognise such conduct as 'restricting, distorting or preventing competition' within the meaning of Section 14.

***Source:*** *CUTS (2002), Towards a New Competition Law in Sri Lanka.*

**Box 10: Promotional Strategy Foreclosed New Entrant in Vietnam Beer Market**

Tiger, Heineken and Bivina (produced by the Vietnam Beer Joint-Venture) were alleged to have formed an alliance, using exclusive dealing tactics to prevent Laser, the first Vietnamese brand of bottled draught beer (produced by Tan Hiep Phat Corp.), from entering the market

Marketed in 2004, Laser beer, however, could not access retail shops, distribution agencies and bars, etc, due to the contracts these shops and agents had with the aforementioned beer producers, which included an exclusive term preventing these sellers and distributors from selling, exhibiting, introducing, marketing… or even allowing marketing staff of any other beer brands to work on their business sites. As compensation, these shops and distributors would receive a 'sponsor' amount between VND50mn (US$3174) and some VND100mn (US$6349) per annum.

To make matter worse, as a warning signal, just recently, a beer shop has been brought to court by one of those big beer producers due to so-called 'violation of economic contract'. The decision of the Ho Chi Minh City People's Court was that the beer shop "Cay Dua" was not permitted to advertise, sell or allow Laser marketing staff at their site until November 2004; in accordance with the contract signed between the shop and the Vietnam Beer Joint-Venture since November 2003.

Though analysts opined that the terms of the contract were an abuse of dominance by Vietnam Beer JV to compete unfairly and maintain its dominant position by unjust practice, the contract was able to escape the scrutiny of the law, as Vietnam was yet to have a Competition Law at the time, while the current Commercial Law and the State Ordinance on Economic Contracts did not cover these areas.

***Source:*** *VietnamNet, July 04, 2004 & May 18, 2004.*

In the recent infamous antitrust cases that Microsoft had in the US and EU, the software giant was alleged to have tied together Microsoft Windows, Internet Explorer, and Windows Media Player. Microsoft's view of it is that a web browser and a media player are simply part of an operating system (and are included with all other personal computer operating systems). Just as the definition of a car has changed to include things that used to be separate products, such as speedometers and radios, the definition of an operating system has changed to include those formerly separate products. However, the dealing US court, for example, rejected Microsoft's claim that Internet Explorer was simply one facet of its operating system. At the same time, the court held that the tie between Microsoft Windows and Internet Explorer should be analysed under the rule of reason, and is not *per se* illegal.[46]

**Box 11: Ghana: Manufacturer vs Manufacturer**

Accra Brewery Ltd sued Guinness Ghana Ltd, seeking an order of interim injunction to restrain the latter from entering into or enforcing an agreement entitled 'Guinness means profit' with outlet owners of alcoholic beverages. The plaintiff manufactures products (Club Super Stout, Club Dark Beer and Castle Milk Stout) that compete with the products (Guinness Foreign Extra Stout) of Guinness. Accra Brewery's arguments were that:

- Guinness Ghana Ltd had entered into a 'money induced' agreement with about 183 retailers of alcoholic beverages in 1999, which bound these retailers to stock and advertise of only their products. Hence, these retailers refused to stock the products of the Accra Brewery;
- It was unlawful for Guinness to induce their common customers to break their contracts with Accra Brewery;
- The conduct of Guinness was preventing the Ghanaian public from exercising their freedom to choose any alcoholic or non-alcoholic beverages in drinking bars, or other authorised places where both the companies' products were sold;
- Guinness's act of inducement contravened the tenets of social and economic liberty and prosperity of the individual to trade with whom he pleases and the prosperity of the nation by the expansion of the total volume of trade; and
- Accra Brewery had lost substantial income as a consequence of the activity of Guinness.

The Judge ruled against Accra Brewery, giving the judgment that:

- There was no evidence of Guinness seeking to create a monopoly;
- There was no evidence that Guinness, by their own actions, was seeking to prevent customers from buying similar products more cheaply from elsewhere. This was since the products had the same sale price that was determined by agreement among the producers; and customers were free to choose which outlets they could buy from;
- There was no evidence that Guinness's market share had risen, as a consequence of the agreement; and
- There was no evidence that the public interest was likely to suffer, as a result of the agreement between Guinness and the selected retailers, since consumers still had a choice.

***Source:*** *Aryeetey & Ahene (2006), Ghana, Competition Regimes in the World – A Civil Society Report, CUTS, p.242.*

The Competition Law 2004 of Vietnam did not provide for the prohibition of tied selling specifically. It, however, prohibits 'agreement on imposing on other enterprises conditions on signing of goods or services purchase or sale contracts or forcing other enterprises to accept obligations which have no direct connection with the subject of such contracts'[47] if the combined market share of the parties to agreement equals or exceeds 30 percent of the relevant market. The Decree 116/2005 explains a little further on this point in Section 1a) of its

Article 18. However, it only mentions the illegality of the act of forcing sale agents to sell or supply goods or services, which are not directly related to the subject of the sale contracts.

**4.6. Abuse of Dominant Position**

The term 'abuse of dominant position' refers to anticompetitive business practices in which a dominant firm may engage in order to maintain or increase its position in the market. These business practices by the firm, not without controversy, may be considered as "abusive or improper exploitation" of monopolistic control of a market, aimed at restricting competition.

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**The term 'abuse of dominant position' refers to anticompetitive business practices in which a dominant firm may engage in order to maintain or increase its position in the market.**

The term 'abuse of dominant position' has been explicitly incorporated in competition laws of various countries such as Canada, the EU and Germany. In the US, the counterpart provisions would be those dealing with monopoly and attempts to monopolise or monopolisation of a market. Which of the different types of business practices are considered as being abusive will vary on a case-by-case basis and across countries? Generally, the business practices which have been contested are the following:

- price discrimination;
- predatory pricing;
- price squeezing by integrated firms;
- refusal to deal/sell;
- tied selling or product bundling; and
- pre-emption of facilities.

Quite a few of these practices have already been discussed in the earlier sections on vertical restrictive agreements, such as tied selling or product bundling and pre-emption of facilities (of which distribution/retailing outlet is one), and horizontal restrictive agreements as well, such as boycott and joint refusal to deal. This section, however, focuses more on the 'unilateral-conduct' aspect of these practices.

Besides, as also already mentioned in preceding sections, the anticompetitive effects of various restrictive agreements are usually treated more harshly when there is a certain degree of market power among the colluding firms. Similarly, in this section, the subject practices, before being examined about their harms/restraints on competition, have to go through the fist filter, which is to establish whether the alleged firms possess market dominance or monopoly.

Abuse of dominance or monopoly position, as might have been mentioned before, is prohibited by the Competition Law 2004 of Vietnam in its Article 11-12, which provide a long list (though not necessarily exhaustive) of various practices by dominant firms, which would be deemed as violations of the law. The important point is that this group of prohibitions does not have an exemption section as in the case of anticompetitive agreements. Presumably, since the dominant firms or group of firms or the monopolists, as defined by the Law, possess at least 30 percent of the relevant market, they have passed the 'safe harbour' threshold provided by the Law, and thus might be able to restrain competition.

### Box 12: Tie-up Sales of Gas Stoves with Supply of Gas Connection

Like in any other command and control economies, some goods and services were always in short supply, which led to political patronage and exploitation. Businesses exploited the situation through restrictive practices like tie-up sales. One such case, which came before the MRTPC of India in 1984, was that of Shyam Gas Company. Shyam Gas Company, the sole distributor to Bharat Petroleum Corporation Ltd, for cooking gas cylinders at Hathras (Uttar Pradesh), was allegedly engaging in the following restrictive practices:

- giving gas connections to the customer only when he purchased a gas stove or a hot plate from the company or its sister enterprise, Shyam Jyoti Enterprises; and
- charging customers for the supply of fittings and appliances at twice the market price.

The MRTPC held that the company was indulging in an RTP that was prejudicial to public interest. When charged, Shyam Gas Co. agreed to stop the RTP, and the MRTPC directed the company to abide by the undertaking.

The company was also asked to display, on its notice board, that the consumers were free to purchase the gas stoves and hot plates from anywhere they liked, and that the release of the gas connection would not be denied or delayed if the stove or hot plate was not purchased from the company or its sister company. This order formed the basis of asking all Liquefied Petroleum Gas (LPG) dealers to put up a similar notice in their premises.

***Source:*** *Monopolies Trade Regulation & Consumer Protection, D P S Verma, 1985.*

**Box 13: Tied Sale Practices in Vietnam Markets**

In 2002, when the demand on the motorcycle labelled "Wave @" in Vietnam was high, tied selling occurred in many shops in such way that the motorcycle was sold tied with a helmet. In many cases, especially under the centrally planned economic mechanism, when the supply usually fell short of the demand, tied selling practice was very popular.

In mid-March 2004, the Informatics and Telecom Company in Ho Chi Minh City (NetSoft) forced all of its agents in HCM City to sign contracts under the conditions that each Internet agent must register for selling pre-paid Internet cards in addition to other services that they wish to register; and the revenue for selling such cards must reach at least VND400000 per month.

***Source:*** *1. http://vnexpress.net/Vietnam/Kinh-doanh/2002/02/3B9B9479/*
*2. Trinh Thi Thanh Thuy et al, (2004), Scientific Background for Determining the Degree of Competitive Restrictive Agreements and Exemption Criteria in the Competition Law, Conference Report, MOT, Research Project 2003-78-009.*

**Box 14: Local Businessman Squares up to Sasol**

South Africa's competition watchdog has recently handed a local business a big victory over the international oil company Sasol.

On April 01, 2005, the Competition Tribunal found Sasol – a Johannesburg-based Multinational Corporation (MNC), which converts coal into liquid fuel, such as gasoline, diesel and heating oils – guilty of unlawful price discrimination, following a complaint by small business Nationwide Poles.

Nationwide had originally complained to the Competition Commission. Following an investigation, the Commission concluded that there was no evidence of illegal price discrimination. Nationwide then complained to the Tribunal.

Nationwide Poles buys creosote, a wood-treatment chemical, from Sasol. It had complained that Sasol discriminated against small businesses, alleging that it was entitled to the full discount offered to Sasol's bigger customers, such as its rival Woodline.

Sasol claimed that it was not a dominant group and that creosote substitutes were freely available. The Tribunal disagreed, ruling that Sasol had broken antitrust law.

***Source:*** *http://www.globalcompetitionreview.com/news/news_item.cfm?item_id=2513*

Article 117 of the Competition Law 2004 of Vietnam provides for a wide range of remedies, which would be applied in the case of finding of abuse of dominant positions, including monetary fines, public corrections, restructuring of enterprises having abused its dominant position in the market, revocation of the business registration certificates, and deprivation of licenses and practicing certificates, etc. Further stipulations in this area are made in the Decree No. 120/2005/ND-CP issued by the Government of Vietnam on handling competition violations.

**Box 15: Promotion or Predatory Pricing: Does Viettel Violate the Competition Law?**

Viettel, a newcomer in the market for mobile phone services in Vietnam, recently launched a huge promotional programme in September 2005, one never undertaken in the country before. To celebrate its one-year operation, the army-run mobile service provider offered unlimited free first calls within the network every day. Viettel has also offered free connection services for new post-paid subscribers and doubled the account value for new pre-paid subscribers. Viettel also cut mobile phone subscription fees by VND10,000 to VND59,000 per month starting October 01, 2005. The corporation management board even announced that it would also keep the subscription fees 10 to 15 percent lower than other mobile phone networks.

Many subscribers have warmly welcomed this move of Viettel. Others, however, remained sceptical that the quality of services might not match the largeness of the promotions. Analysing from the angle of the Competition Law 2004 of Vietnam, many also asked whether such a promotion constituted an act of predatory pricing – a violation under this law.

Tran Anh Son, Deputy Director of the Competition Administration Department under the Ministry of Trade of Vietnam, opined that Viettel's offer of free connection services for new post-paid subscribers was in line with Section B, Article 181 of the Law on Commerce, and that the competition law does not prohibit such promotions. Answering questions whether Viettel's move might be an unfair competition practice to attract competitors' clientele, or a predatory pricing conduct, Son said that the provision of the competition law on predatory pricing only applied to dominant enterprises with more than 30 percent market share, while Viettel controlled only 10 percent of the market at the time. He stressed that Viettel's pricing behaviour was not predatory and did not violate the Competition Law.

***Source:*** *VietNamNet, September 24, 2005.*

**Box 16: Predatory Practices in the Beer Sector in Zimbabwe**

Nesbitt Brewery (Pvt) Limited, a small brewing company located at Chiredzi, Zimbabwe, lodged a complaint with the Competition Commission of Zimbabwe that National Breweries Limited was engaged in predatory pricing, having drastically reduced the price of clear beer in Chiredzi to unprofitable levels, with the intention of driving Nesbitt Brewery out of the market.

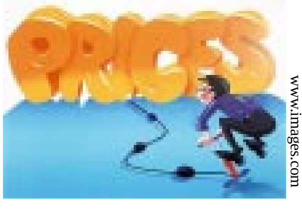
Investigations revealed that the clear beer industry in Zimbabwe was highly concentrated. Nesbitt Brewery was a new entrant into the market, challenging the long-standing monopoly position of National Breweries, which held a market share of 90 percent. National Breweries has a national distribution network, whilst Nesbitt Brewery only operates in Chiredzi.

Investigations further revealed that the National Breweries had organised a beer promotion in Chiredzi from May 1999 to April 2000, when the Commission started gathering information on the case. The promotion included free snacks and T-shirts, lucky draw tickets, free beers and substantial price reductions. The promotion was only held in Chiredzi, where Nesbitt Brewery is based and also sells the bulk of its beer. The National Breweries retail prices for its beer, in Chiredzi during the promotion period, were below its normal landed costs in that town.

The Commission conducted a full-scale investigation under section 28 of the Competition Act of 1996. The alleged practices were found to be predatory within the terms of Section 2 of the Act. Although National Breweries stopped their promotion activities as soon as they became aware that they were being investigated, the Commission made them sign an undertaking that they would desist from future promotional activities primarily aimed at driving Nesbitt Brewery out of the market.

***Source:*** *UNCTAD Intergovernmental Group of Experts on Competition Law and Policy, Geneva, July 03-05, 2002.*

### *4.6.1. Price Discrimination*



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Price discrimination refers to the practice of applying different conditions, normally different prices, to equivalent transactions. A simple example is the practice of charging of different prices to different customers, or categories of customers, for the same product where the differences in prices do not reflect the quantity, quality or any other characteristics of the items supplied.

Price discrimination is prohibited in the Competition Law 2004 of Vietnam, under its Article 13(4). According to the Law, such are the practices of

**Box 17: Viettel Mobile Faces Bankruptcy due to VNPT's Monopoly**

The fledging Viettel mobile phone service provider in Vietnam complained to the Government of its potential bankruptcy caused by a deadlock over network connection with the Vietnam Posts and Telecommunications General Corporation (VNPT). The General Corporation was accused of limiting phone calls by Viettel customers to VNPT's mobile and landline subscribers.

Under the current Vietnamese regulations, VNPT, as Vietnam's largest mobile phone and landline service provider and the dominant market holder, must ensure there is communications connection between the corporation and other start-up companies. The two companies had even concluded a deal in December 2004 over connection issues. Notwithstanding, while Viettel's mobile phone subscription rocketed in the first six months of 2005, VNPT has only provided less than 50 percent of the connection demand, triggering a wave of complaints by Viettel customers about service quality.

VNPT explained that it was not VNPT's intention to cause trouble to Viettel. The problem was said to have been caused by VNPT's circuit switchboards using old technology and at present it would not be economically efficient to upgrade the system. Viettel said the explanation was irrational as VNPT only needed to invest US$2mn or 0.3 percent of its total annual investment capital to satisfy demand for Viettel, far less than the US$30mn Viettel reportedly paid VNPT for connection in 2004.

***Source:*** *CUTS 7Up2 Project, Advocacy and Capacity Building on Competition Policy and Law in Asia, E-Newsletter Vol. V.*

"imposing dissimilar commercial conditions in similar transactions in order to create inequality in competition". This is further defined under Article 29 of the Decree 116/2005.

In countries with a long heritage of centrally planning like Vietnam, where the state sector assumed, and still does, a great importance, such discriminatory treatment is quite prevalent. In cases where the competitive balanced is unjustly titled because of such practices, the competition should try to have a say to protect economic justice. Especially in the case of Vietnam, where 'enterprises producing/supplying products or public-utility services, enterprises operating in the State-monopolised sectors and domains' are also subject to the scrutiny of the competition law.[48]

### *4.6.2. Predatory Pricing*

Predatory pricing occurs when a dominant firm temporarily charges particularly low prices in an attempt to eliminate existing competitors, or create a barrier to entry into the market for potential new competitors. The predator will incur temporary losses during its low pricing policy with the intention of raising prices in the future to recoup losses and gain further profits. Such behaviour may offer consumers advantages in the short run but will be disadvantageous if the seller is able to maintain the price at a monopoly level.


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Predatory pricing necessarily involves the ability to raise prices once rivals have been disciplined or have exited the market. Consequently, a key consideration in determining that low prices are in fact predatory and may lead to a substantial lessening of competition is whether the market is viewed by potential competitors as having high barriers to entry. Such barriers might include high financial costs for entry, with difficult technology and little ability to sell off the assets if the new entry fails. Without such barriers, any post-predation price increase by the dominant firm might attract entry so that the dominant firm would not be able to raise prices and recoup the costs of predation.[49]

**Box 18: IPRs over Weekly TV Guide Abused**

The ECJ, in its decision of 6 April 1995, confirmed that Radio Telefis Eireann (RTE) and Independent Television Publications Limited (ITP), who were the only sources of basic information on programme scheduling, which is indispensable raw material for compiling a weekly television guide, could not rely on national copyright provisions to refuse to provide that information to third parties. Such a refusal, the Court held, in this case constituted the exercise of an IPR beyond its specific subject matter and, thus, an abuse of a dominant position under Article 86 of the Treaty of Rome.

The court argued that RTE and ITP held a dominant position, because they were the only source in Ireland of the basic information necessary to produce weekly television programming guides and were thus in a position to reserve for themselves the secondary market for weekly television guides by excluding all competition from that market.

The Court considered that, whilst refusal to grant a license in exercising an IPR is not of itself an abuse of a dominant position, it might be an abuse where special circumstances exist. Such circumstances included the lack of an actual or potential substitute for a weekly television guide, the existence of a specific, constant and regular demand for such a guide, and the fact that the refusal to grant a license to Magill to produce such a guide prevented the appearance of a new product on the market which RTE and ITP did not offer.

***Source:*** *Joined Cases 241/91 P etc. RTE and ITP v Commission [1995] ECR I-743.*

Predatory pricing is prohibited in the Competition Law 2004 of Vietnam, under its Article 13(1). According to the Law, such are the practices of 'selling goods, providing services at prices lower than the aggregate costs in order to eliminate competitors'. This is further defined under Article 23-26 and Article 31 of the Decree 116/2005, which details quite a lot of criteria for calculating costs in such cases. Broadly, such costs include manufacture costs, distribution costs, and managerial costs.

The Decree also mentions some cases where selling below cost is not considered as predatory pricing, such as in the case of prices for perishables, off-season products/services, sale off, or prices regulated by the State. However, in such cases, price cuts have to be explained in the clearest form possible at the selling points.

***4.6.3. Refusal to Deal/Supply***

Absent a statute or other special circumstances, a business in a free market has an unlimited right to refuse to do business with any buyer for any reason or for no reason at all. This spirit is upheld by the Competition Law 2004 of Vietnam in its Article 4, which says, "Enterprises enjoy freedom to competition within the legal framework. The State protects the lawful right to business competition".

However, in many a case, one will see that the competition statutes of many countries prohibit such practice whereby a supplier refuses to supply goods to a dealer without reasonable justifications. In other more special instances, it might be the case that one dominant business which is in possession of 'essential facilities' in an industry or a market is prohibited by the competition law to refuse/restrict access to those facilities by competitors, if this is seen as an effort to maintain its dominant position.[50]

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A supplier may refuse to supply for various reasons, for example to control the retail prices at which its products are sold or to protect its downstream markets. A situation may arise in which a supplier recommends resale prices to its dealers and refuses to supply those dealers who do not resell at these prices.

The problem arises when one firm is active in both upstream and downstream activities (it is vertically integrated) and refuses to grant other firms, who wish to provide either upstream or downstream services only, access to the "facility". The refusal to supply may be anticompetitive if it prevents third party firms from entering the market and consequently has the effect of lessening competition. A dominant firm, which controls access to an essential facility, may be abusing its dominant position if it refuses access to the facility without reasonable justification or grants access only on discriminatory terms such that its competitors in the related market are disadvantaged.

Refusal to deal/supply is not explicitly mentioned as being prohibited in the Competition Law 2004 of Vietnam, except in Article 13(6) and Article 8(6) as well as other provisions (e.g. Article 14), which seem to prohibit some kinds of discrimination against existing or potential entrants as competitors or retailers of the products made by a firm. Article 20 of the Decree 116/2005, when explaining the concept of restrictive agreements aimed at eliminating from the market firms which are not parties to the agreement (prohibited irrespective of the combined market share of the parties to the agreement under Article 8(7) of the Law), did mention something related to a joint refusal to deal or joint predatory pricing tactics. However, nothing was mentioned in either the Law or the Decree 116/2005 about such unilateral conduct, or an act of restricting access to essential facilities. It was not mentioned either under Article 31 of the Decree 116/2005 about erecting barriers to entry to new competitors, which includes only exclusive dealing and predatory pricing tactics.

Other sectoral regulations in Vietnam, such as the Ordinance No 43/2002 on Posts and Telecommunications and the Electricity Law 2004, however, do mention the obligation on the part of incumbent businesses in these sectors to provide interconnection to their network to competitors on fair terms. The Ordinance No 43/2002 on Posts and Telecommunications, for example, provides for such obligations to be placed on parties who are in a dominant position in respect of provision of interconnect and who control "essential facilities" (though this key term is left undefined). These obligations provide for good faith negotiations and prohibit refusal to interconnect.

# 5. ENFORCEMENT OF THE COMPETITION LAW AGAINST RBPs

RBPs in Vietnam, according to the Competition Law 2004, may be investigated *suo moto* by the Competition Administration Department (CAD), as well as upon receipt of a complaint.[51] Any organisation or individual believing their rights and interests have been infringed by a violation of the Law (for instance, a company that thinks the practices of a competitor are in breach of the Law) has the right to lodge a complaint with the CAD. (Article 58(1) of the Law) The time limit for commencement of investigation is two years from the date on which the alleged breach of the Competition Law occurred.

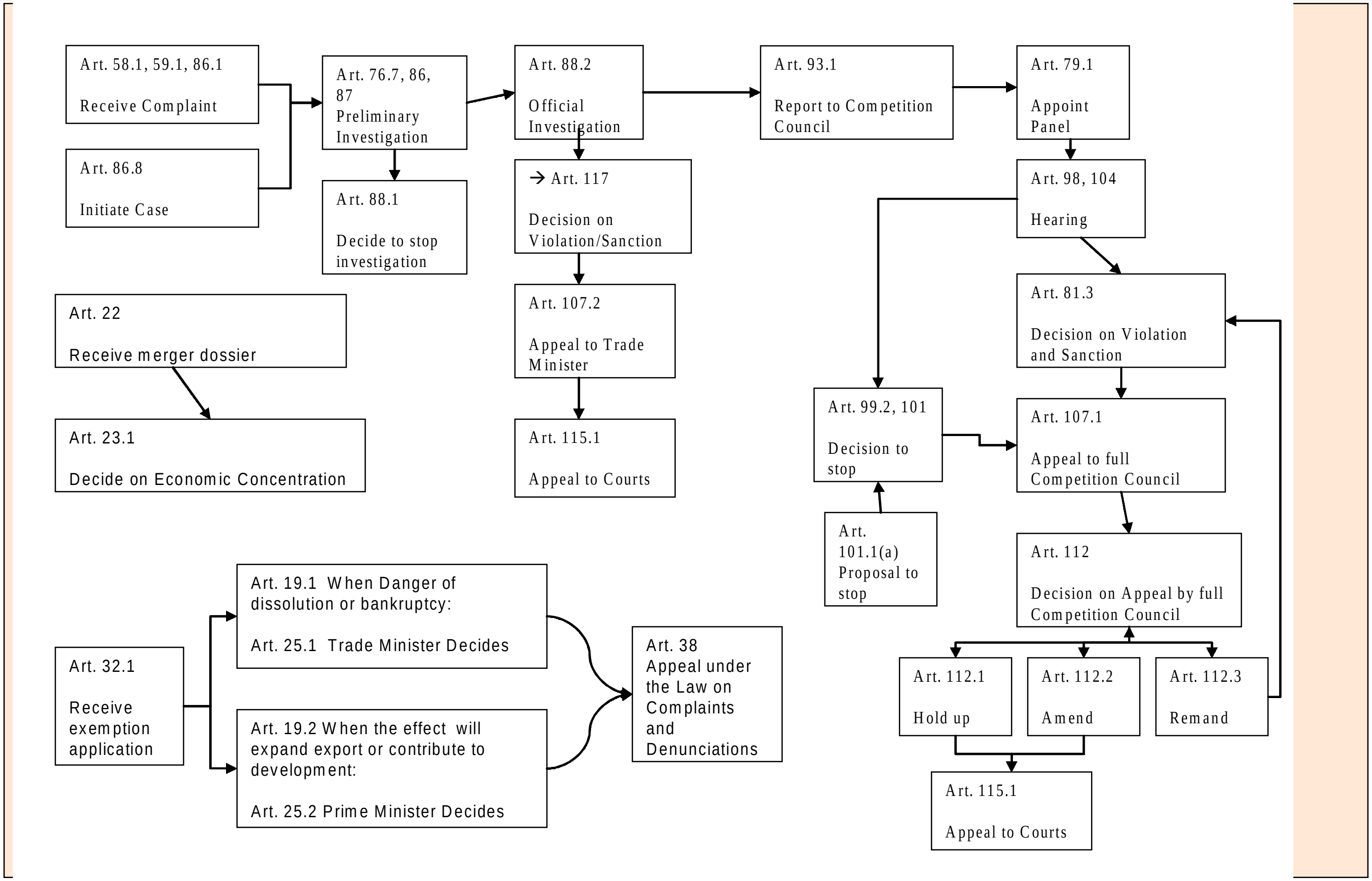
A complaint file must include evidence of the competitive practice which is complained of. The CAD will return a complaint file to the complainant if the limitation period has expired, if the case is beyond the CAD's investigative authority, or if the file is not complete (or supplemented within the deadline). A complainant may appeal against the return of a complaint within five days of the return; and the Minister of Trade must decide the appeal within seven days of the appeal. If a complaint is accepted, an advance worth 100 million *dong* (equivalent to more than US$6000) are payable within 15 days in provision for costs of case handling by the CAD, in the case of complaints on competition restraints. (Article 62-63 of the Law and Article 47(1) & 53 of the Decree 116/2005). This fees will be refunded to a successful complainant, as costs will be payable by the offender. The competition authority will bear the entire fees in cases where they acted *suo moto* but the suspected enterprises are not found guilty. (Article 63(3) of the Law) Upon payment of fees, the CAD will commence competition legal proceedings based on the complaint.

**There are some issues which should be taken into account by the competition authorities during the law enforcement process for effective case handling.**

The following diagram illustrates in brief how competition proceedings in Vietnam take place.[52] Other than the hard procedural aspects, there are some issues which should be taken into account by the competition authorities during the law enforcement process for effective case handling.

### 5.1. Detection of Violations

At least three classes of people will provide competition authorities with information that sometimes leads to investigations and findings of competition law violations: confidential informants (employees or persons or businesses


Art. 58.1, 59.1, 86.1
Receive Complaint
Art. 86.8
Initiate Case
Art. 76.7, 86, 87
Preliminary Investigation
Art. 88.1
Decide to stop investigation
Art. 88.2
Official Investigation
→ Art. 117
Decision on Violation/Sanction
Art. 107.2
Appeal to Trade Minister
Art. 115.1
Appeal to Courts
Art. 93.1
Report to Competition Council
Art. 79.1
Appoint Panel
Art. 98, 104
Hearing
Art. 81.3
Decision on Violation and Sanction
Art. 99.2, 101
Decision to stop
Art. 101.1(a)
Proposal to stop
Art. 107.1
Appeal to full Competition Council
Art. 112
Decision on Appeal by full Competition Council
Art. 112.1
Hold up
Art. 112.2
Amend
Art. 112.3
Remand
Art. 115.1
Appeal to Courts
Art. 22
Receive merger dossier
Art. 23.1
Decide on Economic Concentration
Art. 32.1
Receive exemption application
Art. 19.1 When Danger of dissolution or bankruptcy:
Art. 25.1 Trade Minister Decides
Art. 19.2 When the effect will expand export or contribute to development:
Art. 25.2 Prime Minister Decides
Art. 38
Appeal under the Law on Complaints and Denunciations

seeking to take advantage of leniency provisions); victims of anticompetitive practices (generally customers or suppliers who suspect that the reason that they cannot get a deal for price they expect is that the price/supply is being artificially raised by a cartel); and, employees of the competition authorities who monitor public actions of industries (for example, a competition investigator would not find it unusual for prices of different producers to be about the same for identical products because the higher price seller would find no buyers; but the investigator would strongly suspect that a price cartel exists if the only five producers of identical products announced at the exact same time a price increase of the exact same amount).

Now there are strong reasons that some people, perhaps most, who fall into these three categories might be unwilling to file a public complaint or pay the advance, as provided for in the Competition Law 2004 of Vietnam. Consider, for example, an employee who overhears a conversation or sees a document that indicates that his (or her) company is party to a price cartel. As a good citizen, he may be willing to tell the competition authorities about his suspicions. But so long as they are only suspicions, he would not like the company to know what he said. In fact, competition authorities normally would attempt to keep both the person's identity and the allegations confidential until more information was obtained. Indeed, they are likely to want the informant to seek further evidence of the unlawful activity, which would be impossible if the company knew the employee was talking to the competition authorities. Moreover, the employee is unlikely to have the money to pay the 100-million-*dong* advance or any desire to pay it.

Much the same is true of a co-conspirator who is seeking leniency. Such an enterprise may have enough money, but they may not be sure that there will be enough evidence to prove the conspiracy if the allegations are made public before an investigation. If the cartel members have been careful in arranging meetings and have no written agreements, and especially if there has been some cheating by cartel members, the testimony of a single competitor may be insufficient to prove that the cartel existed. They might simply deny the meetings or agreement and point to the instances of cheating (selling at less than the agreed upon price) as evidence that there never was an agreement on price. Competition authorities might, therefore, encourage the informant to meet again with the other cartel members at a place where the authorities might videotape the cartel members (as happened in the US in the lysine cartel case).

Customers might be willing to suggest to the competition authorities that their suppliers seem to be engaged in a customer allocation cartel. The customer might suspect this if he tried to find a new supplier and the first two new suppliers he tried said that they have committed all of their supplies to existing customers. The customer who has made this allegation might try to find out if his rivals also face the same problem, but it is not clear that his rivals have an incentive to tell him the truth and if word gets out that he has complained to the competition authorities, the suppliers may make his supply problems more difficult. While it is likely that the customer will have to testify at some time, he could assist the competition authorities if he could try to gather additional evidence of an allocation cartel before the cartel member become aware of the investigation.

The timing of notification to suspected violators is also crucial to being able to gather additional information about a suspected violation. In the example of firms raising prices at the exact same time, it is possible that some external event or series of events caused the companies to announce their price increase at the same time. For example, if an association of business that purchased their products was about to meet and the competitors all learned that their suppliers were going to increase their prices; it is conceivable that all the firms individually decided that it would be prudent to announce the price increase before the meeting. A non-public investigation is more likely to be able to determine the facts and avoid the possibilities of wrongly accusing a group of innocent companies of violating the law or giving violators warning of the investigation and allowing them to make up an untrue story to disprove the violation.

The idea that an investigator should or the competition authority should get an advance on their fee for handling a case before conducting an investigation, as in the case of Vietnam, therefore, is not recommended. Besides, it might not be a good idea to announce publicly that a competition investigation is taking place before the investigation is concluded. An announcement should be made only when the investigation is concluded. The reason that all investigations are non-public is both to make it easier for the staff to conduct the investigation and because it can unnecessarily damage a company if it is known to be under investigation and then later it turns out that the company has committed no violation.

### 5.2. Obtaining Proof of Violations

**The kind of proof needed will depend on the nature of the violation and the proof required in order to show that the competition law has been violated.**

The kind of proof needed will depend on the nature of the violation and the proof required in order to show that the competition law has been violated.

*Market shares:* These are a set of number that are required in proving certain unlawful RBPs, abuse of dominance, and unlawful mergers or joint ventures (as will be discussed in Section 6). For example, Article 8(1-5) of the Competition Law 2004 requires proof of market shares; while Article 8(6-8) does not. Proof of dominance also requires a demonstration of market shares.

In order to determine market shares, it is necessary to define the market and determine the share of the enterprise or enterprises that are being investigated.


As discussed earlier, this requires both a determination of the product market and the geographic market. In general, competition authorities begin with what their investigators know as individuals, what the authorities know from previous investigations, and what information is available from public sources.

As a result, an investigation might be compared to creating a map of undiscovered territory. In an investigation of manufacturers of a product, one might start by interviewing retail stores to determine what products are considered substitutes by consumers and what enterprises can sell the retailer the supplies, whether the suppliers must have local production facilities or whether the product is produced on a national or international level. Such interviews might be just a start to defining the product and geographic market. The list of manufacturers gained from the retailers would provide a start that might be followed up with interviews with distributors or wholesalers. Any of these interviews might point to other manufacturers who could make the products or who might be planning to make the products. Little by little a consistent picture of the industry is likely to emerge as the answers of businesses are cross checked. Ultimately, it will be necessary to gain information from the manufacturers themselves to determine the size of their sales in the relevant market and their capacity to manufacture additional products for that market.

Most established competition authorities can quickly put together a preliminary sketch of an industry from voluntary interviews with market participants. Obtaining such information voluntarily and quickly is possible only if the businesses have confidence that the competition authorities will keep business information secret. The Competition Law 2004 of Vietnam requires that the competition authorities keep such information confidential, which is a positive point (Article 56(3) of the Law *inter alia*). Special procedures are provided for introducing such information at trials to protect the confidentiality of business information.

Competition authorities should find it easier to obtain information informally if they make it known that they are required to keep business secrets confidential and they have demonstrated that they comply with the requirement of confidentiality. Accordingly, for a new competition authority, it is important to build trust with the business community; but it is also helpful if the authority has the formal authority to require the submission of the information. At some point in a competition proceeding, it will be necessary to obtain formal records, but in making the preliminary determination whether an investigation should be pursued, it may be that the burden on everyone will be less if the interviews in a preliminary investigation are informal. Many allegations or suspicions of violations can be dismissed quickly and at a low cost by using informal investigative techniques.

*Intent evidence:* It is often much more difficult to obtain. As noted above, evidence that enterprises are parties to illegal agreements is often difficult to obtain, especially if there is no confidential informant. An abuse of dominance case may present the same kind of difficulties in obtaining adequate proof of a violation. But obtaining such proof is not simply a matter of luck or magic, it is more often the product of intense investigative work. For example, it might be possible to prove that managers of rival firms met regularly in secret from hotel or restaurant records or by credit card or banking records. Establishing a predatory pricing case generally requires the use of an accountant to show below-cost pricing and the use of other investigators to determine whether the enterprise was simply eliminating excess inventory of discontinued product lines. If we think of determining market shares to be like mapping unknown territory, we might think of obtaining evidence about intent to be like detective work. The objective is not usually to obtain a confession, but to eliminate the possibility of innocent explanations for the business events that have occurred.

There are occasions in which special techniques like the offer of leniency to a co-conspirator or a "dawn raid" on facilities may be the key to establishing violations.

*Dawn raids:* In the competition world, dawn raids mean those surprise inspections carried out by the officials of the competition authorities at the premises of the business or businesses suspected, to obtain incriminating evidence. Dawn raids are not too difficult to undertake, and can generally bring good results, especially in the case the alleged companies refuse to cooperate.

Though the Competition Law 2004 of Vietnam does not specify the use of dawn raids during the investigation process over competition cases, the Decree 116/2005, under its Article 94 provide for the same. More information about the necessary techniques to carry out searches, raids and inspections in general can be obtained from the website of the International Competition Network (ICN) at: <*http://www.internationalcompetitionnetwork.org/cartels/Section2_Anti-Cartel_Enforcement_Manual.pdf*>

*Leniency:* Leniency is a generic term to describe a system of partial or total amnesty from the penalties that would otherwise be applicable to a cartel member, which reports its cartel membership to a competition enforcement agency.[53] In addition, agency decisions that could be considered lenient treatment include agreeing to pursue a reduction in penalties or not to refer a matter for criminal prosecution. The term leniency, thus, could be used to refer to total immunity and "lenient treatment", which means less than full immunity.

A leniency policy describes the written collection of principles and conditions adopted by an agency that govern the leniency process. A leniency policy is one component of a leniency programme, which also includes internal agency processes, for example, how the agency implements their leniency policy.

Many jurisdictions have developed programmes that offer leniency in order to encourage violators to confess and implicate their co-conspirators with first-hand, direct "insider" evidence that provides proof of conduct parties want to conceal. The programmes uncover conspiracies that would otherwise go undetected, can destabilise existing cartels and can act as a deterrent effect to entering into cartel arrangements. The programmes elicit confessions, direct evidence about other participants, and leads that investigators can follow for other evidence too. The evidence can be obtained more quickly, and at lower direct cost, compared to other methods of investigation, leading to prompt and efficient resolution of cases. To get this information, the parties who provide it are promised lower fines, shorter sentences, less restrictive orders, or even complete leniency.

Some leniency is available in Vietnam Law, as provided under Article 85 of the Decree 116/2005. However, these provisions are at a very initial stage and will be of much help in inducing cartelists to come forward and cooperate with the competition authority. A more proper leniency programme, therefore, needs to be built up in Vietnam. More information on how to draft an effective leniency programme again can be obtained from the website of the International Competition Network (ICN) at: <*http://www.internationalcompetition network.org/capetown2006/FINALFormatted Chapter2-modres.pdf*>

**Competition authorities should build a file, while obtaining evidence, which includes proof of every element of the violation.**

### 5.3. Preserving Proof of Violations

The idea is that the competition authorities should build a file, while obtaining evidence, which includes proof of every element of the violation. In the US, for example, when an enterprise is first notified that an investigation has been initiated, the enterprise is told that it is forbidden by law from destroying any documents that may relate to the investigation. At an appropriate time, this evidence should be collected in a manner, which is both admissible in a competition hearing and, if possible, in a form that cannot be denied by the enterprises charged with a competition violation. For example, the request or demands for information and documents always require that the submitting enterprise include a certification by an authorised official that the submission contains all the documents requested (or certified copies of them) and that these are unaltered documents. Written submissions and oral testimony is sworn under penalty of perjury.

The Competition Law 2004 of Vietnam deals with this issue very briefly in its Article 60, which only defines what evidences are. However, the Decree 116/2005 devotes an entire section with 11 articles to the issue of "finding proof/evidence" (Section 5, Article 74-84). Especially, Article 82 of the Decree talks about preservation of evidence which has been filed, though of course one does not expect techniques for preservation to be mentioned here.

# 6. MERGERS & ACQUISITIONS

The phrase 'mergers and acquisitions' or 'M&A' refers to the aspect of corporate finance strategy and management dealing with the merging and acquiring of different companies as well as other assets.[54]


## 6.1. Distinction between M&As

Although they are often uttered in the same breath and used as though they were synonymous, the terms M&A mean slightly different things.

When one company takes over another and clearly established itself as the new owner, the purchase is called an acquisition. From a legal point of view, the target company ceases to exist, and the buyer "swallows" the business.

In the pure sense of the term, a merger happens when two firms agree to go forward as a single new company rather than remain separately owned and operated. For example, both Daimler-Benz and Chrysler ceased to exist when the two firms merged, and a new company, DaimlerChrysler, was created.[55]

**In Vietnamese law, M&A cases are called as 'economic concentration', which include *inter alia* mergers, acquisitions, joint ventures, and consolidations.**

In Vietnamese law, M&A cases are called as 'economic concentration', which include *inter alia* mergers, acquisitions, joint ventures, and consolidations. The Competition Law 2004 of Vietnam defines them as follows:

"1. Merger of enterprises means an act whereby one or several enterprises transfer all of its/their property, rights, obligations and legitimate interests to another enterprise and at the same time terminate the existence of the merged enterprise(s).

2. Consolidation of enterprises means an act whereby two or more enterprises transfer all of their property, rights, obligations and legitimate interests to form a new enterprise and, at the same time, terminate the existence of the consolidated enterprises.

3. Acquisition of enterprises mean an act whereby an enterprise acquires the whole or part of property of another enterprise sufficient to control or dominate all or one of the trades of the acquired enterprise.

4. Joint venture between enterprises means an act whereby two or more enterprises jointly contribute part of their property, rights, obligations and legitimate interests to the establishment of a new enterprise."[56]

### 6.2. Varieties of M&As

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Mergers can be characterised according to three categories: horizontal mergers, which take place between firms that are actual or potential competitors occupying similar positions in the chain of production; vertical mergers, which take place between firms at different levels in the chain of production (such as between manufacturers and retailers); and other mergers, such as those which take place between companies that sell the same products in different markets (market-extension mergers), or companies selling different but related products in the same market (product-extension mergers), or conglomerates with different types of businesses.

An acquisition may be only slightly different from a merger. In fact, it may be different in name only. Like mergers, acquisitions are actions through which companies seek economies of scale, efficiencies and enhanced market visibility. Unlike all mergers, all acquisitions involve one firm purchasing another – there is no exchange of stock or consolidation as a new company.

**Unlike all mergers, all acquisitions involve one firm purchasing another – there is no exchange of stock or consolidation as a new company.**

In an acquisition, a company can buy another company with cash, stock or a combination of the two. Another possibility, which is common in smaller deals, is for one company to acquire all the assets of another company. Company X buys all of Company Y's assets for cash, which means that Company Y will have only cash (and debt, if they had debt before). Of course, Company Y becomes merely a shell and will eventually liquidate or enter another area of business.

### 6.3. Concerns about M&As

The review and approval of mergers, acquisitions and other corporate combinations (hereinafter referred to as 'mergers' for convenience) is normally entrusted to competition authorities or other relevant branches of government such as ministries of company affairs or sectoral regulators.

Many mergers will have little or no negative impact on competition. Some mergers may be pro-competitive, for example, by enhancing production efficiencies resulting from economies of scale or scope. Mergers may also create new synergies, lead to innovation by combining talents of different firms, and provide additional resources to develop new products and services.

Concerns about mergers, acquisitions and other corporate combinations are generally based on the same concerns about anticompetitive behaviour as discussed earlier in this paper. The main concern is that a larger merged firm may increase its market power. To the extent a merged firm becomes more dominant in a market, there is a greater potential to abuse the accumulation and exercise of market power to the detriment of competitors and consumers. In practice, merger reviews and the exercises of related powers by competition authorities are usually based on an evaluation of the impact of specific merger on competition in the relevant markets.

As will be discussed in subsequent sections on cross-border competition concerns, at times, a merger might not, by itself, be competition-problematique at home, but might affect its subsidiaries in a developing country. However, despite the fact that such merging of subsidiaries has apparent negative effects on the competitive process of host countries, competition authorities of host countries can do very little to regulate a *fait accompli* merger (see Box 21 for an example).

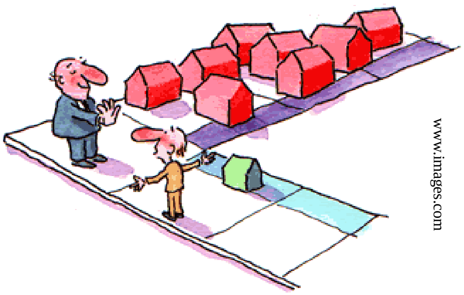
**Concerns about mergers, acquisitions and other corporate combinations are generally based on the same concerns about anticompetitive behaviour.**

According to the Competition Law 2004 of Vietnam, certain M&A cases (or 'economic concentration', as in the Law's words) 'shall be prohibited if the combined market shares of participating enterprises ... account for over 50 percent on the relevant market', except for cases when 'one or more of the participants ... is/are in danger of dissolution or bankruptcy, or 'the economic concentration has an effect of expanding export or contributing to socio-economic development, technical and technological advance', or 'the case where enterprises, after implementing economic concentration, are still of small or medium size as prescribed by law'.[57]

### 6.4. Merger Review

Large merger cases require prior review and approval in many jurisdictions. As part of their review, competition authorities may prohibit mergers or approve them subject to conditions. Mergers are usually only prohibited or subjected to conditions if the authority concludes that the merger will 'substantially harm competition'. Given the discretion inherent in the interpretation of this threshold, various competition authorities have published merger guidelines. These are intended to assist firms and their advisers to anticipate the procedures and criteria that will be applied in assessing a merger.

An example of such guidelines is contained in the Horizontal Merger Guidelines published in 1997 by the US Department of Justice (DoJ) and the FTC. The Guidelines set out a five-stage analysis of the following subject areas:[58]




- market definition;
- identification of firms participating in the relevant market and their market shares;
- identification of potential adverse effects of the merger;
- analysis of barriers to market entry; and
- evaluation of any efficiencies arising from the merger.

Further details about investigative techniques recommended for use during the merger review process can be found at the website of the ICN, at: <*http://www.internationalcompetitionnetwork.org/media/library/conference_5th_capetown_2006/ICNMergerGuidelinesWorkbook.pdf*>
.

### 6.5. Information in Merger Review

As part of the merger review process, the merging firms must normally provide information to the reviewing authority. It is standard practice in jurisdictions, which impose merger review, to require parties to be merger to submit advance notice of the proposed transaction. The information disclosed in the pre-merger notification will normally be used by a competition authority in the first stage of merger review (i.e. to determine if any anticompetitive concerns are present and whether to proceed with a more detailed review of the proposed transaction).[59]

> **Mergers are usually only prohibited or subjected to conditions if the authority concludes that the merger will 'substantially harm competition'.**

In Vietnamese Law, pre-merger notification is required 'if enterprises participating in economic concentration have combined market shares of between 30 and 50 percent on the relevant market'. 'Where combined market shares of enterprises participating in economic concentration are lower than 30 percent on the relevant market or where enterprises, after implementing economic concentration, are still of small or medium size as prescribed by law, such notification is not required'.[60]

These provisions create a design flaw that will impair the workability of the Law. How does a company know what its market share is for any of its products? Suppose only one or two products of a company that makes 20 products have a 30 percent market share and those two products only have a greater than 30 percent share only in two small local markets. Does the enterprise file a prior notification only for those products and only for those markets? In short, this obligation to file a notification seems to require any firm having intention to merge with or acquire another firm to have knowledge about the relevant product or geographic markets or the total sales in those markets; and consequently their individual or combined market shares. Relevant markets are virtually impossible to define in the abstract, and even in context, the merging parties are frequently not going to know whether they need to notify the competition authorities, whether they need an exemption or are subject to merger controls, etc. This is the worst footing that a law could start with. Businesses must know if they

**In Vietnamese law, pre-merger notification is required 'if enterprises participating in economic concentration have combined market shares of between 30 and 50 percent on the relevant market'.**

**Box 19: Merger Led to Monopoly in the Cable TV Sector**

The nation-wide cable television service in Thailand became a monopolistic industry, in February 1998, as the two operators, the International Broadcasting Corporation (IBC) and the United Television Network (UTV), merged to become one single entity – the United Broadcasting Corporation (UBC).

The merger was approved by the Mass Communication Organisation of Thailand (MCOT), the State Enterprise that holds licensing authority in Bangkok. The main justification for the merger was the need for the operators to consolidate, given the cost hike following a sudden sharp devaluation of the baht in June 1997, marking the beginning of the country's financial crisis that spread globally.

In May 1999, UBC raised its monthly subscription fee for its 'gold package' – i.e. the subscription package with the largest number of channels – by a whopping 22.47 percent from 890 bahts (US$23) to 1090 (US$28) per month.

An expert sub-committee was established to investigate whether the cable monopoly was abusing its market power in general, and whether the price increase was excessive. The sub-committee produced an 80-page investigation report.

Later on, the TCC decided that since the cable television service is a regulated service, the de facto regulatory body, the MCOT, should handle the matter, which is responsible for tariff approval and ensuring licensees' compliance to the terms of the licence. The case was, therefore, transferred after which it was never heard of again.

***Source:*** *Cable Television Monopoly Case Study: An Investigation by the Thai Trade Competition Commission: Deunden Nikomborirak, Research Director, Thailand Development Research Institute.*

have obligations. Here they will not know until the litigation is finished at which point they may be liable for large penalties even though they had no idea that they are covered. That after-the-fact determination of the law's coverage will undermine its credibility.

The content of pre-merger notifications is generally defined by the law or regulation. Required information typically includes:

- identity of the firms involved in the proposed transaction;
- description of the nature and commercial terms of the transaction;
- timing of the transaction;
- financial information on the involved (including revenue, assets and copies of annual or other financial reports);
- identification of related ownership interests and the organisation structure of the firms involved; and
- description of the relevant product and service markets in which the firms operate.

The initial information filing typically triggers a waiting period, during which the reviewing authority will be entitled to request further information. This process concludes with a determination by the reviewing authority whether to proceed with a more detailed investigation.

If the competition authority decides to proceed with a further investigation, it will obtain more information from the merger participants. Additional information is usually gathered from third parities such as competitors and customers. Commercially sensitive information is also generally protected from public disclosure.

During a more detailed review, a competition authority will normally seek information about matters such as the following:

- products, customers, suppliers, market shares, financial performance;
- activity of competitors and competitors' market shares;
- availability of substitute products;
- influence of potential competition (including foreign competition);
- pace of technological or other change in the relevant markets, and its impact on competition;
- nature and degree of regulation in the relevant markets; and
- quality of a merger review will depend heavily on the quality and range of information available to the reviewing authority.

### 6.6. Merger Remedies

The goal of merger control law is to prevent or remove anticompetitive effects of mergers. Three types of remedies are typically used to achieve this goal.

*Prohibition or Dissolution*: The first remedy involves preventing the merger in its entirety, or if the merger has been previously consummated, requiring dissolution of the merged entity.

*Partial Divestiture*: A second remedy is partial divestiture. The merged firm might be required to divest assets or operations sufficient to eliminate identified anticompetitive effects, with permission to proceed with the merger in other respect.

**The goal of merger control laws is to prevent or remove anticompetitive effects of mergers. Three types of remedies are typically used to achieve this goal.**

*Regulation/Conditional Approval*: A third remedy is regulation or modification of the behaviour of the merged firm in order to prevent or reduce anticompetitive effects. This can be achieved through a variety of one-time conditions and ongoing requirements.

The first two remedies are structural, and the third remedy is behavioural. Behavioural remedies require ongoing regulatory oversight and intervention. Structural remedies are often more likely to be effective in the long run and require less ongoing government intervention.

**Box 20: South African Pharma Mergers: Conditions for Aspen**

Aspen Pharmacare (Pty) Limited, a generic drugs firm was a protagonist of two merger cases, both conditionally approved by the Competition Commission in South Africa. In the first case it acquired one of its smaller direct competitors, Triomed. Based on an internationally accepted criterion of defining relevant markets of pharmaceutical products, it was found that there were 26 product overlaps between the two firms. The divestiture of Tetracycline products by Aspen was stipulated as the condition of authorising the merger.

In the second Aspen case, the South African subsidiary of the multinational pharmaceutical firm GlaxoSmithKline expressed its interest in acquiring the company. The merger took place in a fast changing market environment, at a time when a new market regulation was being introduced for pharmaceutical products. This new regulation eliminated a significant part of the sales margins charged by wholesale firms, it created an incentive system for replacing innovative drugs with generic ones and, in general, it introduced a so-called transparent pricing system. It may be supposed that the merger was, at least in part, initiated by the multinational firm in order to get a better competitive position on the domestic market of generic drugs. The conditional authorisation of the merger affected only the sales of one specific product (Lanoxin). It stipulated no divestiture as such but just the condition that this product may not be part of the transaction.

***Source:*** *Adam Torok (2005), Competition Policy Reform in South Africa – Towards the Mainstream CP Model for 'Transition' Economies in the Third World, Budapest, p. 39.*

**Box 21: The Rothmans of Pall Mall/ British American Tobacco Merger in Zimbabwe**

In January 1999, British American Tobacco Plc of the United Kingdom announced that it had reached an agreement with the shareholders of Rothmans International, Compagnie Financiere Richemont AG of Switzerland and Rembrandt Group Limited of South Africa to merge their international tobacco businesses. Subsequent to the completion of the international merger between British American Tobacco Plc and Rothmans International, Rothmans of Pall Mall (Zimbabwe) Limited in September 1999 applied to the Competition Commission of Zimbabwe for authorisation to acquire the entire issued share capital of British American Tobacco Zimbabwe Limited.

The merging parties gave as one of the reasons to merge the declining market for cigarettes in Zimbabwe. It was presented that the Zimbabwean manufactured cigarette market had declined to such an extent that it was no longer big enough for the continued viability of two manufacturers as evidenced by the poor performance of British American Tobacco Zimbabwe Limited in its financial year ended December 31, 1998.

The case was evaluated as a horizontal merger as defined in section 2 of the Competition Act.

The Commission noted that although the merger would result in a creation of a monopoly situation in the relevant market (i.e. the manufactured cigarette market), it had other public interest benefits provided for in the Competition Act. The failing firm defence put forward by the merging parties was also considered a strong point in support of the merger.

The Commission therefore authorised the merger with certain conditions aimed at alleviating the adverse effects of the monopoly situation created. The conditions related to the disposal of surplus cigarette making equipment to third parties interested in entering the Zimbabwean cigarette making industry, and surveillance by the Competition Commission of future cigarette price increases while the monopoly situation created remains in existence, with any price rises being justified to the Commission before being effected.

***Source:*** *Alexander J Kububa, Issues In Market Dominance: Merger Control In Zimbabwe, paper presented at the World Bank's Regional Conference on Competition Policy, Competitiveness, and Investment in A Global Economy, Dar-es-Salaam, Tanzania: 10–12 May 2004.*

Partial divestiture or behavioural constraints are less intrusive into the operation of market than preventing a merger from proceeding or requiring dissolution of a previously completed merger. Partial divesture can reduce or eliminate anticompetitive effects while preserving some of the commercial advantages of a merger. Partial divestiture is emerging as a preferred remedy in many jurisdictions.

In Vietnam, if an M&A case is found to be in violation of the Competition Law 2004, i.e. the parties to the merger have a combined market share of more than 50 percent in the relevant market and the merger is not eligible for exemption under the law,[61] then 'division or split the merged or consolidated enterprises; or forced resale of the acquired enterprise parts' will be the applicable remedies.[62]

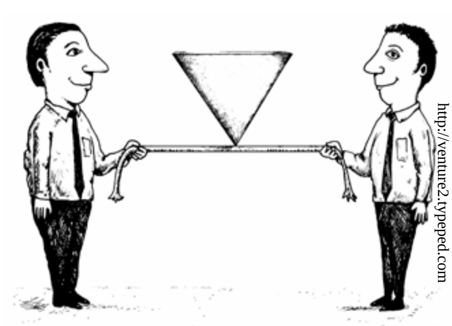
Further details about remedies recommended for use by competition authorities can be found at the website of the ICN, at *<http://www.internationalcompetitionnetwork.org/ICN_Remedies_StudyFINAL5-10.pdf>*.

### 6.7. Joint Ventures

In some cases, existing competitors in a market may decide to enter into a joint venture. The competition analysis of joint ventures generally raises similar issues to those discussed under the section of restrictive agreements, and therefore would normally violate *per se* competition rules. The process and information requirements for review of a joint venture, however, should resemble those discussed earlier in this section on M&As.

The reasons for this recognition may be important to understand. Joint ventures create less economic concentration than mergers, therefore there is some economic policy reason to prefer or at least not discriminate against lesser concentrations of economic power. While that seems logical, competition laws did not develop that way because joint ventures are commonly horizontal agreements between competitors that eliminate competition between them. Mergers of course do the same thing but it was assumed that mergers always contain some efficiencies. Thus, in the beginning, joint ventures are allowed only if they were *necessary* to create the venture, which means neither company alone could undertake the new project.

**Joint ventures create less economic concentration than mergers, therefore there is some economic policy reason to prefer or at least not discriminate against lesser concentrations of economic power.**




Over time, however, the focus shifted from the need for cooperation between the competitors to the question of whether there are economic savings from the joint venture and, if there were, then the joint venture would be held lawful if it would be allowed as a merger (meaning if the combination of the two companies would leave enough companies in the market to maintain competition).

**Box 22: Joint Distribution of Polyethylene Covers**

A Request for Exemption from Court Approval for Agreement to Establish Poligar was made to the Antitrust Authority of Israel in 1994 to approve a marketing joint venture between the only two Israeli producers of polyethelene covers.

In analysing the effects of the proposed venture, the General Director stressed the disciplining effects of potential and existing imports, on the market power of the domestic firms. He approved the venture since it would enable the domestic firms to reduce their costs and thus compete more effectively with foreign importers, without harming the Israeli consumer.

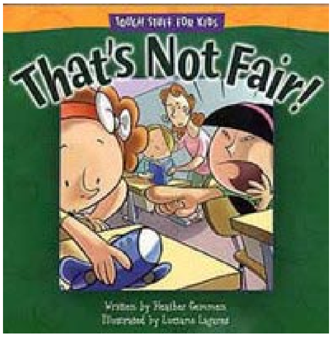
This reasoning differs significantly from that on which past decisions to approve joint ventures was based. Whereas, in the past, emphasis was placed on the ability of the parties to the venture to reduce their costs without a real analysis of total welfare effects, the decision in Poligar approves the venture based on the need of the parties to act more efficiently in order to meet foreign competition.

The analysis ensures that the Israeli consumer, as well as the Israeli firms, will enjoy the benefits of the venture. This sort of analysis, which gives much weight to competitive considerations, based on market conditions, and evaluates the effects of the conduct on all market players, characterises most of the decisions from the 90's onwards.

***Source:*** *Gal & Israeli (2006), Israel, Competition Regimes in the World – A Civil Society Report, CUTS, p. 69.*

# 7. UNFAIR TRADE PRACTICES: COMPETITION & CONSUMER PROTECTION

The complementarities between competition and consumer protection is no longer a new and debatable issue in any discussion pertaining to competition law, but rather a settled one.[63]




Competition presses producers to offer the most attractive price and quality options. In competitive markets, producers must gain new sales, new clientele by satisfying consumer needs by increasing the range of choices available, since if consumers dislike the offerings of one seller, they might turn to others. This is because the availability of substitutable goods at acceptable prices in competitive markets enables consumers to shift purchase, which pushes each seller to try to satisfy consumer preferences.

Further than increasing the choices available to consumers, in competitive markets, long-term competitive strategies make it imperative for producers to provide correct and useful information about their products, to fulfill promises concerning price, quality, and other terms of sale, and thus to improve their image toward the consumers. Thus, in its mandate of ensuring the markets function competitively, competition law becomes an effectively tool to promote consumer welfare, which is also the objective of consumer protection policy.

Consumer protection policy works to ensure that consumers can make well-informed decisions about their choices and that sellers will fulfil their promises about the products they offer. In other words, consumer protection policy prevents producers from engaging in unfair practices while seeking to increase their sales.

UTPs not only harm the consumers, but also harm other market players in the process, and more importantly, they harm the market as a whole as well.[64] Revelations that they are cheated by a producer, a group of businesses might lead the consumers to distrust an entire industry or market, which in turn will affect sales in that market negatively. In a way, while preventing and punishing

UTPs, consumer protection policy does more than safeguarding the interests of the consumers or promoting consumer welfare, it comes back to facilitate competition.

### 7.1. Unfair Trade Practices

UTPs encompass a broad array of torts, all of which involve economic injury brought on by deceptive or wrongful conduct. The legal theories that can be asserted include claims such as trade secret misappropriation, unfair competition, false advertising, palming-off, dilution and disparagement. UTPs can arise in any field of technology and frequently appear in connection with the more traditional intellectual property claims of patent, trademark and copyright infringement.

**UTPs can arise in any field of technology and frequently appear in connection with the more traditional intellectual property claims of patent, trademark and copyright infringement.**

Specific types of UTPs prohibited in domestic law depend on the law of a particular country. The World Bank (WB) and Organisation for Economic Cooperation and Development (OECD) Model Law, for example, lists the following trade practices to be unfair:[65]

- distribution of false or misleading information that is capable of harming the business interests of another firm;
- distribution of false or misleading information to consumers, including the distribution of information lacking a reasonable basis, related to the price, character, method or place of production, properties, and suitability for use, or quality of goods;

- false or misleading comparison of goods in the process of advertising;
- fraudulent use of another's trade mark, firm name, or product labelling or packaging; and
- unauthorised receipt, use or dissemination of confidential scientific, technical, production, business or trade information.

The Competition Law 2004 of Vietnam call these practices 'unfair competition acts', i.e. 'competition acts performed by enterprises in the process of doing business, which run counter to common standards of business ethics and cause damage or can cause damage to the State's interests, legitimate rights and interests of other enterprises or consumers'.[66] These acts include:
(i) misleading indications;
(ii) infringement upon others' trade secrets;
(iii) constraint in business;

**Box 23: Misleading Advertising & Bait-and-Switch**

UTPs, which are now exclusively within the scope of the Consumer Protection Act of India (COPRA), were brought under the purview of the MRTP Act in August 1984. The first sales promotion organiser to be charged under the Act was Bal Krishna Khurana, who was famous, in all of North India, for selling 'export quality' hosiery goods at ridiculously low prices.

CUTS reacted accordingly when Khurana hit Jaipur in 1984 to sell his goods at throwaway prices. CUTS had been receiving complaints from a large number of victims of these sales and decided to investigate. Consequently, CUTS moved the MRTPC against Khurana and demanded to know how he could offer 'export quality' hosiery goods, worth Rs 210, for as low as Rs 5 to15.

In its complaint before the Commission, CUTS stated that misleading advertisement and bait-and-switch selling, that followed, caused harm and inconvenience to the public and buyers. Visits to Khurana's stalls caused mental agony to consumers as what they took home were mainly bogus goods after wasting time and money.

The MRTPC promptly ordered an inquiry into the complaint, which was followed by an order restraining Khurana from organising any more sales promotion ventures.

Furthermore, the MRTPC advised newspapers not to carry misleading advertisements, as one of the duties of the media is to protect consumer rights, and not solely earn revenue through bogus advertisements. The newspapers responded to the advice. Even so, after a gap of a few years, sadly, newspapers continue to carry such advertisements.

***Source:*** *Mehta, Pradeep S, How To Survive As A Consumer, CUTS, 1998.*

**Box 24: Giant Supermarkets Misled Consumers in Argentina**

In April 2002, the implementing authority of the Commercial Loyalty Act condemned Wal-Mart Argentina SA for violation of Article 9 of Bill 22.802, which prohibited misleading publicity and promotion of goods and services.

Throughout 2002, it was the norm for big supermarket chains (Wal-Mart, Carrefour, to name a few) to offer products at special prices to attract customers. However, when the time to pay the bill came, in many cases customers found out that the price charged for some of the products were different than the one announced either on the brochures or the stand.

In the case under review, the implementing authority decided to regulate the price of several products of the basic food basket. During the inspection, it found differences of over eight percent in two of the products chosen. Prices shown in the brochure or at the stand were less than the one finally charged at the counter.

The severity of the sanction took into account the fact that Wal-Mart had already been penalised for the same type of infraction more than 30 times in the period of three years.

***Source:*** *Andrea Botto (2006), Argentina, Competition Regimes in the World – A Civil Society Report, CUTS, p. 544.*

(iv) discrediting other enterprises;
(v) disturbing business activities of other enterprises;
(vi) advertising for the purpose of unfair competition;
(vii) sale promotion for the purpose of unfair competition;
(viii) discrimination by associations; and
(ix) illicit multi-level sale, etc.[67]

### 7.2. Misleading Advertising

Misleading advertising refers to any false or misleading representation that is made to the public by a person in the course of business. The representation may be about the nature, character or performance of a product, such as size, type of contents or weight. It also includes warranties, statements, or guarantees that are not based on adequate and proper tests.[68]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A clear example of misleading advertising is an advertisement, which describes a pair of shoes, which was "Made in Taiwan" as "English Handmade". Through the use of an expression associated with a long history of quality shoes, the merchant had made a misrepresentation as to the type of shoe that was being sold. Another example of misleading advertising occurs when a merchant makes a promise to a consumer to deliver an item in a certain number of days and does not fulfill this promise. Failure to disclose information, which is material to the consumer's purchasing decision, will also amount to misleading advertising.

> **Misleading advertising is prohibited under Article 45 of the Competition Law 2004 of Vietnam, together with comparative advertising and imitation of others' advertising products.**

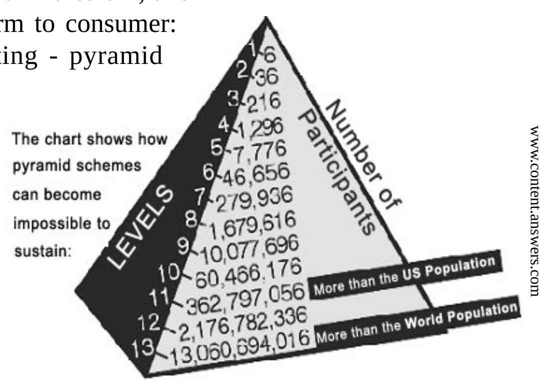
> **The essence of a pyramid scheme is that the profit of the business comes from the sale of franchises, not the sale of products either because there are no products or the products are not saleable at a price that would make the investment in the franchise profitable.**

Misleading advertising is prohibited under Article 45 of the Competition Law 2004 of Vietnam, together with comparative advertising and imitation of others' advertising products. Hopefully, when the Law is fully enforced, it will help to eradicate such practices, which are quite prevalent in Vietnam. For instance, many consumers in Vietnam complained about their sad experiences with a shampoo brand called CLEAR, which is certified by some ELIDA Institute (Paris) to be able to eliminate dandruff within seven times of shampooing, according to the advertisement, though of course, this miracle does not happen in real life, though CLEAR does help a bit in dandruff controlling[69]

In addition to misleading advertisement, other unfair and deceptive trade practices are also fully defined in and prohibited by the Competition Law 2004 of Vietnam. Hereafter, we choose to discuss further only another type of UTP, which is also very prevalent in Vietnam, and has caused tremendous harm to consumer: illegal multi-level marketing - pyramid schemes.

### 7.3. Pyramid Schemes

Pyramid schemes, or also referred to as "chain referral", "binary compensation" or "matrix marketing" schemes, is a non-sustainable business



**Box 25: Multi-level Marketing Firm Faces Fraud Probe**

The HCM City Department of Trade has recently proposed fraud investigators to launch a probe into possible irregularities, including trade fraud, at multi-level marketing firm Sinh Loi. The department earlier undertook a two-month investigation into the operations of Sinh Loi and announced its results at a meeting in mid June 2006, with a representative of the MLM company and the HCM City Consumer Protection Association attending.

A month before, the Department of Trade temporarily revoked the multi-level marketing business registration certificate of Sinh Loi as its inspection team found signs of the company infringing regulations on taxes, documentation, promotions, goods labelling and network marketing. At the meeting, Sinh Loi's representative objected to the withdrawal of the certificate, saying it is abiding by law and fighting the case to the end.

Eight companies have been allowed to engage in this business activity in the city since when the Government Decree No. 110/2005ND-CP that allows for multi-level sales came into force early this year. Sinh Loi, which was established in 2000 with total registered capital of VND2bn, has more than 100 staff and over 26,000 associates.

In the meantime, other MLM companies in Vietnam are also facing allegations, and accordingly, investigations from relevant State agencies, creating a complete chaos in this industry. For instance, a former agent of the Lo Hoi Trading Company said that the selling prices of Lo Hoi were always 5-7 times higher than the average price levels on the market. For example, Lo Hoi sold a multivitamin box at VND400,000, while the same product is priced at less than VND100,000 on the market.

Such companies, like Lo Hoi, have successfully attracted many agents because people thought that they would be able to buy products at wholesale prices, which are much lower than the official retail prices. For example, a product, coded as 015, was sold at the retail price of VND432,000/unit, while the wholesale price is VND303,000/unit only.

***Source:*** *http://english.vietnamnet.vn/biz/2006/08/603121/ et al.*

model that involves the exchange of money primarily for enrolling other people into the scheme, usually without any product or service really being delivered.

There are other commercial models using cross-selling such as multi-level marketing (MLM), which are perfectly legal and sustainable.[70] Most pyramid schemes take advantage of confusion between genuine businesses and complicated but convincing moneymaking scams. The essence of a pyramid scheme is that the profit of the business comes from the sale of franchises, not the sale of products either because there are no products or the products are not saleable at a price that would make the investment in the franchise profitable. The reason they are called pyramid schemes is that at the beginning the first levels of franchisees can and do make money because in addition to selling some products, they are also able to sell 10 franchises to friends. In order for these ten franchisees to make money they will each have to sell ten franchises (or a total of a hundred). For those hundred to make money they will have to sell a thousand franchises. And those thousand will have to sell 10,000 franchises, and so on.

The evil is not the sale of the franchise or even the payment of a finder's fee to the franchisee who signs up new franchisees. The evil is that information about the profitability of the sale of the basic product is misleading. At no level is the sale of this product profitable. The business seems to be profitable to prospective franchise buyers because the person selling them the franchises are making money from the sale of new franchises. But as the numbers above illustrate the numbers of new buyers of franchises quickly escalates to impossibly large numbers. This would be clear if the originators of the franchise showed how many products had to be sold to make the franchise profitable and what the likelihood is of being able to make that many sales.

In Vietnam, the Competition Law 2004 (Art. 48) and its subordinate Decree No. 110/2005/ND-CP explains in details the differences between MLM and pyramid selling, and sets out the responsibilities for operators and participants in these types of plans. MLM, when it operates within the limits set by the law, is a legal business activity, while pyramid selling is a MLM plan that incorporates various deceptive marketing practices, making it a serious offence.

It is illegal to:

- request those who wish to participate in the marketing scheme to pay a deposit, buy an initial volume of goods or pay a sum of money for the right to participate in the multi-level sale network;
- not commit to buy back goods at 90 percent at least of the price at which the goods were sold to participants for re-sale;
- give participants commissions, bonuses or other economic benefits which are gained mostly from the enticement of other people to participate in the multi-level sale network; and
- supply false information on the benefits of the participation in the multi-level sale network, false information on the nature and utilities of goods in order to entice the participation of other people.

# 8. CROSS-BORDER ISSUES

With the opening up of domestic markets to foreign competition, countries have become increasingly susceptible to anticompetitive practices that originate outside their own territory.[71] The types of cross-border anticompetitive practices are quite similar to that of those perpetrated within national borders. The only difference lies in the cross-border (international) dimensions of the anticompetitive behaviour. A number of areas where these behaviours are perceived to give rise to competition concerns with international dimensions are discussed here. Though there is no single way by which one can estimate the damage that these cross-border anticompetitive practices are causing. However, one can have a fair understanding of the nature and dimensions of the problems through the analysis of anecdotal evidence. These issues can broadly be classified into four groups:[72]

- market power in global or export markets;
- barriers to import competition;
- foreign investment related; and
- IPRs related.

### 8.1. Market Power in Global or Export Markets

International cartels, export cartels and related arrangements can be included under this category, together with multi-jurisdictional M&As, abuse of dominance in overseas markets, cross-border predatory pricing and price discrimination.


Several international cartels, most of which were constituted by producers from industrialised countries, were uncovered in the 1990s. These cartels were found to have severely affected the international trade flows during this period, significantly raised the prices of goods traded, including imports into low-income countries. Developing countries' imports of cartelised goods in 1997, for example, amounted to US$81.1bn, which represents 6.7 percent of these countries' imports and 1.2 percent of their national incomes.

Cartelisation, however, is not only about loss in consumer welfare; it also hampers the development of poor countries, and growth of their firms, in several ways. Various techniques, ranging from the threat of retaliatory price wars, use of common sales or distribution agency, to patent pooling, were used by international cartels to block developing-country competitors' entry into the relevant markets.

**Box 26: The Graphite Electrodes Cartel and its Effects on Developing Country Steel Producers**

Graphite electrodes are used primarily in the production of steel in electric arc furnaces. In a highly concentrated world market, two firms (one German and one American) had a combined market share of roughly two-thirds at the beginning of the 1990s. Japanese producers supply a considerable part of the remainder, with modest contributions from a number of smaller producers based in certain developing countries, principally India and China. All of the major producers in this market operate production facilities in a number of countries, including developing countries such as Brazil, Mexico, South Africa, Russia, and Poland, and sell their products throughout the world.

The OECD estimates that, "the cartel affected US$5-7bn in sales world-wide. Throughout the world, the cartel resulted in price increases from roughly US$2000 per metric tonne to US$3200-US$3500 in various markets".

The only direct estimate of pecuniary harm caused to purchasers in developing countries comes from the Korea Fair Trade Commission (KFTC), which in March 2002 convicted six graphite electrode manufactures from the US, Germany, and Japan. According to KFTC, Korean steel manufactures "imported graphite electrodes amounting to US$553mn from the six companies from May 1992 to February 1998, and during the period the import price increased from an average of US$2,225 per ton in 1992 to an average of US$3,356 in 1997 (about 48.9 percent price increase). The damage incurred by the companies importing graphite electrodes is estimated at approximately US$139mn. Korea's major industries such as automobile and shipbuilding that consume much steel were also influenced by this international cartel".

***Source:*** *Evenett, Simon J. (2003), Study on Issues Relating To A Possible Multilateral Framework on Competition Policy, WTO Document No. WT/WGTCP/W/228.*

Also a type of collusive agreements by producers to exercise market power in foreign markets, export cartels, however, are 'restraints on trade' officially sanctioned by many governments who follow a 'beggar-thy-neighbour' policy by permitting their private firms to cartelise, as long as affected markets are outside the country.[73]

**Cartelisation, however, is not only about loss in consumer welfare; it also hampers the development of poor countries, and growth of their firms, in several ways.**

Large companies merge in the developed world and consequently their subsidiaries and associates in developing countries too end up in new combinations. This can create position of dominance for merging firms, having a potential of subsequent abuse. Moreover, developing countries may also be affected by M&A activities that take place outside their territory, and affect their local subsidiaries. The Zimbabwe tobacco merger case presented in Box 20 provides a good example in this regard.

**Import cartels formed by domestic importers or buyers, and similar arrangements may be a threat to maintaining competition in a market.**

Other than collusion or combinations, the size and scope of transnational companies (TNCs) make it possible for them to engage in a variety of anticompetitive practices. Take the example of Microsoft. The company has been hauled up for indulging in anticompetitive practices time and again in the US and the EU. By and large, it has not faced such action in other jurisdictions, especially in the developing world, where the effects of Microsoft's conduct have been increasing at the same pace as its business.

### 8.2. Barriers to Import Competition

Import cartels, vertical market restraints creating import barriers, private standard setting activities, abuse of monopsonistic dominance, etc, may fall under this category. Import cartels formed by domestic importers or buyers, and similar arrangements may be a threat to maintaining competition in a market. In principle, a national competition law may normally be able to tackle such market-access barriers to foreign supplies and suppliers, though in practice those barriers have been very much deliberately tolerated. In some cases, import cartels were allowed to counter export cartels.

A well known example in this regard is the dispute between Japan and the US where it was alleged that Fuji effectively prevented Kodak's exports to the Japanese market by controlling the distribution channel. In the early 1990s, such concerns prompted a revision of US guidelines regarding international enforcement to permit application of the US antitrust laws to foreign-based activities such as import cartels that restrict US producers' access to foreign markets.

### 8.3. Foreign Investment-related Competition Issues

Foreign investment has always been recognised as having complex effects on host countries' market structure and competition. M&As, in particular, can be used to reduce competition via "monopolising M&As", which can occur when:

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- The acquiring firm was exporting substantially to a market before it buys a competing firm there;

- A foreign firm with an affiliate, already in the market, acquires another, thereby acquiring a dominant or monopolistic market share;
- The investing TNC acquires a market leader with which it had previously competed; and
- The acquisition is intended to suppress rather than develop the competitive potential of the acquired firm.

**Foreign investment has always been recognised as having complex effects on host countries' market structure and competition.**

While these monopolising M&As' adverse effects on a host country's market structure and competition can be tackled if the host country has an adequate legal framework to impose some remedies, as what happened in many cases in the developed world, evidence in this line remains anecdotal in developing countries.

In India, for instance, in 1994, Hindustan Lever Limited (HLL), the Indian subsidiary of Unilever, acquired its main local rival, Tata Oil Mills Company (TOMCO), to assume a dominant position in the toilet soap (75 percent) and detergent (35 percent) markets.[74] The proposed merger had been challenged by the HLL Employees' Union on various grounds, including that the merger would result in a large share of the market being controlled by a TNC, and that consumers' interests might be adversely affected. However, no measures have been undertaken since the 1991 amendment of India's then competition law, the MRTP Act 1969, had unfortunately removed the need for approval of mergers, acquisitions and takeovers involving "large" and/or "dominant" firms.[75] After that, HLL also acquired several local companies in other markets, such as the ice cream makers Dollops, Kwality and Milkfood. This raised its market share in the ice cream market from zero in 1992-1993 to 69 percent in 1996-1997 and over 74 percent in 1997-1998.[76]

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### 8.4. IPRs-related Competition Issues

Without a suitable and strong legal framework in place to check the anticompetitive behaviour of IPR holders, the possibility that TNCs will be tempted to abuse their market power cannot be ruled out. To make matters worse, though the Trade Related Aspects of Intellectual Property Rights (TRIPs) Agreement enables the broad framework for countries to take necessary action if an IPR is abused, leading to anticompetitive outcomes, it does not 'empower' every country to do so. For example, in cases where there are disparities in the bargaining power between the 'guilty' – which is often giant TNCs, and the 'law-enforcer' – when they are developing countries with weak enforcement capacity and small markets, it would be hard to discipline IPR abuses. In another case, the suggested remedy

**The TRIPs Agreement enables the broad framework for countries to take necessary action if an IPR is abused, leading to anticompetitive outcomes, it does not 'empower' every country to do so.**

of compulsory licensing would not be available to a country that does not have domestic production capacity, except in the case of pharmaceutical products.

## 8.5. Dealing with Cross-border Issues under the Vietnamese Competition Law

Whether it is to deal with anticompetitive practices that occur at national level, or those that have international dimensions, having a strong and well-oiled competition regime is an essential prerequisite. Even so, a strong competition regime, at national levels, may not be enough to tackle cross-border anti-competitive practices. It is recommended that provisions for extra-territorial jurisdiction be adopted to legally empower competition authorities in developing countries to deal with such cases.

The Competition Law 2004 of Vietnam, as well as its implementation regulations, does not deal with any of the cross-border issues. The only foreign element dealt with by these provisions occurs when one of the parties to competition cases is a foreign-invested enterprise, based and operating in Vietnam (Art. 2(1) of the Law).

This is quite a big constraint of the laws because of the fact that Vietnam is actively opening its economy and integrating into the global economy. Pending its accession into the WTO, which also means most of the protectionist measures currently existing would be removed, enterprises in Vietnam will have to face with not only the competitive pressure from within and outside the country, but anticompetitive conducts originating from outside as well.

Besides, with the physical borders increasingly tumbling down due to globalisation and international integration, business transactions are no longer bound within the territory of a certain country. Numerous global and regional deals are being concluded everywhere. In this context, whereas the foreign counterparts can count on their national or regional (for instance, in the case of EU) competition authorities, Vietnamese enterprises would be left without shelter in any antitrust case, if the deal or transaction is concluded outside the territory of Vietnam, or if their counterpart does not have a physical presence in the country.

**A strong competition regime, at national levels, may not be enough to tackle cross-border anticompetitive practices.**

Last but not the least, with global competition cases, which have serious consequences on trade, economies, and

**Box 27: International Patent Laws Hurt Developing Countries**

In South Africa in 1998, approximately one in five adults is living with HIV/AIDS. Since 1996, the world has known that "cocktails" of antiretroviral drugs save lives. They are not a cure for AIDS, but here they have turned it into an almost chronic disease, akin to diabetes. The rate of AIDS deaths in the US was plummeting, but in South Africa, no one except the exceedingly rich could afford the drugs. In the US, taxpayers subsidise the cost of the drugs, which cost around US$15,000 per year. In South Africa, making treatment universally available at such prices would have bankrupted the government. But it was not the drugs themselves that were expensive - it was the patents.

The South African government was in a bind. South Africa has a strong patent system - the legacy of apartheid, but also the result of pressure from countries like the US. Affordable drugs existed, but not for them. So, in 1998, they did what any responsible government would do: They passed a law that would give them the power to bring drug prices down. The law would have allowed them to "parallel import" cheaper medicines, which is completely legal under the TRIPs Agreement, to take advantage of the fact that patented drugs are sold at different prices in different countries.

Faced with a potential public health crisis, the US Congress recognised what many other countries have been arguing all along: that patents are not "rights" but rather privileges – and that they do not come before the rights to health and life. But that is not how they – or the drug industry – approached the issue when it came to South Africa. The possibility that South Africa – a tiny percentage of the world's drug market – might start using generic drugs was treated as a colossal threat to the interests of the US pharmaceutical industry. It did not matter that the US had signed the TRIPs agreement in 1994, recognising that developing country governments have the ability to do just what the US could do and had done in similar cases. And it didn't matter that literally millions of lives were at stake. According to Charlene Barshefsky, the US Trade Representative at the time: "We all missed it.... I didn't appreciate at all the extent to which our interpretation of South Africa's international property obligations was draconian".

Activists around the world realised it, and mobilised against the lawsuit with slogans like "Patient Rights over Patent Rights", and "Stop Medical Apartheid". In March 2001, when the case finally reached the courtroom, the drug companies, fearing the public relations backlash, withdrew their suit.

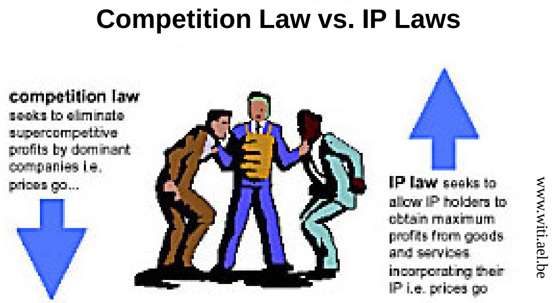
***Source:*** *Kapczynski (2002), Strict International Patent Laws Hurt Developing Countries, YaleGlobal Online at http://yaleglobal.yale.edu/display.article?id=562.*

consumers all over the globe (such as those of international cartels, or cross-border M&As etc), Vietnam as a country and Vietnamese consumers would not be able to assert their legitimate rights and interests and redeem any damage done on them.

In this regard, it is important to note that the competition regime of Vietnam is still very young and under severe resource and capacity constraints, which would make it impossible at this stage for them to discipline huge multinational companies or investigate/enforce cases with cross-border elements. However, having extra-territorial jurisdiction would help this young competition authority to challenge conduct which may have an effect in the domestic market. It would also be useful for Vietnam to enter into cooperation, understanding or agreements with their counterpart agencies to garner information of such conduct. The adoption of such provisions dealing with cross-border issues should be a priority for Vietnam in the future.

# 9. COMPETITION LAW VS INTELLECTUAL PROPERTY LAWS

IPRs protection is a policy tool meant to fostering innovation; which benefits consumers through the development of new and improved goods and services, and spurs sustaining economic growth. It bestows on innovators the right to legitimately exclude, for a limited amount of time, other parties from the benefits arising from new knowledge, and more specifically, from the commercial use of innovative products and processes based on that new knowledge. In other words, innovators or IPR holders are rewarded with a temporary monopoly by the law to recoup the costs incurred in the research and innovation process and earn rightful and reasonable profits, so that they have incentives to invest in further research and innovation.




Competition law, on the other hand, has always been regarded by most as essential in curbing market distortions, disciplining anticompetitive practices, preventing monopoly and abuse of monopoly, inducing optimum allocation of resources and benefiting consumers with fair prices, wider choice and better qualities. It, therefore, ensures that the monopolistic power associated with IPRs is not excessively compounded or leveraged and extended to the detriment of competition. Further, while seeking to protect competition and the competitive process, which in turn prod innovators to be the first in the market with a new product or service at a price and quality that consumers want, competition law underscores the importance of stimulating innovation as competitive inputs, and thus also works to enhance consumer welfare.

Thus, it is now generally recognised that the goals of competition law and IP law are rather complementary and mutually reinforcing. They share the common purpose of promoting innovation, enhancing and benefiting customer welfare as well as allocating efficient economic resources. Moreover, they are also different levels of market regulation. Errors or systematic biases in the interpretation or application of one policy's rules can harm the other policy's effectiveness. A challenge for both policies is to find the proper balance of competition and innovation protection.

**9.1. IPRs Standards as Competition Regulation**

IPRs policy acts as an institutional framework regulation for the proper operation of markets for intangible subject matter, and is therefore exempt from antitrust control.

IPRs policy acts as an institutional framework regulation for the proper operation of markets for intangible subject matter, and is therefore exempt from antitrust control. Competition law of most countries, therefore, expressly or implicitly exempt from their application the exclusive rights inherent in intellectual property protection granted by the state, which are considered to justify restrictions that would otherwise be subject to competition scrutiny.

The Competition Law 2004 of Vietnam, similarly, also gives exemption to competition restraints, which "promote technical and technological advances, raising goods and service quality".[77] Economic concentration cases, which will otherwise be prohibited by the law, will also be exempted if they contribute to 'technical and technological advance'.[78]

**9.2. Regulation of the Exercise of IPRs through Competition Law**

As a piece of individual property, IPRs are fully subject to general competition principles, when they are exercised or put into commercial use in the market. Competition law, thus, while having no impact on the very existence of IPRs, operates to contain the exercise of the property rights within the proper bounds and limits which are inherent in the exclusivity conferred by the ownership of intellectual rights. In other words, when the exercise of IPRs gives rise to some competition concerns, competition law will have a role to play.

The Competition Law 2004 of Vietnam does not deal with competition restraints caused due to the exercise of IPRs in an explicit manner, though it does provide for unfair competition acts associated with the infringement of intellectual property, such as trade secrets, trademarks and brand names.[79] However, its prohibition towards various competition-restricting agreements, abuse of dominant position and abuse of monopoly position implicitly cover such practices, notwithstanding IPRs as an element of the same or not.

Moreover, Article 5(1) of the Law also stipulates that, 'where there is any disparity between the provisions of this Law and those of other laws, regarding competition restriction acts or unfair competition acts, the provisions of this Law shall apply'. This is further enhanced by Vietnam's new Law on IPRs, adopted in November 2005, to be effective since 01 July, 2006 (hereinafter referred to as the IPRs Law 2005), which says, 'the exercise of those IPRs shall not violate the interests of the State's and the public interests, the legitimate rights and interests of other organisations and individuals,' legitimate rights and interests, and shall not violate related laws and regulations'.[80]

On the other hand, in Vietnam, before promulgation of the Vietnam Civil Code of October 28, 1995 (hereinafter referred to as the VCC 1995),[81] IPRs had been stipulated separately in several subordinate ordinances, namely the Ordinance on foreign technology transfer to Vietnam in 1988, the Ordinance on the industrial property in 1989, and the Ordinance on protection of copyrights in 1994. Out of the 8 eight parts of the VCC 1995, Part 6 (Art. 745 to 825) covered IPRs and technology transfer, but no specific provision governed the relationship between IPRs and competition. However, in the Decree No. 45/1998/ND-CP dated July 01, 1998 governing the details of technology transfer (hereinafter referred to as the TT Decree 1998), some anticompetitive clauses were listed that could not be incorporated into technology transfer agreements. Accordingly, several restrictive acts were declared illegal, where the licensee is forced to do things which it would not have been able to do as an independent person.

**IPRs had been stipulated separately in several subordinate ordinances, namely the Ordinance on foreign technology transfer to Vietnam in 1988, the Ordinance on the industrial property in 1989, and the Ordinance on protection of copyrights in 1994.**

In the classification of the industrial property licensing agreements, the IPRs Law 2005 recognises exclusive agreements.[82] However, it also states that industrial property licensing agreements shall not unreasonably restrict the licensee's rights. In particular, they shall not contain restrictive conditions that do not derive from the licensor's rights, such as improvement in the licensed property; right to export goods; buying conditions and a no-challenge clause.

**Licensing constitutes an important part of the IPRs regime, or to be more specific, industrial property rights.**

### 9.3. Competition Concerns in Licensing Agreements

As already stated, licensing constitutes an important part of the IPRs regime, or to be more specific, industrial property rights. Far from restricting competition, in principle, it extends the opportunities for traders to stimulate the market, by facilitating the wider dissemination of the protected technologies/knowledge as well as products and services using the protected patent as input. Indeed, what may give a licensing agreement its business-restrictive character are the specific contractual agreements and market conditions, which create more or less essential restrictions if the agreement is to have any value. Some of these dimensions:

- Territorial restraint;
- Exclusive dealing;
- Tie-in; and
- Grant-back.

**Box 28: Microsoft's Abuse of Dominance**

Microsoft is the legitimate owner of the IPRs over the personal computer operating system (PC/OS), which is the company's original creation. The PC/OS is an essential facility both for users to be able to perform applications such as word processing, spreadsheet, etc; and for the application software developers to be able to offer a marketable product for users. This enabled Microsoft to enjoy a monopoly power over licensing the operating systems for PCs (with a 90-percent-plus market share and a substantial applications barrier to entry). Restriction on end-users and monopoly pricing are found among the various abusive conducts committed by the software giant.

Microsoft does not sell its software to anyone. Instead, it parcels out different bundles of rights with respect to its software. These rights, which are bundled together as a "license," are the only "products" that Microsoft conveys. Microsoft retains the title and all rights to its software except for those rights, which Microsoft expressly conveys through one of these licenses.

Microsoft enters one type of license with the original equipment manufacturers (OEMs). The specified purposes of the license with OEMs permit them 'to pre-install [the software] on PCs sold to end users'.

On the other hand, Microsoft provides a wholly different license, known as the end-user license agreement (EULA), to consumers. Microsoft grants the right to 'use the software on the PCs' to and only to end-users. Microsoft's end-user license is a take-it-or-leave-it proposition and not a product of negotiation. The end users choose to enter the EULA license with Microsoft only when they first begin to use the OS, not at the times of purchase, payment, or other incidents of the transaction.

As a direct result of Microsoft's restrictive and exclusionary practices, end users were caused to suffer unique injury. They were deprived of the benefits of competition, including but not limited to technological innovation, market choice, product variety, and substitutable supply.

Over time, Microsoft coupled these restrictions with other anticompetitive steps. These included Microsoft's nearly two-fold increase during 1998 of its prices for licenses of its old and dated (but not obsolete) PC/OS to the same level of prices charged for licenses of its new PC/OS (from US$49.00 to US$89.00).

***Source:*** *Opinion on the Microsoft Corp. Antitrust Litigation, for the United States District Court of Maryland, MDL No. 1332, January 2001, by J. Frederick Motz, US District Judge, US District Judge, Opinion on the Microsoft Corp. Antitrust Litigation, for the United States District Court of Maryland, MDL No. 1332, January 2001.*

## 9.4. IPRs and the Abuse of a Dominant Position

IPRs, by their very nature, create a form of monopoly or, in other words, a degree of economic exclusivity. The creation of that legitimate exclusivity, however, does not necessarily establish the ability to exercise market power or even in case it does confer market power (as already discussed in the previous part), that dominant position on the market does not by itself constitute an infringement of the rules on competition law; nor does it impose on the IPRs holders the obligation to license that property to others. Besides, competition authorities are normally concerned with the abuse of the dominant position, whatever the source of such dominance, rather than with any abuse of IPRs. Much, however, also depends on the facts of each case involved.

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"Your problem is in the gene that makes antibodies, but since the Biophase Corp. now has a patent on that gene, I can't do anything for you."

Other cases of IPRs-related abuse of dominance include, some cases can be identified such as:

- *Monopoly Pricing*: This is rarely a serious competition concern in developed countries due to the abundance of market substitutes. Meanwhile in developing countries, because the number of available substitutes may be more limited and because most IPR-protected products are owned by foreign interests, monitoring to discipline monopoly pricing practices by IPR holders is of greater significance.

- *Restrictions on End Users*: One very interesting case in point worthwhile mentioning to shed some light on restrictions on end users as abuse of dominant position is the Microsoft case, which also embodies a monopoly-pricing dimension (see Box 35).

- *Exclusive Dealing:* Competition aspects of the limitations on a licensee's ability to deal in competiting technologies will be analysed on the basis of (i) the duration, (ii) rationale, and (iii) degree of foreclosure caused by restrictions to rival licensors.

**IPRs create a form of monopoly. Besides, competition authorities are normally concerned with the abuse of the dominant position, whatever the source of such dominance, rather than with any abuse of IPRs.**

- *Tied Sales*: Tie-in is generally deemed *per se* illegal if (i) it involves two separate products or services that are tied together, (ii) the seller has market power in the tying product and has the ability to extend this market power in the tied product, due to favourable market conditions (high entry barriers etc); (iii) the arrangement has an adverse effect on competition in the relevant market for the tied product; and (iv) efficiency justifications for the arrangements do not outweigh the anticompetitive effects.

### 9.5. Refusal to Deal

A widely accepted premise of IP laws is that IP holders are under no obligation to license subject matters protected to others. This principle is generally held to be true even when a firm is in possession of a monopolistic position in a market as a result of its ownership of intellectual property. An early non-antitrust decision by the US Supreme Court stated that the ability to exclude competitors from the use of a new patent 'may be said to have been of the very essence of the rights conferred by the patent, as it is the privilege of any owner of property to use or not use without question of motive'.[83] On the other hand, from the perspective of IPR/ competition law interface, there may be the question of whether such duty exists.

**A widely accepted premise of IP laws is that IP holders are under no obligation to license subject matters protected to others.**

Courts in the EU and the US have at times held that refusals to license a patent violate competition law. However, in neither jurisdiction, though they are among the most advanced jurisdictions in terms of IP and competition law, have they provided clear direction as to whether a refusal to deal is anticompetitive where it involves intellectual property. Slightly different was the case of Brazil, where Article 21 of the Antitrust Law enlists the "non-exploitation or the inadequate use of intellectual property rights and technology of a company" as a strong indication that the free competition rules have been violated.

### 9.6. Compulsory Licensing

A compulsory license is an involuntary contract between a willing buyer and an unwilling seller imposed and enforced by the state. The three most prevalent compulsory licensing provisions are applicable where a dependent patent is being blocked, where a patent is not being worked, or where an invention relates to food or medicine. Additionally, compulsory licensing may be implemented as a remedy in antitrust or misuse situations, where the invention is important to national defence or where the entity acquiring the compulsory license is the sovereign. In these cases, the public interest in broader access to the patented invention is considered

**Compulsory licensing may be implemented as a remedy in antitrust or misuse situations, where the invention is important to national defence or where the entity acquiring the compulsory license is the sovereign.**

more important than the private interest of the right holder to fully exploit his exclusive rights. The designated third party should generally compensate the patent holder through payment of remuneration. Compulsory licenses do not deny patent holders the right to act against non-licensed parties.

With regard to the IPR/competition interface, compulsory licensing can be granted on the grounds of the existence of: (i) a refusal to license; and (ii) anticompetitive exercises of IPRs by patent holders.

Such compulsory licensing is permitted not only in the WTO TRIPs Agreement but also in the Vietnam-US Bilateral Trade Agreements (BTAs). (Art. 31(c) and 31(k), TRIPs; Article 7.8.K, Chapter II, BTA). The IPRs Law 2005 of Vietnam also stipulates that compulsory licensing is possible when 'the person(s) having demand to use a patent cannot reach an agreement with the person(s) in possession of the exclusive right to use that patent despite trying to negotiate, in a sufficient time period, with reasonable prices and commercial terms' (refusal to license) or 'the person(s) in possession of the exclusive right to use the patent is/are considered as having undertaken RTPs prohibited under laws on competition'.[84]

### 9.7. Parallel Import

Another issue of the most controversial areas of direct and significant interface between the exercise of IPRs and competition law not yet mentioned above is parallel import.

**Parallel imports are goods brought into a country without the authorisation of the patent, trademark or copyright holders after those goods were placed legitimately into the market elsewhere.**

Parallel imports are goods brought into a country without the authorisation of the patent, trademark or copyright holders after those goods were placed legitimately into the market elsewhere. Unlike pirated copyright goods or counterfeit trademark goods, parallel imports are legitimate products, as argued by some, since the IPR holders have agreed

**Box 29: Chile Allows Parallel Import to Promote Competition**

Many matters of parallel imports have been brought up before the Preventative Commission of Chile, most of which originated as complaints from private parties. Generally, importers have asked the Commission about the legality of importing original products, which are already in the market by virtue of a previous distribution agreement. The Preventative Commission established the criteria that the parallel imports of original products promote competition in markets, authorising them.

***Source:*** *Gesner Oliviera, Chile, Competition Regimes in the World – A Civil Society Report, CUTS (2006), p.565.*

**Box 30: Ministry of Health to Regulate Foreign Drugs, Medicine Prices**

In early 2004, the Ministry of Health of Vietnam decided to establish a panel responsible for examining licence applications to import foreign medicines that have not yet been registered for distribution in Vietnam.

Deputy Minister of Health, Le Ngoc Trong, issued the decision on April 20 describing it as another long-term effort to control foreign drug imports and distributions and as a means of stabilising domestic drug prices.

The panel is to meet at least once a week to check applications for drug imports without registered numbers. It would bear full responsibility for decisions made at every meeting and must sign the minutes.

The policy was one of 18 that the Ministry of Health plans to issue before June 2004 to curb rising drug prices. The new drug import policy was expected to allow domestic companies to directly import medicines from foreign manufacturers if distributors do not, or cannot sufficiently supply the market or supply at inflated prices.

Another decree, which would soon be adopted, would allow some domestic companies to have 'parallel import licences' (meaning they will be allowed to import cheaper brands of drugs now selling at high prices in Vietnam), for drugs to treat serious diseases when drug manufacturers, distributors or companies possessing registered drug trademarks cannot adequately supply the market, or sell the drugs items at inflated prices.

This measure is also designed to prevent monopolies from occurring in the market place, Tuu said. In the interim, the Ministry will immediately focus on measures to strengthen controls over the import and distribution of foreign drugs, develop new administration procedures for pharmacy drug supplies at all hospitals, fight against monopolies, monitor drug prescriptions and sales and strictly enforce punishment regulations.

***Sources:*** *http://english.vietnamnet.vn/social/2004/04/143011/.*

to put them into market and thus implicitly authorised their subsequent use, be it being imported by an unauthorised distributor.

Policies regulating parallel imports stem from specification of the exhaustion of IPRs. The term "exhaustion" refers to the territorial rights of IPR holders after the first legitimate sale of their intellectual property-protected products. There are three variants of exhaustion doctrines, namely:

- *National exhaustion*: IPRs end upon first authorised sale within a nation but IPR owners may prevent parallel trade with other countries.

**Box 31: Importation and Retailing of Compact Discs**

The Australian Competition & Consumer Commission (ACCC) alleged the defendants Universal Music, Sony Music and Warner Music and others had taken unlawful action (threatening to withdraw significant trading benefits from retailers and cutting off supply to retailers who stocked parallel imports of compact discs) in order to discourage or prevent Australian businesses from selling competitively priced parallel imports of compact discs.

The conduct was alleged to constitute a misuse of market power and exclusive dealing prohibited by the Trade Practices Act of Australia. Senior executives were alleged to have been involved in the conduct.

The Full Court of the Federal Court upheld an appeal by Universal and Warner that their conduct did not breach the misuse of market power provision but confirmed that the conduct did breach the exclusive dealing provisions.

The Full Court also upheld the ACCC's appeal on penalty increasing the total penalties from about US$760,231.59 to over US$1,520,786.52mn.

***Source:*** *Proceedings instituted in September1999 – For summary of allegations, see http://www.accc.gov.au/content/index.phtml/itemId/322787.*

- *Regional exhaustion*: IPRs are exhausted upon first authorised sale in a particular region only.
- *International exhaustion*: IPRs are exhausted upon first sale anywhere and parallel imports are permitted (also referred to as the "doctrine of first sale").

Treatment and opinions on parallel imports vary widely. For example, Japan permits parallel imports in patented and trademarked goods unless contract provisions explicitly bar them or unless their original sale was subject to foreign price regulation. The US policy on parallel imports is mixed, by which restrictions on parallel imports exist only for certain types of goods.

No multilateral binding agreements have ever directly addressed the issue of parallel imports; neither the TRIPs Agreement nor the 1996 World Intellectual Property Organisation (WIPO) Copyright Treaty; leaving countries to deal with the issue in the manner they feel appropriate. Article 6 of the TRIPs specifically states that: "nothing in this Agreement shall be used to address the issue of the exhaustion of IPRs".

# 10. ESSENTIAL ELEMENTS FOR SUCCESS


Building an effective competition regime in the context of developing countries is not a easy job. The dearth of expertise on competition issues as well as the newness of the same makes the mere task of drafting a good and appropriate legislation a huge challenge. Furthermore, even after the law has been drafted with much thought and caution, there is still no guarantee that it will meet its aims.

**10.1. Sequencing the Competition Law Implementation**

Toward such success, one of the useful suggestions made so far is to establish a competition authority with a phased approach, which may be appropriate to the design and implementation of a competition law.[85] The sequencing illustrated below is a refined version based upon a presentation made by Gesner Oliviera (former chairman of the Brazilian Competition Agency) at a CUTS meeting in 2002. He developed this on a simple idea inspired by World Bank's Shyam Khemani and Mark Dutz.[86]

Given its limited resources and novelty, a competition authority should start with actions which will most likely benefit the market and build its own acceptability. Gradually it would introduce measures, which require more sophisticated cost/benefit analysis. Merger review comes after conduct control due to the fact that the welfare effect of a merger might be less clear than that of price fixing or collusion, the latter being positively welfare diminishing and easily identifiable by the polity and public.

**A competition authority with a phased approach, which may be appropriate to the design and implementation of a competition law.**

Development is a continuum, and the stages will never be all this clear, and in some cases different priorities will be appropriate. In some economies, especially those that have a legacy of state-owned or other dominant firms like Vietnam, abuse of dominance/ monopolisation might also require a priority similar to that given to horizontal restraints.[87] However, in exercising its powers to tame public sector monopolies, the authority has to do it slowly rather than follow the rule book. This is because, while people as consumers would like some restraint on public sector's anticompetitive and anti-consumer behaviour, the establishment feels

| Table 1. Different Stages of Institutional Development of National Competition Regimes | | | |
|---|---|---|---|
| **I. Start** | **II. Enhancement** | **III. Advancement** | **IV. Maturity** |
| 1. Competition advocacy and public education | 6. Merger control | 9. Regulation | 11. Second-generation international arrangements |
| 2. Control of horizontal restraints | 7. Vertical restraints | 10. International cooperation arrangements | 12. Pro-active competition advocacy |
| 3. Checking abuse of dominance | 8. Development of the effects doctrine | | |
| 4. Exceptions and exemptions, including on public interest grounds | | | |
| 5. Technical assistance | | | |

***Source:*** *Mehta, Pradeep S (2003), Friends of Competition – How to Build an Effective Competition Regime in Developing and Transition Economies, CUTS, India, p.20*

subconsciously threatened when action is taken against them. This is often reflected in public support, often orchestrated by politicians and trade unions, that it is people who are being penalised when public sector firms are upbraided. Often these are linked to privatisation fears and that also to foreign companies.

The stages suggested are organised according to the degree of difficulty a competition authority might face in doing a cost-benefit analysis of the impact of competition measures on social welfare. However, it might well be argued that legally sound prosecution of price collusion turns out to be more difficult than a merger review. In fact, it is generally easy to establish the ill effects of a collusive behaviour but often difficult to prove in a court of law, due to lack of legally-sound and solid evidence. Therefore, the actual plan should take into account the damage caused to the economy and consumers of a particular anti-competitive act, but also the chances of success and the expected return on the money spent in pursuing the case, given the relative probabilities of success through other lines of action or public policies.

### 10.2. Building a Healthy Competition Culture

The second, though no less important, key to successful implementation of a competition law is to build up a healthy competition culture. Creating a healthy competition culture depends on effective implementation of the competition law and a supportive policy environment. There are a number of factors that contribute to (though also have the potential to undermine) the successful enforcement of a competition law, which include:[88]

**Creating a healthy competition culture depends on effective implementation of the competition law and a supportive policy environment.**

- power conferred on the competition authority;
- independence from political interference;
- political support for competition goals; and
- availability of resources.

### *10.2.1. Power Conferred on the Competition Authority*

*Institutional framework:* For the competition authority to function properly, it is important that it has the right powers, which include investigative and adjudicative ones. The investigative power, naturally, is always bestowed with the competition authority.

In cases, where the competition authority also has adjudicative power, then it can give out orders and decisions on cases based on their investigation and analysis results. The competition law enforcement system, thus, is completed within one single agency. For reasons of accountability though, such decisions of the competition authority are usually subject to appeal, which can be taken up by the firms involved at a court of higher authority within the judiciary system of the country. In this model, private right of action is usually limited. The EU follows this system; with decisions and orders given out by the European Commission (EC) being subject to appeals.

There are also other systems, where the adjudicative power is separated from the investigative arm, which is the competition authority. One of such systems is when the competition authority (being in charge of investigating restrictive trade practices as well as M&A cases) may bring competition cases before a court of law for adjudication. In the meanwhile, private parties also have a parallel right to bring their own case directly before the court. This is the case in the US. In India too, such a power exists. In addition to this, consumers and their organisations too can bring action. This system helps to keep a check on the investigative and prosecutorial arm of the agency to be vigilant and active.

Alternatively, adjudication may be undertaken by a specialised competition tribunal, which belongs to the overall judicial system of a country. This is meant to take care of the dearth of special expertise amongst judges adjudicating all sorts of civil and criminal matters at the same time. On the other hand, it helps to avoid the problem of the all too great concentration of power in a fully integrated competition authority. One such model, which has proven to be very successful so far, is that of South Africa, where the enforcement system is bifurcated between the Competition Commission and the Competition Tribunal. This is called a 'self-contained' system and is strongly recommended in the OECD-World Bank Model Law.

In the case of Vietnam, the investigative power rests solely with the Competition Administration Department of the Ministry of Trade, which can also hands out orders and approvals in the case of unfair competition acts and M&As. Adjudication over restrictive business practices lies with an agency called the Competition Council. The Trade Minister and the Prime Minister authorise exception and exemption cases.[89]

This separation of powers is expected to help to establish trust in the fairness of competition law enforcement, especially in view that the competition authority is located within the Trade Ministry. Establishing a specialised body should help develop knowledge and expertise and avoid the trouble of having to go to the courts in every case, which is time and resource intensive and so might limit the number of cases that a split-power competition structure is able to handle. However, in practice, most members of the Council are high-level personnel from relevant ministries and regulatory bodies, appointed as ex officio officials, rather than permanent full-time judges. Though this may help to facilitate inter-agency cooperation, it has the drawback of having a low level of professionalism and expertise, which defeat the original objectives of separating powers and developing specialised expertise.

*Advocacy power:* An important set of powers for a developing country competition authority is the power of advocacy. In order to create a competition culture, awareness of competition issues and how they affect various groups needs to be created among businesses, consumers, policymakers and the media. This would help to increase compliance and deterrent effects, foster recognition and acceptance of competition mechanism within the society, as well as generate support for competition law enforcement. The authority will need to allocate resources for these activities. Besides, in order to conduct these activities effectively, advocacy should be specifically included in the mandate of the authority. In many countries including India, such a power is granted to the competition authority.

In the case of Vietnam, the law does not mandate the competition authority and adjudicative council to undertake any activities except enforcement, though the Competition Administration Department has tried to integrate a strong element of advocacy in most of its activities so far. This lack of legal mandate, however, may straddle the agency's budget. An alternative option is to generate support from international funding agencies, or to enter into partnership for advocacy with some civil society organisations (CSOs) of high credibility.

*Legal enforcement tools:* There are several legal provisions that affect the institutional competence of the competition authorities.

To begin with, the provisions of the law, especially those that determine the institutional structure and powers of the competition authority, should be compatible with general legal principles and constitutional values.

Secondly, the investigative powers vested with the competition authority should be broad. Competition authorities need to ably monitor markets and obtain information on the conduct of market participants if they are to be effective. To perform such tasks, the authorities must be equipped with investigative tools that enable it to obtain the relevant information. For example, they should be empowered to enter into business premises to collect information, to investigate managers and employees of firms and to demand information from business entities, where there is suspicion of violation. There should also be a high penalty for failing to comply with investigative efforts.

Last but not least, the authorities should be able to impose high penalties for anticompetitive conduct. The level of deterrence of a law is largely determined by the probability of detection of a violation and the height of sanction imposed upon the violator. If sanctions were not sufficiently high, then it would still be rational for market players to engage in anticompetitive conduct, and then willingly pay fine if caught. This is particularly true in the case of large multinational companies, or serious violations where economic rents earned are enormous. Accordingly, the law should provide the enforcing bodies with sanctions that are high enough to act as a disincentive to engage in anticompetitive conduct, when taking into account enforcement levels.

The Competition Law of Vietnam, fortunately, meets all these conditions. The competition authority and adjudicative council have been established and will soon be fully operational. They also have the powers to undertake premise raids and individual searches, issue cautions and cease-and-desist orders. 'For business practices which violate the provisions on competition-restricting agreements, abuse of dominant position on the market, abuse of monopoly position or economic concentration, the relevant agencies may impose fines of up to 10 percent of total turnover earned by the violating organisations or individuals in the fiscal year preceding the year when they commit the violative acts'.[90]

***10.2.2. Independence from Political Interference***

*Autonomy:* Competition authorities may take one of a number of different structures. The most independent institutions are not only administratively separate from the government, but they are also staffed by competition professionals and do not rely on the government for budget allocation. The least independent authorities are those that form part of a government Ministry and are also therefore subject to civil service restrictions on recruitment and on central budget allocations for the administrative personnel.


In some circumstances, however, the politicisation of the antitrust authority need not be rejected. Russia provides a fascinating example. Russia has adopted an Antimonopoly Law as an integral part of wide-scale economic reforms to move from a centralised, communist government to a market-oriented economy. In the beginning, a minister, who is an active member of government, headed the Russian Antimonopoly Ministry. This proved to be beneficial: the antitrust principles were so different from the embedded ones that to be effective, the head of the antitrust authority had to be a strong political figure that took part in the ministerial discussions on the adoption of economic policy. Although some decisions were based on political considerations, others could not have been reached or implemented without strong political power. Once the new economic order matures, however, it might be wise to change the institutional organisation and create a more autonomous agency.[91]

The Russian system was changed in 2004, when the authority was turned from a Ministry to a Federal Antimonopoly Service, after gaining some experience. How, the head of the Korean Fair Trade Commission (KFTC) is also a member of the ministerial cabinet. Political interference, therefore, clearly cannot be determined by looking only at the structure of the relevant institutions.

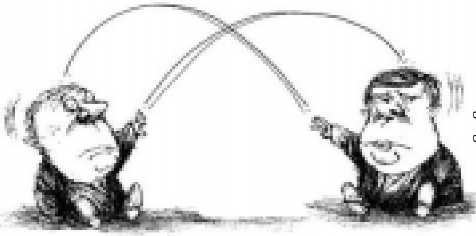
This is also the case in Vietnam, where the lack of autonomy in the competition authority (which is placed in the Ministry of Trade, with the Trade Minister having a large power over it) has been an issue of much controversy. However, it is also recognised that the Trade Ministry is the only place where knowledge and expertise on competition issues is available. Perhaps this should be the optimal model at the moment and one should wait for a longer term for the authority to evolve into a completely independent body.

*Good leadership:* Experience from many countries shows that the effectiveness of a competition authority fluctuates with the quality of the authority's leadership. In reality, the head of the agency largely determines the authority's priorities and the outcomes of its decisions. Even if (s)he is not legally empowered to authorise certain types of conduct, (s)he may nonetheless decide whether or not to conduct an inquiry of certain markets. It is thus crucial that (s)he not be politically oriented towards any specific group of interests. Although political pressures on the nomination process cannot be totally eliminated, it is important to minimise such pressures.

Besides, as already touched upon in the examples of Russia and Korea above, it is extremely helpful if the leader of a new competition authority has personal prestige, as this will give the institution itself higher standing in the political arena and also in the eyes of the public. It is also helpful if the leader has good political contacts that can assist him in taking up more controversial cases.

### *10.2.3. Political Support*

*Political support and dealing with various interest groups:* As an extension of the point above, political support is crucial to the success of competition law. This will enable the passage of legislation and probably provide more independence and resources for the authority that will implement the policy. Wide publicity about the competition authority and its support from key politicians will make it more difficult for the politicians to backtrack on their commitment under pressure from special interest groups. Political backing will raise the profile of competition issues and create public awareness through the media.


www.google.com

In the course of its work, the competition authority will have to take on entrenched domestic interest groups. Many of these groups will have benefited from protection from competition in the past from domestic or foreign sources and continue to be very influential in the political system. High-level political backing will be necessary to ensure that there is no political interference in the work of the competition authority and its decisions are carried out.

*Interface with other regulators:* Competition law is just one element of competition policy. The effectiveness of the competition law will depend on the extent to which it is coordinated with other regulatory policies and, consequently, the most direct overlap will be with sectoral regulators governing key utility sectors, which are mandated to create and promote competition in the regulated sector. The boundaries and roles of the sectoral regulators and the competition authority are difficult to define and in many countries the overlap issues remain unresolved. Ideally, the sectoral regulators would concentrate on the structure of the sector, trying to create a competitive market so that the regulator's day-to-day role in setting prices would diminish over time.

The role of the competition authority would be to deal with cases of anti-competitive practices when they arise. However, it is likely that sectoral regulators will continue to play a hands-on role for the foreseeable future. To prevent potential conflict and confusion, the competition law and the sectoral laws should specify clearly the circumstances under which the competition authority could investigate the behaviour of companies in the regulated sector.

The legislation should also define a consultative role for the competition authority in the implementation and development of sector regulatory policies.

In the case of Vietnam, the Competition Law 2004 specifies that 'where there is any disparity between the provisions of this Law and those of other laws regarding competition-restricting practices or unfair competition acts, the provisions of this Law shall apply'.[92] This means the competition authority will have power over all behavioural competition issues in all sectors, including regulated ones, while the sectoral regulatory bodies therein will look after structural as well as technical issues.

*Support of an active consumer movement:* An active consumer movement has been long recognised as making a significant difference to the effectiveness of competition law specifically and reforms generally. Empowered consumers and representative organisations will bring anti-competition cases, including abuse of dominance and collusion, to the attention of the competition authority. They will also act as a positive pressure to counteract the opposition of inefficient businesses to the successful implementation of the law.

Many consumers are not aware of the relevance of competition law. Therefore, consumer organisations have an important role in demonstrating the importance of competition law by connecting the law with people's everyday experiences and products with which they are familiar.

The only recognised consumer organisation in Vietnam to date is the Vietnam Standards and Consumers Association (VINASTAS), which is headquartered in Hanoi with branch offices all over the country. It has been actively involved with the adoption and implementation process of the Competition Law 2004 of Vietnam. The organisation, however, suffers from serious resource constraints as well as leadership crisis (since the older generation will not be able to shoulder responsibility any longer). Government, as well as public support to develop the same, therefore, is crucial.

***10.2.4. Availability of Resources***

In order for the competition authorities to function effectively, they clearly need adequate resources. The level of financial support available and the way it is used is important, but equally important are human resources.

*Human resources:* The best law cannot be applied without adequate human resources, i.e. a staff of sufficient size with adequate technical competence. The last condition is especially important in the area of competition law, which often involves a high-level economic analysis that complements a legal one in order to detect and to analyse the effects of business conduct.

Competition authorities thus need to employ lawyers, economists and investigators familiar with competition issues. In addition, several attorneys with litigation experience and a sound knowledge of administrative law and civil procedure should be hired. Particularly in its early years, the competition agency might be required to convince the courts that its cases are procedurally sound and have substantive merit.

*Financial resources*: Financial resources are a necessary complement for human resources. These expenses encompass the salaries of professional and administrative staff and the creation of an infrastructure to support the work of such staff.

Since competition law cases often consume large sums in investigation and trial costs, it is also vital that enforcement decisions be taken on a rational basis and cases should only be tried where enforcement costs are lower than the harm prevented in the specific case or by the possible deterrence effects that would prevent similar cases. This is especially true for small economies, which naturally have lower enforcement budgets.

# 11. THE DESIRED FRAMEWORK FOR VIETNAM

The purpose of a competition law is to ensure that competition prevails in the market. A competition law that is successful in doing this is an effective law. There have been cases where a competition law which is too rigid, such as the Monopolies and Restrictive Trade Practices Act (MRTP Act) 1969 of India, it might have the effect of hindering the competitive process in the market by excessive bureaucratic control.[93]

On the other hand, a competition law, which is too lax, might leave large firms finding it easy to eliminate other players from the market by restrictive practices, or exploiting the consumer. Therefore, the competition law of a country has to strike a proper balance between freedom to do business and regulation of business activity. From the earlier discussion, some points are summarised below, which should be kept in mind while building the competition regime of Vietnam:

### 11.1. Appropriate Revision of Certain Provisions of the Law

Certain provision of the laws have the fault of being either too lax or too rigid, and need to be revised more appropriately, to match with the human and financial resources available. This would help to save on enforcement costs for such cases, which are over-burdening for a young and resource-constrained competition authority like that of Vietnam. The rule of reason applied for such anticompetitive agreements in Vietnam, for example, is too lax and might impose unnecessary enforcement burden. On the other hand, provisions which detail out the content of an investigation and the steps to take (such as defining relevant markets, calculating market shares, etc – Art. 89(1) of the Law) in all cases might be unnecessarily rigid.

**Certain provision of the laws have the fault of being either too lax or too rigid, and need to be revised more appropriately.**

Most importantly, Article 8 and 13 appear to require businesses to know their own market shares before undertaking certain activities, whether in entering agreements or in merging with other enterprises, and therefore know whether they are covered by the Law or not. This is virtually impossible and might undermine the credibility and workability of the Law, as discussed in earlier sections. It would be preferable, given the desire to exempt small and medium-sized businesses, to determine coverage of the Law by definition of this term. Everyone else ought to be subject to the requirements of the Law. Figures on market share will still matter in terms of proving anticompetitive effects but at least businesses will be on notice whether they are covered by the Law or not.

### 11.2. Clear Differentiation between Horizontal and Vertical Competition Restraints

The provisions of the Competition Law 2004 of Vietnam addressing anticompetitive agreements do not entail a clear differentiation between horizontal and vertical ones. Many of such provisions can be applied for both cases. This should be rectified in the next amendment of the law, or the application of the law towards the two types of agreements should be clearly explained in some guidelines for the public, with a view to avoiding harsh treatment toward efficiency-enhancing vertical agreements or unnecessary exemption for anticompetitive horizontal ones.

### 11.3. Publication of Reader-friendly Implementation Guidelines

The adoption of the Competition Law 2004 of Vietnam is a great step forward in promoting competition in the Vietnam economy. Together with it, several implementation regulations were also issued such as the Decree 116/2005, which explains several provisions of the law, the Decree 120/2005, which stipulates the various levels of fine and remedies for competition violations, etc. However, all these documents are highly technical and not yet have much public ownership. In this regard, reader-friendly guidelines on important features of the law, which has great significance on advocacy, public education as well as compliance, should be published and distributed widely. A live website should also be maintained to allow curious people to access information.

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### 11.4. More Comprehensive Coverage of the Law

Several important issues have not been explicitly dealt with in the Competition Law 2004 and should be inserted, such as refusal to deal, the interface with sectoral regulators, issues related to IPRs, the knowledge economy, etc.

One rather important anticompetitive practice that is not mentioned in the Law is refusal to deal, while this very practice is dealt with (though not substantially) in the sectoral regulation for telecommunications. On the other hand, the competition law is supposed to prevail over other laws and policies on all competition matters. While refusal to deal is a competition matter, one would not know how to deal with this issue when there is conflict between the two laws.

**11.5. Specific Regulation over IPRs-related Competition Issues**

Competition law and intellectual property law, especially the enforcement of these laws, are quite new to Vietnam. Given the substantial interface between the two areas, if the Vietnamese policymakers and enforcement authorities could determine a reasonable balance between them, it can help attract and encourage technology transfer, while at the same time promote the establishment of a competitive business environment promoting both customer welfare and social benefits. While the IPRs Law 2005 of Vietnam has touched upon this subject, and refer all IPRs-related competition matters to the Competition Law 2004 of the country, the latter has been unable to deal with the same in an exhaustive and appropriate manner.

**11.6. Extension of Jurisdiction beyond Territorial Boundaries**

In the era of globalisation, a competition law which lacks jurisdiction to try any anticompetitive practices originating from outside its country (though having substantial adverse effects on the competitive process in its domestic market) would only be half-effective. The Competition Law 2004 of Vietnam, therefore, in its next amendment, should widen the scope of regulation to such practices to avoid this surmountable hurdle. Besides, other issues with foreign elements, having substantial impact on trade and livelihood in the country, such as export and import cartels, compulsory licensing of IPRs on grounds of public interest should also be dealt with.

**11.7. Building the Competition Authorities' Human Resources**

The Competition Council, the adjudicative agency on competition matters in Vietnam, as said, might be staffed with bureaucrats from various relevant ministries and regulatory agencies. Appointment of independent judges (at least as a majority of the council, in addition to some key figures in the government) should be a more viable option. Besides, for all members of the Council, their judicial competence should be built up; similarly as the investigative skills of the competition authority should be constantly enhanced.

Considering the serious shortage of personnel with competence and specialised qualification in developing countries, the competition authorities should devise ways to overcome such obstacles. In the long run, low levels of professionalism can be countered by building links with universities. In the short run, staff training programmes in procedural, methodological and substantive matters should be considered a top most priority. Such training can be provided internally, but often there is an important role for external training. Internships, or seconded staff from more mature authorities should be arranged to guide staff while gaining practical experience.

**11.8. Independence/Autonomy of the Competition Authority**

The independence of the competition authority, as discussed in the preceding section, has a significant impact on the effectiveness of the overall competition regime in any country. For the time being, maybe a less independent structure is more suited for Vietnam. However, in the future, such structure should be gradually changed and the authority should become fully independent.

### 11.9. Active Involvement of Consumer and other CSOs

There is a need for the competition authority to engage consumer groups and other civil society organisations in educating and helping the common man on competition issues, due to the latter's credibility and neutrality.

The consumer movement in Vietnam, as said, is still at a nascent stage, while most existing CSOs are either research-oriented (without a strong advocacy mandate) or partly politicised. The individual consumer's awareness on competition issues is low, and so is their access to law and justice. The competition authority of Vietnam should constantly search for such CSOs or consumer organisations with the same goals, extend support to them and make them strong allies in building up a healthy competition culture in Vietnam.

# *ENDNOTES*

1 From Wikipedia, the free encyclopaedia, at <http://en.wikipedia.org/wiki/Market>, as on April 03, 2007.

2 For the purpose of simple explanation, only two actors of the market are considered here, which are buyers and sellers, or producers and consumers, presumably in a single sector. The role of the government will be discussed later, as well as any other factors and actors.

3 Yingyi Qian (2000), *The Modern Market Economy and the Rule of Law*, available at http://www.oycf.org/Perspectives/5_043000/modern_market_economy_and_the_ru.htm

4 This is excluding the case where producers might have opportunistic, rent-seeking or strategic behaviours; which would be discussed in subsequent sections. For purpose of simplicity, from here onwards, competition would be largely explained in terms of prices.

5 Reckon LLP, Glossary, at <http://www.reckon.co.uk/open/Glossary>, as on April 03, 2007.

6 Web-based definition from <media.pearsoncmg.com/intl/ema/ema_uk_he_lipczynski_indorg_2/0273688073_glossary.html>

7 Rai, Qureshi & Saroliya (2003), *Restrictive and Unfair Trade Practices – Where Stands the Consumer?*, CUTS, India, p.5.

8 Competition Law 2004 of Vietnam, Article 3(1).

9 Article 4(5) of the Decree says "*Goods or services shall be deemed capable of being substituted for each other in terms of price if above 50 percent of a random sample quantity taken from 1,000 consumers living in the relevant geographical area change to purchasing or intend to purchase other goods or services with the same characteristics and use purpose as the goods they are currently using or intend to use where the price of such goods or services increases more than 10% and remains stable for six consecutive months.*

*Where the number of consumers living in the relevant geographical area stipulated in this clause is less than 1000, the minimum random sample quantity shall be equal to fifty (50) percent of the total number of such consumers.*"

10 Based on Office of Fair Trading (2004), *Market Competition – Understanding Competition Law (Competition Law 2004)*, UK, p.20.

11 Supra note 1, at <http://en.wikipedia.org/wiki/Market_share> as on April 03, 2007.

12 Supra note 8, Article 3(5).

13 Dennis Carlton & Jeffrey Perloff (2005), *Modern industrial organisation*, 4th Edition, The Addison – Weasley Series in Economics, p. 57.

14 <www.econ100.com/eu5e/open/glossary.html>, as on April 03, 2007.

15 The word is derived from the Greek language for few sellers.

16 Addison Wesley, *Student Resources – Glossary*, at <http://wps.aw.com/aw_rohlf_econreason_5/0,5759,11635-,00.html> as on April 03, 2007.

17 The discussion in this section draws from CUTS (2006), *Promoting Competition Policy and Law in Lao PDR – A Civil Society Perspective*, p.1-2.

18 For further discussion on this, see, for example, Kenneth Davidson (2005), *Creating Effective Competition Institutions: Ideas for Transitional Economies*, Asian & Pacific Law & Policy Journal, Volume 6, Issue 1 (Winter 2005).

19 ADB (2005), Asian Development Outlook 2005, Chapter III: Promoting competition for long-term development, Asian Development Bank, at <http://www.adb.org/documents/books/ADO/2005/part030200.asp>

20 Supra note 8, Article 3(3).

21 OECD Glossary of Statistical Terms, at <http://stats.oecd.org/glossary/detail.asp?ID=3256>
22 The discussion in this section draws from Fruitman (2006), *Abuse of Dominance in Developing Economies – A Focus on the Issue in Cambodia, Laos and Vietnam*, CUTS, p.10.
23 Supra note 8, Article 11.
24 *Ibid.*, Article 12.
25 Decree 116/2005, Article 22.
26 Supra note 1, at <http://en.wikipedia.org/wiki/Illegal_per_se> as on April 03, 2007
27 Supra note 8, Article 10(1).
28 Supra note 6, Article 9(2).
29 Supra note 7, p. 16.
30 Decree 116/2005, Article 14.
31 Competition Law 2004 of Vietnam, Chapter II, Article 8 (1).
32 CUTS (2001), *Competition Policy and Law Made Easy*, p.8.
33 An interesting thing about the absence of a need to show a 30 percent market share under Article 8 of the Vietnamese Law is that if all the bidders collude, their combined market share for purposes of the bid is 100 percent. But going by the letters of the Competition Law 2004 of Vietnam, it would also be unlawful if only some bidders colluded and someone else submitted a lower bid and got the contract.
34 Supra note 7, p.18.
35 Competition LawGram (3/2006), *Constructing the Olympics: Why Colluding for Contracts May Land You in Jail*, Lawrence Graham LLP, London, Vol I, p.2, available for further reading at <http://www.lawgram.com/servlet.cgi?page_id=resources/publications/CompetitionLawgram1.pdf;section=publications>
36 Supra note 8, Article 89.
37 Khemani, R. Shyam, *A Framework for the Design Implementation of Competition Law and Policy*, World Bank and OECD, p.20, as cited in Rai, Qureshi & Saroliya (2003), *Restrictive and Unfair Trade Practices – Where Stands the Consumer?*, CUTS, India.
38 For further reading, see Verouden (2005), *Vertical Agreements: Motivation and Impacts*, forthcoming in *Directions in Competition Law and Policy*, (W.D. Collins, ed.), American Bar Association, 2006, available at <http://ec.europa.eu/dgs/competition/verouden.pdf>
39 Dobson & Waterson (1996), *Vertical Restraints and Competition Policy*, Office of Fair Trading Research Paper 12, v-vi.
40 *Ibid.*
41 For further reading, see OECD (1997), *Resale Price Maintenance*, Paris, OCDE/GD(97)229.
42 Supra note 8, Article 9(2).
43 Asker J. (2004), *Measuring Cost Advantages from Exclusive Dealing – An Empirical Study of Beer Distribution*, Harvard University, p.2.
44 *Ibid.*
45 See *Continental T.V. Inc. vs GTE Sylvania Inc., 433 US 36 (1977)*
46 See *United States vs Microsoft*, 253 F.3d 34 (D.C. Cir. 2001).
47 Supra note 8, Article 8(5).
48 Supra note 8, Article 2(1).
49 For further reading, see DiLorenzo (1992), *The Myth of Predatory Pricing*, Cato Policy Analysis No. 169, or <http://en.wikipedia.org/wiki/Predatory_pricing>

50 An essential facility may be defined as a facility or infrastructure, without access to which competitors cannot provide services to their customers. An essential facility may exist either at the manufacturing (upstream) or distribution (downstream) level. Examples of essential facilities include technical information, transport infrastructure (e.g., rail, port or airport) and pipelines/wire for the supply of water, gas, electricity or telecommunications services.

51 The Law does not mention this in a clear manner, but it is possible, as provided by Article 86 of the Law, which says "the decision of initiating a preliminary investigation shall be made either by (i) competition case dossiers/complaints accepted by the authority, or (ii) the competition authority detects signs of violation of the Law".

52 John R. Davis, *The Structure of Discretion in ASEAN Competition Laws*, Presentation at the Competition Policy Conference on Challenges in Competition Law in Asia, May, 2007 in Jakarta, available at <http://www.asiancompetitionforum.org/presentation/Jakarta/schedule.htm> as of June 2007.

53 The discussion in this section draws from International Competition Network (2006), *Anti-Cartel Enforcement Manual* (Chapter 2 – Drafting and Implementing an Effective Leniency Programme), Cartel Working Group – Subgroup 2: Enforcement Techniques.

54 Based on definitions from Wikipedia, the free encyclopaedia, at <http://en.wikipedia.org/wiki/Merger> as on April 05, 2007.

55 *Ibid.*

56 Supra note 8, Article 17.

57 Supra note 8, Article 18-19.

58 The discussion in this section draw from Washington State University, NetTel@Africa Off-Line Content (2004), *Mergers, Acquisitions and Other Corporate Combinations*, ICT Industry and Markets, p.53 of 73, available at <http://cbdd.wsu.edu/kewlcontent/cdoutput/TR503/page53.htm>

59 *Ibid.*

60 Supra note 8, Article 20.

61 Supra note 8, Article 18-19.

62 Supra note 8, Article 117(3b).

63 The discussion in this section draws from CUTS (2006), *Fairplay Please!*, p.112-113.

64 Unfair trade practices in these contexts should be differentiated from unfair practices in the context of international trade, which are usually related to dumping and subsidies.

65 Supra note 7, p.32.

66 Supra note 8, Article 3(4).

67 Supra note 8, Article 39.

68 Jamaica Fair Trading Commission, *The FCA Prohibitions*, at <http://www.jftc.com/TheFCA/Prohibitions/prohibitions3.htm>

69 See http://vnexpress.net/Vietnam/Kinh-doanh/2005/01/3B9DADF3/ for more details.

70 Multi-level marketing (MLM), also called network marketing or NM, is a business model that combines direct marketing with franchising. In a typical MLM arrangement, individuals associate with a parent company as an independent contractor and are compensated based on their sales of products or service, as well as the sales achieved by those they bring into the business. In a legitimate MLM company, commissions are earned only on sales of the company's products. No money may be earned from recruiting alone ("sign-up fees"). Some less legitimate companies produce revenues primarily by attracting new participants or selling them marketing services, as opposed to selling actual products. One

must analyse the compensation plan to determine whether participants are paid from actual sales to customers and not from new-recruit bonuses or business support sales.

71 The discussion in this section draws from Mehta, Nanda & Pham (2005), *Multilateral Competition Framework: In Need of a Fresh Approach*, CUTS, India.

72 This categorisation is borrowed from "Special Study on Trade and Competition Policy" as included in Chapter Four of WTO Annual Report for 1997.

73 It is important to note a particular case of (international) export cartel, which is not included for discussion hereby, despite their makeup – the Organisation of Petroleum Exporting Countries (OPEC). The oil cartel is supposedly outside the realm of antitrust action, as it is a sovereign activity of governments.

74 Mehta (1999), *Foreign direct investment, mega-mergers and strategic alliances: Is global competition accelerating development or heading towards world monopolies?*. UNCTAD, *The Role of Competition Policy for Development in Globalising World Markets*, UNCTAD Series on Issues in Competition Law and Policy, Geneva, United Nations.

75 A section of the MRTP Act requiring government approval for acquisition or transfer of shares in excess of 25 percent of a firm's equity was simultaneously moved to the Companies Act and made applicable only to acquisition by "dominant" firms as defined in the MRTP Act (those with a market share of one-fourth or more). This, however, does not apply to mergers and acquisitions.

76 Nagesh Kumar (2000). *Multinational enterprises and M&As in India: pattern and implications*. Paper presented at the UNCTAD Seminar on Cross-border M&As and Sustained Competitiveness in Asia: Trends, Impacts and Policy Implications (Bangkok), mimeo.

77 Supra note 8, Article 10(1c).

78 Supra note 8, Article 19(2).

79 Supra note 8, Article 40, 41 & 199.

80 IPRs Law 2005, Article 7(2).

81 The VCC 1995 was later replaced by a new Civil Code, promulgated by the National Assembly of Vietnam on June 14, 2005.

82 IPRs Law 2005, Article 143(1).

83 *Continental Paper Bag Co. v. Eastern Paper Bag Co.*, 210 U.S. 405, 429 (1908)

84 IPRs Law 2005, Article 145(1c-d).

85 This section is drawn from Pradeep S. Mehta (2003), *Friends of Competition – How to Build an Effective Competition Regime in Developing and Transition Economies,* CUTS, India.

86 Khemani, R. Shyam & M.A. Dutz, (196), *The Instruments of Competition Policy & Their Relevance for Economic Development*, PSD Occassional Paper No. 26 (Washington, World Bank).

87 Russell Damtoft, Federal Trade Commission, US in a personal communication to Pradeep S Mehta, Secretary General, CUTS.

88 CUTS (2003), *Towards a Healthy Competition Culture*, pp.40

89 Supra note 8, Article 49-55.

90 Supra note 8, Article 118(1).

91 Michal Gal (2004*), The Ecology of Antitrust Preconditions for Competition Law Enforcement in Developing Countries*, New York University Law and Economics Working Paper No. 10/2004, Berkeley Electronic Press <http://lsr.nellco.org/nyu/lewp/papers/10>

92 Supra note 8, Article 5(1).

93 Rai, Qureshi & Saroliya (2003), *Restrictive and Unfair Trade Practices – Where Stands the Consumer?*, CUTS, pp.37.

# GLOSSARY

### A

***Abuse of dominant position*** refers to the use of anticompetitive business practices by a dominant firm in order to restrict competition and hence maintain or increase its position in the market.

***Acquisition*** of enterprises means an act whereby an enterprise acquires the whole or part of property of another enterprise, which is sufficient to control or dominate all or one of the trades of the acquired enterprise. In an acquisition, a company can buy another company with cash, stock or a combination of the two. Another possibility, which is common in smaller deals, is for one company to acquire all the assets of another company.

***Anticompetitive agreements*** are those agreements either between competitors (firms in a horizontal relationship) or those at different stages of production and distribution chain (firms in a vertical relationship) concerning price, customer allocation, etc. These agreements help member firms to exercise collective market power, restrict competition in order to seek unjust economic rents for all members.

### B

***Barriers to entry*** are factors which prevent or deter the entry of new firms into an industry or a market even when incumbent firms therein are earning excess profits. There are two broad classes of barriers: structural (also called 'economic') and behavioural (also called 'strategic'). It should also be noted that governments can be a source of entry barriers through licensing and other regulations (legal or administrative).

***Bid rigging*** usually refers to the collaboration of competitors to restrict competition in response to a tender issued either by a public authority or by a private entity. It is universally viewed as one of the worst 'hard-core' cartel-type offences along side price-fixing, output restriction and market allocation, and is often a combination of these practices.

### C

***Cartels*** are arrangements between groups of firms that produce and sell the same product for the purpose of exacting and sharing monopolistic rents. Most commonly, they accomplish this by agreeing on a relatively high common asking price for their product that none of the member firms will be permitted to underbid (i.e. price-fixing cartels). Alternatively, the member firms may simply agree to divide the market by geographic territory or by customers and grant each other local monopolies without necessarily enforcing a uniform price structure (i.e. market allocating or customer sharing cartels).

***Collusive tendering**:* See ***Bid-rigging***.

***Competition law*** is a body of legal rules and provisions that ensures fairness and freedom in the marketplace by regulating the conducts of firms, prohibiting anticompetitive arrangements and abuse of dominance, which impede the competitive process and hamper the legitimate rights and interests of other market players, including consumers.

***Competition policy*** refers to those government measures that directly affect the behaviour of firms and the structure of the industry. It is an integral part of economic policy, and may embrace several elements such as trade liberalisation, industrial, investment, and privatisation policies, which have the main objective of preserving and promoting competition as a means to ensure efficient allocation of resources in an economy, resulting in the best possible choice of quality, the lowest prices, and adequate supplies to consumers.

***Compulsory licensing*** refers to the act by the state to impose an involuntary contract between a willing buyer and an unwilling seller. The three most prevalent compulsory licensing provisions are applicable where a dependent patent is being blocked, where a patent is not being worked, or where an invention relates to food or medicine. Additionally, compulsory licensing may be implemented as a remedy in antitrust or misuse situations, where the invention is important to national defence or where the entity acquiring the compulsory license is the sovereign. See also ***Licensing agreements***.

***Consumer protection policy*** is a body of legal rules enforced to ensure that consumers can make well-informed decisions about their choices and that sellers will fulfill their promises about the products they offer. In other words, consumer protection policy prevents producers from engaging in unfair practices while seeking to increase their sales.

***Concentration of economic power*** is the action in which a firm aims to govern other competitors, including but not limited to mergers, acquisitions, joint ventures and consolidations.

***Conditional approval*** is regulation or modification of the behaviour of merged firms in order to prevent or reduce anticompetitive effects which might likely arise from some specific mergers. This can be achieved through a variety of one-time conditions and on-going requirements.

**D**

***Dawn raids*** are those surprise inspections carried out by officials of competition authorities at the premises of the business or businesses suspected, to obtain incriminating evidence.

***Dissolution*** is the action of competition authorities to re-divide a merger which has already been consummated because of its anticompetitive effects and/or failure (of the merging parties) to notify and obtain the approval of the competition authorities prior to the merger.

***Divestiture*** (also called '*partial divestiture*') refers to the situation when a merged firm is required to divest part or whole of their assets or operations to eliminate identified anti-competitive effects, with permission to proceed with the merger in other respect.

**E**

***Exclusive dealing*** is a vertical agreement by which a retailer or wholesaler is 'tied' to purchase from a supplier on the understanding that no other distributor will be appointed or receive supplies in a given area.

***Export cartels*** are agreements or arrangements between firms to charge a specified export price and/or to divide export markets. Such agreements are usually exempted from the scrutiny of many countries' competition statutes, unless when they lead to injurious effects on competition in the domestic market, e.g., give rise to price fixing agreements or result in reduction in exports.

***Extra-territorial jurisdiction*** is the power conferred upon competition authorities by their countries' competition law statutes to try anticompetitive practices originating from outside their countries' territory but having substantial adverse effects on the competitive process in their domestic markets.

**G**

***Geographic market*** (also called *'geographic relevant market'*) is the relevant market in competition case analyses defined by the ability of customers or consumers to switch purchase between suppliers of substitute products in case of a price hike.

**H**

***Horizontal anticompetitive agreements***: See ***Cartels***.

**I**

***Import cartels*** are agreements between domestic importers in order to gain control over some specific import markets and to act as a counterbalance against export cartels. See also ***Export cartels***.

**J**

***Joint refusal to deal*** (also called *'boycott'*) is a joint action by competitors that has the purpose of using the combined market power of those competitors to force a supplier, a competitor or a customer to agree to an action that harms competition, which would not be agreed to, absent the joint action. See also ***Refusal to deal***.

***Joint venture*** is an association of firms or individuals established to undertake a specific business project. Joint ventures should be scrutinised by competition authorities when they are formed by competing firms in a relevant market.

## L

***Leniency*** is a generic term used to describe a system of partial or total amnesty from the penalties that would otherwise be applicable to a cartel member, which reports its cartel membership to a competition authority. In addition, competition authority decisions that could be considered lenient treatment include agreeing to pursue a reduction in penalties or not to refer a matter for criminal prosecution. The term leniency, thus, could be used to refer to total immunity and "lenient treatment", which means less than full immunity.

***Licensing agreements*** are arrangements by which a firm or a person confers the right to do something, such as to use a patent, or produce a product, on another firm or person, which the latter earlier did not possess. Licensing agreements may contain restrictions as to how the license is employed, which might affect the competitive process in the relevant markets adversely.

## M

***Market power*** refers to the ability of an individual firm or a group of firms to raise and maintain price above the level which would prevail under competition. The highest degree of market power is associated with a monopoly, although all firms; except for those operating in perfectly competitive markets; possess some degree of market power.

***Market share***, in strategic management and marketing, is the percentage or proportion of the total available market or market segment that is being serviced by a company. In the competition world, market share of a company will vary according to the definition of relevant markets. The smaller the relevant market defined for a particular case, the higher share a company may account for in that market.

***Market allocating*** (or *'customer sharing'*) refers to cartel agreements that divide markets by territory or by customers among competitors.

***Merger*** is an amalgamation or joining of two firms or more in which one or several firms transfer all of its/their property, rights, obligations and legitimate interests into an existing firm or to form a new firm. Mergers can be characterised according to three categories: horizontal mergers, which take place between firms that are actual or potential competitors occupying similar positions in the chain of production; vertical mergers, which take place between firms at different levels in the chain of production (such as between manufacturers and retailers); and other mergers, such as those which take place between companies that sell the same products in different markets (market-extension mergers), or companies selling different but related products in the same market (product-extension mergers), or conglomerates with different types of businesses.

***Merger review*** is the process of evaluating a merger's current conditions as well as its potential impacts over the competitive process in relevant markets by competition authorities in order to decide whether to prohibit or to approve them (wholly or with conditions).

***Misleading advertising*** refers to any false or unfounded representation related to products made to the public by a company. The representation may be about the nature, character or performance of a product, such as size, type of contents or weight. It also includes warranties, statements, or guarantees that are not based on adequate and proper tests.

***Monopoly*** is a market structure characterised by a single firm selling a product for which there are no close substitutes and by substantial barriers to entry".

**N**

***Normal competition*** is a market structure in which a large number of firms compete with each other by making similar but slightly different products. Each of the firm has some control over the prices it charges since products are differentiated. However, since there are no significant barriers to entry and products are closely substitutable, the firm cannot affect the market as a whole.

**O**

***Oligopoly*** a market structure in which the market is dominated by a small number of sellers or buyers ('*oligopolists*'). Because there are few participants in this type of market, each oligopolist is aware that it can affect market price and hence its competitors' profits. Oligopolistic markets, thus, can be said as being characterised by inter-relationship between market participants. A firm *must* consider rival firms' behaviours to determine its own best policy.

***Output restriction*** happens when enterprises producing/supplying the same products/services agree to limit their supplies to a lower proportion of their previous sales. The effect of limiting supplies is to create scarcity in the market, which makes it possible for sellers to raise prices of products/services.

**P**

***Parallel imports*** are goods brought into a country without the authorisation of the patent, trademark or copyright holders after those goods were placed legitimately into the market elsewhere. Unlike pirated copyright goods or counterfeit trademark goods, parallel imports are legitimate products, as argued by some, since the holders of the IPRs in question have agreed to put them into market and thus implicitly authorised their subsequent use, be it being imported by an unauthorised distributor.

***Perfect competition*** is an ideal market structure in which all firms produce a homogeneous, perfectly divisible output; producers and consumers have full information, incur transaction costs and are price takers; and there are no externalities. Since perfect competition is rarely, if ever, encountered in the real world, it is mentioned here only as an ideal against which to compare other types of market structures.

***Per se rule*** is a regulatory approach by which some certain business practices are conclusively presumed to impose unreasonable restraint on the competitive process and thus anticompetitive, or can be held as illegal by themselves, without further defence. See also ***Rule of Reason***.

***Predatory pricing*** occurs when a dominant firm temporarily charges particularly low prices in an attempt to eliminate existing competitors, or create a barrier to entry into the market for potential new competitors. The predator will incur temporary losses during its low pricing policy with the intention of raising prices in the future to recoup losses and gain further profits.

***Price discrimination*** is the practice of applying different conditions, normally different prices for the same products to different customers.

***Price fixing*** includes a wide variety of concerted actions undertaken by competitors which have a direct effect on price

***Private international cartels*** are conspiracies in restraint of trade (whether by fixing prices, allocating markets or customers, or rigging tenders, etc) that have or allegedly have one or more corporate or individual participants with headquarters, residency or nationality outside the jurisdiction of the investigating competition authorities.

***Product market*** (also called '*product relevant market*') is a market that includes all products that are close substitutes for one another, both in consumption and in production.

***Pyramid selling*** is a non-sustainable business model that involves the exchange of money primarily for enrolling other people into the scheme, usually without any product or service really being delivered.

**R**

***Refusal to deal*** is the situation when a seller refuses to deal with a purchaser, usually when the purchaser has limited options of alternative supply. The competitive effects of refusal to deal have to be weighed on a cases-to-case basis. See also ***Joint refusal to deal***.

***Relevant market*** is the concept used in competition case analyses which defines the extent of effective constraints in the market in terms of product/services, time and location. See also ***Product market*** and ***Geographic market***.

***Remedies*** refer to those undertakings imposed and enforced by competition authorities in order to remove the adverse effects on competition and consumers caused by certain business practices or arrangements, or to prevent such consequences in the future.

***Resale price maintenance*** is the practice whereby a manufacturer and its distributors agree that the latter will sell products of the former at certain prices (resale price maintenance), at or above a price floor (minimum resale price maintenance) or at or below a price ceiling (maximum resale price maintenance).

***Restriction on end-users*** refer to those restrictive requirements by a holder of intellectual property rights that exclude end-users from the benefits of competition, including but not limited to technological innovation, market choice, product variety, and substitutable supply.

***Restrictive business practices*** (also called '*anticompetitive practices*') are actions by enterprises, whether in the private or public sector, designed to limit access to markets or restrain competition in the market in order to maintain or increase their relative market position and profits without necessarily providing goods and services at a lower cost or of higher quality.

***Rule of reason*** is a regulatory approach by which competition authorities weigh the restraining effects on competition and the dynamic efficiency benefits of business behaviours to decide whether to prohibit them. In case the latter consequences override the former effects, then those behaviours can be allowed to pass the scrutiny of competition statutes. See also ***Per se rule***.

**S**

***Sequencing implementation of competition law*** is the approach adopted in some countries in the world which puts the implementation of competition laws into different stages in order to maximise the effectiveness and efficiency of their enforcement in view of the competition authorities' limited resources and novelty.

***Substitute*** is a product which, by its characteristics, price, intended use and customers' patterns of purchases, can serve as a substitute for another (relevant) product thereby satisfying the equivalent need of the customers

**T**

***Tied selling*** is the practice by that customers are obliged to purchase unwanted goods or services as a condition of purchasing the goods or services they really want, typically when the supplier makes one product or service that is critical to many customers.

**U**

***Unfair trade practices*** encompass a broad array of torts, all of which involve economic injury brought on by deceptive or wrongful conduct. The legal theories that can be asserted include claims such as trade secret misappropriation, unfair competition, false advertising, palming-off, dilution and disparagement.

**V**

***Vertical agreements*** are contractual agreements between suppliers (manufacturers) and distributors (retailers) affecting the conditions in which the parties can buy, sell or resell certain goods or services.