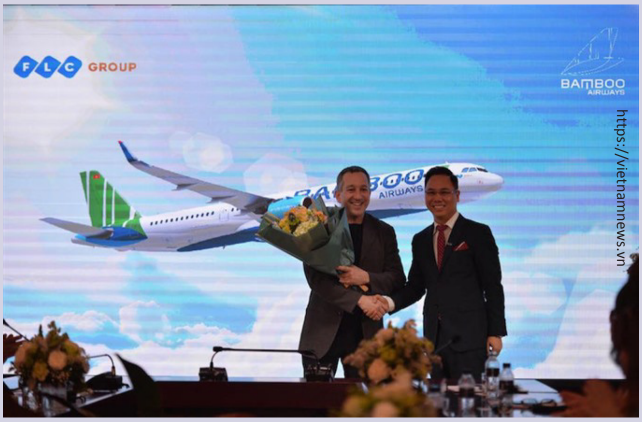
Competition Distortions Dossier

April-June, 2018

1. Bamboo Airways to Open 40 New Routes



FLC Group plans to open 40 local and international routes after its carrier, Bamboo Airways, becomes operational, said Dang Tat Thang, General Director of the airline. In Vietnam, the airline will connect tourist attractions, such as Thanh Hoa-Quy Nhon, Thanh Hoa-Phu Quoc, Thanh Hoa-Nha Trang and Hai Phong-Quy Nhon. In the international segment, Bamboo Airways will cover Japan, South Korea, China, Singapore, Thailand, Hong Kong, Taiwan and the Philippines. It also plans to open flights to the US and Europe in the long run.

FLC Group signed a Memorandum of Understanding (MoU) with Airbus to buy up to 24 A321 new aircrafts for Bamboo Airways, which will be a hybrid airline – a combination of traditional and budget airlines to meet the demands of every segment.

http://vietnamnews.vn/economy/426839/bamboo-airways-to-open-40-new-routes.html#tfBKxI5cYZYduEgR.97

Food for Thought

FLC Group decided to enter the air passenger transport industry when market potentials are still bright. According to the International Air Transport Association (IATA), Vietnam's Aviation sector had the third fastest growth rate in the world, with an average rate of 16.6 percent per year in the period 2001-2014. IATA also forecasted that Vietnam would be the fifth fastest growing Aviation market in the world, with 150 million passengers being transported by the year 2035. Vietnam's Aviation industry is also the fastest growing in Southest Asia, according to the Centre for Asia Pacific Aviation. The air passenger volume in Vietnam has reached an average growth rate of 14.9 percent in the period from 2010 to 2015, and is expected to remain at least 13.9 percent in the next five years.

In recent years, the frequency of travelling by air of Vietnamese people is growing. According to statistics by the Vietnam Tourism Association, there were about 65 million Vietnamese people travelling abroad in 2016, and this number would countinue to grow strongly at 9.5 percent in the next five years. Up until the entry by Bamboo Airways, there are only four big service providers in the Vietnamese Aviation market, namely Vietnam Airlines, Vietjet Air, Jetstar Pacific and VASCO, and the competition is mainly between Vietnam Airlines and Vietjet Air on major routes.

In a market with high potential like Vietnam, it is not difficult to understand why so many new airlines are planning to enter the sector. However, lack of

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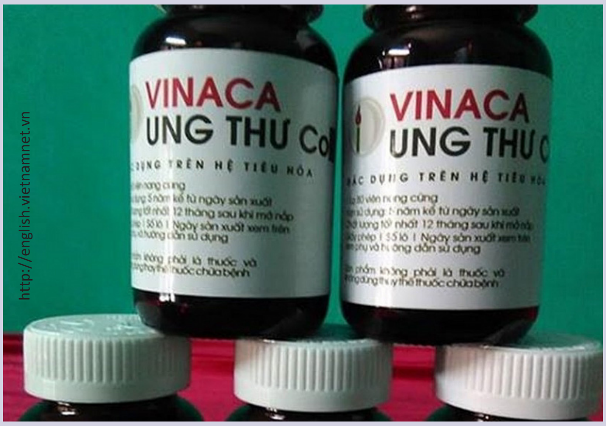
infrastructure remains a big hurdle. Almost all airports in Vietnam are faced with congestions both in the sky and on the ground, and could not keep up with the developments of the Aviation industry. Currently, the Government of Vietnam (GOV) is directing the review and expansion of airport infrastructure, especially at Tan Son Nhat International Airport in Ho Chi Minh City to remove difficulties for the airlines. This move is expected to have a positive impact on the level of investments by current and potential aviation enterprises.

The Ministry of Transport of Vietnam has just recently submitted to the Prime Miniser the draft amendment of the Plan on the Development of Vietnam's Air Transport sector till 2020, with an orientation till 2030. Once the draft is approved, along with the boom in the tourism industry which boosts the number of domestic and foreign tourists, development opportunities in the Aviation market of Vietnam would be abundant, attracting more new players like Bamboo Airways. This would ultimately result in increased choice, convenience and affordability for air passengers in the country.

2. Fake Anticancer Drugs Found in Circulation

The Government authorities of Kien An District (in the Northern city of Hai Phong) recently caught 10 workers pouring bamboo charcoal powder into



capsule shells and then packaging and labelling these capsules as anticancer medicine at Vinaca's pharmaceutical production facility under the supervision of Dao Thi Chuc in Kien An District's Ngoc Son Ward.

At the time of investigation, Dao Thi Chuc could not show any documents and certificates proving the products' origin. In fact, all Vinaca products are licensed to Hong An Phong Co., Ltd., not to Vinaca. According to the Hai Phong Department of Health, Hong An Phong Co., Ltd. only submitted the relevant papers for Vinaca's six products, including: Vinaca Vi5, Vinaca Cancer CO3.2, Baby Vinaca Vi6, Vinaca Activated Carbon, Vinaca Micronutrients and Vinaca Multipurpose. All these six products were registered as cosmetics, not even functional food supplements.

http://english.vietnamnet.vn/fms/society/199077/fake-anticancer-drugs-found-circulating-in-the-market.html

Food for Thought

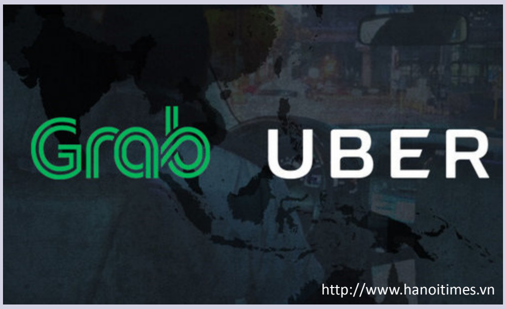
Exploiting the anxiety of cancer patients, Vinaca has produced anticancer drugs from bamboo charcoal powder and distributed this product throughout many provinces and cities in Vietnam. However, there were no record of actual production in Hai Phong City, no legal documents and certificates granted by competent State agencies, and using unidentified raw materials. This is a serious fraud which negatively affects the interest of not only cancer patients, but also the society, as a whole.

Vinaca had blatantly advertised their anticancer drug CO3 as a panacea treatment for nine different diseases, including cancer. In 2017, the company was even recognised amongst the Top 10 Brands, Products, Services and Business Entrepreneurs in Vietnam by the Institute for Anti-Counterfeit Technologies – Vietnam Association for Anti-Counterfeiting and Trademark Protection (VATAP).

Companies, such as VINACA could do such things due to legal loopholes in the regulatory framework governing food and pharmaceutical products in Vietnam. Specifically, the governmental Decree No. 15/2018/ND-CP guiding the implementation of some articles of the Law on Food Safety allows companies to use their own food safety declarations, except for three group of controlled products. This mechanism was meant to save time and resources instead of unnecessarily subjecting all enterprises and products to several rounds of inspections. However, this provision could be abused by dishonest companies to avoid the scrutiny of relevant State agencies. Unless severe penalties and sanctions are provided by law, consumer interests are at risk.

3. MoIT to Run Official Investigation into Grab/Uber Merger

The Ministry of Industry and Trade (MoIT) recently announced that it would start an official investigation of the Grab/Uber merger in the Vietnam market.The MoIT would start the 180-day investigation after the announcement. This period could be extended if necessary, but not more than two times, with each extension not exceeding 30 days. After that, the agency would submit the case file to the Vietnam Competition Council for further processing.



Earlier, the preliminary investigation report by the MoIT showed that the merger between Grab and Uber in Vietnam formed an entity with a combined market share of more than 50 percent on the relevant market, which is suspected to have infringed upon the provisions on economic concentration under the country's Law on Competition 2004.

http://english.vtv.vn/news/moit-to-run-official-investigation-into-grab-uber-merger-20180520134141268.htm

Food for Thought

Since early April 2018, Uber has officially terminated its application in Vietnam and exited the market. The merger between Grab and Uber could then be said as having been completed in this market. In response to an information enquiry by the MoIT, Grab sent a report on the acquisition of ridesharing and food delivery services of Uber in Southeast Asia, according to which the combined market share of Grab and Uber in Vietnam remained lower than 30 percent. Hence, Grab believed that it was unnecessary to notify the competition-managing agency under the MoIT before implementing this deal. However, Grab had not provided any specific evidence to support its claim yet.

According to the Competition Law 2004 of Vietnam, if enterprises participating in economic concentration cases with a combined market share of between 30 to 50 percent on the relevant market fail to notify the competition-managing agency before implementing the economic concentration, it is considered a violation of the law. The parties could then be fined with up to 10 percent of their total turnover in the fiscal year preceding the year when they commit the violations.

If the combined market share of the enterprises participating in economic concentration is over 50 percent on the relevant market, the deal is likey to be prohibited. However, in the preliminary investigation report, the MoIT did not specify the relevant market of this case and how to determine it. Until the result of the official investigation is announced, Grab could continue their business in Vietnam, because there is no provision in the law which requires enterprises to temporarily suspend their business during the investigation period.

Meanwhile, a draft of the Decree replacing Decree No. 86/2014/ND-CP on business and conditions for transportation business by car, has just been circulated by the Ministry of Transport for comments. The drafting committee of this decree considers digital taxis as separate from digital contract-based vehicles involved in the transportation business, rather than grouping both these forms as less-than-nine-seater cars used for passenger transportation business using software for fare calculation, in line with the proposal of transport associations and companies.

Accordingly, the draft decree allows the use of software for fare calculation with a permanent light box indicating 'digital taxi' on the vehicle instead of only using regular taxi metres. For contract-based cars that work by contract for Grab or similar enterprises, they would have to a sticker signalling 'contract-based vehicle' on their cars, or if they use smartphone applications, a sticker that indicates 'digital contract-based vehicle'.

This regulation, once adopted, could form the legal basis for identifying and distinguishing between traditional taxis and 'digital taxis'. What remains to be seen is whether and/or how the MoIT would utilise this method of differentiation while determining the relevant market for the Grab/Uber merger.

4. GOV Issues New Law on Competition

The National Assembly of Vietnam passed an updated version of the Law on Competition on June 12, 2018. The new law governs merger control and anti-competitive activities in the Vietnam market and will take effect on July 01, 2019, replacing the current Law on Competition of 2004.

http://www.aggbusiness.com

One of the notable changes of the new Competition Law is that the Vietnamese competition authorities will have discretion to prohibit competition-restricting agreements and economic concentration cases on the basis of whether they "have or potentially have the effect of significantly restricting competition in the market", instead of focussing solely on market share thresholds as in the 2004 Competition Law.

In addition, the body in charge of competition issues will be the National Competition Commission (NCC), a subordinate unit of the Ministry of Industry and Trade of Vietnam (MoIT), formed by consolidating the existing Vietnam Competition Council (VCC) and Vietnam Competition Authority (VCA).

https://www.competitionpolicyinternational.com/vietnam-gov-issues-new-law-on-competition/

Food for Thought

As compared to the Competition Law 2004, the amended law has the following important, major changes and additions:

Firstly, the scope of application of the amended law is now extended to include all 'competition-restricting acts, economic concentration acts that have a negative impact or are likely to have a negative impact on competition in Vietnam'. The expansion of the scope of application will create the legal basis for the competition authorities to investigate and handle with all competition issues, no matter where they occur or originate from, if they could potentially have a negative impact on the Vietnam market. At the same time, this change also creates the legal basis for the competition authorities of Vietnam to cooperate with foreign competition authorities in the process of investigating and handling competition cases, in order to implement the competition-related commitments included in bilateral and multilateral trade agreements.

Secondly, the amended law would equally apply to all domestic and foreign organisations and individuals involved in competition activities in the market, including:

- *Business organisations and individuals (hereinafter referred collectively to as enterprises), including enterprises producing, supplying products, providing public-utility services, enterprises operating in the State-monopolised sectors and domains, public administrative units and foreign enterprises operating in Vietnam*
- *Professionall associations operating in Vietnam and*
- *Relevant domestic, foreign agencies, organisations and individuals*

This change is consistent with the general development objective and direction of the GOV that encourages and creates an equal and non-discriminatory competitive environment.

Thirdly, the amended law contains provisions that would enhance and improve the independence, position and powers of the State competition authority, with a view to ensuring the effective enforcement of the law. Accordingly, the existing competition authorities, i.e. the VCC and the VCA will be combined into a single agency – the NCC. The GOV will define the position, functions, tasks, and structure of the NCC in a separate regulation.

Fourthly, the amended law adjusts the approach of controlling competition-restricting agreements in the direction of combining economics and legal *thinking, in line with international norms and practices, especially the amended law:*

- *controls competition-rerstricting acts on the basis on their nature, impact or likelihood of substantially restricting competition in the market*
- *provides a clearer differentiation between horizontal and vertical competition-restricting agreements and*
- *includes a leniency programme to enhance the ability to detect and investigate competition-restricting agreements*

Fifthly, the amended law focusses more on the (likely) consequences and impacts of abusive behaviours by dominant business, as well as the anti-competitive nature of those behaviours as defined in Article 28 of the amended law. Accordingly, it provides a list of criteria to determine the 'significant market power' in a more complete and appropriate manner to accurately reflect the position of the enterprises in the market and its competitive behaviours in Clause 1, Article 27. These changes address the limitation of the Competition Law 2004 that only describes the abusive behaviours without paying attention to their nature.

Sixthly, the amended law removes from its scope unfair competition acts which have already been regulated by other specialised laws, such as advertising for unfair competition purposes, misleading indications, promotions for unfair competition purposes, as defined in the Law on Intellectual Property, and the Law on Advertisement, etc. This is meant to avoid overlapping and conflict in the implementation of Clause 6, Article 46.

In addition, acts, such as 'illicit multi-level sale' and 'discriminatory treatments by associations' were also removed because they do not reflect the true nature of unfair competition acts. The amended law also adds 'illicit customer enticement' in Clause 5, Article 46, which is naturally consistent with the concept of unfair competition as regulated in its Clause 6, Article 3. The order and procedures of investigating and handling unfair competition cases are simplified as well.

Finally, the amended law changes the approach of controlling economic concentration activities to empower the competition authoritiy of Vietnam to assess the competitive impact of economic concentration cases, instead of relying on market share thresholds as before, and to expand the factors for assessing an economic concentration case. Companies are encouraged to actively notify their economic concentration activities to the competition authority.

This Competition Distortions Dossier is prepared by CUTS Hanoi Resource Centre. The information in this newsletter has been collected through secondary research and CUTS Hanoi is not responsible for any errors therein. The press clippings used here have been suitably adapted and summarised to convey their essence to the reader without any distortion of content.

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