Competition Distortions Dossier

June 2014 - August 2014

A. TRADE POLICIES

1. Liberal business environment yet to be established

It was stipulated in the first Constitution of Vietnam in 1946 that Vietnamese citizens are guaranteed the right to own assets they have from all sources, including from business. The right was made clearer in the 2013 Constitution, which said that all Vietnamese citizens are allowed to do business in all sectors that are not banned by law.

However, the regulations on business freedom themselves create difficulties for individuals and enterprises in different ways. Recently, the Ministry of Planning and Investment suggested putting hundreds of business sectors in a list termed as 'conditional business sectors', with eight areas being completely off-limit.

On August 19, while chairing the Government's periodic meeting, Prime Minister, Nguyen Tan Dung required relevant Ministries and departments to continue removing unnecessary requirements from business registration procedures.

http://www.vietnambreakingnews.com/2014/08/liberal-business-environment-yet-to-be-established/

Food for Thought

According to the latest statistics by the Ministry of Planning and Investment, there are, currently, 386 conditional business lines, 895 "level-1" business conditions, 2,129 "level-2" business conditions and 1,745 "level-3" business conditions. These conditions are prescribed by a total number of 16 Ministries and sectors nation-wide. General conditions are often set forth in laws and decrees, whereas specific conditions are created by Ministries or local authorities, often amounting to substantial obstacles for enterprises during their operations in Vietnam. In many cases, the underlying objectives of many licenses and conditions are not clear and rational. More importantly, their contents are heavily subject to the subjective judgment of government officials.

According to the Organisation for Economic Cooperation and Development (OECD), business license is one type of administration tool aiming to protect public interests, in areas, such as security, environment and consumer protection. However, if improperly implemented or abused, they can significantly increase enterprises' market entry costs and ultimately undermine their freedom to do business. In Vietnam, over the past few years, the number of new permits and licenses are still burgeoning despite government efforts to curb their issuance. Though the Decree No 139/2007/ND-CP enacted in 2008 contains a specific provision regarding the elimination of permits and sub-license requirements imposed by Ministries, agencies or local authorities, its implementation is weak. Currently, the Commercial Law is being revised with an attempt to create a fair and favourable business environment for the enterprises. Therefore, the list of prohibited and conditional business lines is vital to bring a revolutionary change to the business environment. However, in response to the request of the Ministry of Planning and Investment for reducing conditional business lines, no significant move on the part of Ministries and sectors has been undertaken till date.

In the context of global integration, not only local businesses need assistance to compete with foreign ones but Vietnam also has to compete with other strong rivals in the region including China, Thailand, Indonesia and the newly emerging countries, such as Laos, Myanmar and Cambodia to be a destination of choice for investment. Legal burdens are one of the main reasons that make Vietnamese business environment less attractive than

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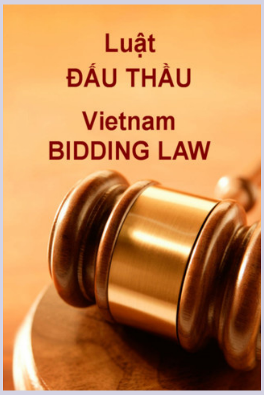
others. Hence, any regulations that make a negative impact on the economy should be eliminated. It is high time that the government should put an end to the increasing number of permits and licenses. Specifically, it is highly advisable that business conditions be stipulated in legal documents at the level of the Prime Minister or Government; meanwhile conditional business lines are listed in one (01) single and clearly written legal document so as to avoid overlaps and confusions. In any case, any revision should be in line with the Prime Minister's recent directive that "State management is not for our convenience but aims to create favourable conditions for the people and the enterprises to do business and to make investments".

B. INVESTMENT POLICIES

2. New decree streamlines bidding



The recently issued Decree 63/2014/ND-CP, which provides guidelines for the implementation of the Law on Bidding, is expected to ensure transparency and efficiency, and help avoid any overlaps during the bidding process.

The Law on Bidding, which came into force on July 1 in the current year, has quite a few novel points as compared with the previous law, especially the provisions on selecting the bidders.

The Decree 63 doles out various incentives for domestic bidders when they join international bidding processes, together with incentives for the use of local products.

The Decree 63 also raises the standards for the evaluation of bids, which will help procuring agencies and entities to effectively select contractors appropriate to the demands of each bidding package.

The decree is also expected to encourage fair competition in the bidding process.

http://vietnamnews.vn/economy/talking-shop/258195/new-decree-streamlines-bidding.html

Food for Thought

Competition among bidders will definitely provide tenderers with more choices of products and services at the most reasonable price. Ideally, contracts are awarded to the most efficient bidder through a fair and equal bidding process, irrespective of the type and size of the enterprises. Any discrimination against bidders would harm competition and eventually eliminating the auction's effect of obtaining the best offer.

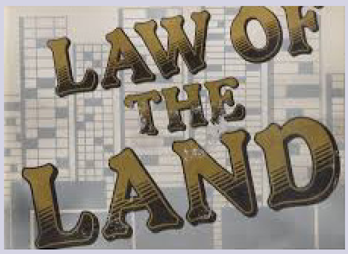
By giving priority to domestic bidders, the Decree aims to encourage more domestic participation in the bidding process and bringing more employment opportunities for domestic workers. Specifically, it states that "incentives are awarded to contractors who propose the domestic costs (including consultancy, goods and installation) of 25 percent or more of the package value". This is definitely a preferential treatment given only to domestic enterprises; however, there is reason that needs to be articulated from both legal and economic perspective.

The legal framework for bidding activities is quite extensive but inadequate and unclear, causing a lot of difficulties during bidding transactions. Some key legal documents include the Law No. 61/2005/QH11 on Bidding, which took effect on April 01, 2006, the Decree No. 85/2009/ND-CP providing guidelines for the implementation of the Law on Bidding and for the selection of construction contractors pursuant to the Law on Construction issued by the Government on October 15, 2009, and the Circular No. 17/2010/TT-BKH providing details for pilot online bidding issued by the Ministry of Planning and Investment on July 22, 2010. These regulations still contain certain loopholes that can be taken advantage of by enterprises for illegal transactions. Therefore, the issuance of the Decree 63 containing more specific provisions is an essential and timely measure expected to encourage a more competitive environment for government bid packages.

In reality, when participating in an international auction, especially Official Development Assistance (ODA) projects, Vietnamese bidders are disadvantaged in terms of financial requirements, experiences, special equipment compared to foreign bidders, which often come from large corporations. Therefore, Vietnamese bidders are often engaged in projects as "sub-contractors", struggling with low rates. On one hand, it is believed that laws and regulations should create conditions for domestic enterprises to win contracts and create jobs for domestic labourers. On the other hand, it should be noted that preferential treatment to domestic bidders should only be considered a temporary measure as the long-term consequence would be a considerable distortion of competition and an obstacle to the country's integration process. In the long run, the principles of equal treatment and transparency should be strictly respected and public auctions should always allow market competition to take place.

3. Vietnam's Land Law goes into effect, more room for FIEs

On July 1, 2014, Vietnam's 2013 Land Law (revised) officially came into effect. The new Law has seven more chapters and 66 more articles as compared to the original 2003 Land Law. The new Law institutionalises the viewpoints and orientations contained in the Resolution 11-NQ/TW of the sixth Plenum of the Central Committee of the Communist Party of Vietnam (CPV).



Although the new Land Law still does not allow foreign-invested enterprises (FIEs) to receive the transfer of land use rights or purchase land, it does not prohibit foreign investors from buying the capital associated with the land, for example, factories.

Therefore, foreign investors can first purchase the capital associated with the land, then the land owners repay the land to the government, and the foreign investors can then rent this land from the government. In the case of land that users are not entitled to transfer, if the capital associated with the land is purchased, the government will recover the land and rent it to the capital buyers.

http://www.vietnam-briefing.com/news/vietnams-land-law-goes-effect-room-fies.html/#sthash.D5gANLb6.dpuf

Food for Thought

Under the Law on Real Estate Business, which took effect on January 1, 2007, a foreign company is only entitled to (i) buy houses or construction works for sale, lease or hire-purchase; and (ii) lease houses or construction works and then sublease them to others. Under the new Land Law, overseas Vietnamese and foreign-invested enterprises can be allotted land for investment projects for the construction of houses for sale or for a combination of sale and lease. By this, it puts local and foreign investors on an equal footing in terms of equal access to land, which would make the Vietnamese real estate market more attractive in the eyes of investors. It is expected that by enabling land allocation to foreign investors, a more competitive business environment is in place, which will help to ensure more efficient land usage.

The real estate market of Vietnam has hit its bottom for the past few years and more active participation on the part of foreign investors is expected to help the market become more dynamic and developed. Foreign investors would surely contribute substantial investment into the Vietnamese market, which is very much in need of capital. Besides, thanks to foreign competition, domestic investors have no alternative but to increase their own competitiveness so as not to lose out to foreign rivals. Land-related regulations are one of the key factors that would encourage foreign investors to invest more in the domestic market.

It is also observed that one of the ways that foreign investors can get access to land-use rights in Vietnam is through M&A activities, which can be accomplished in the form of acquisition of shares or assets. Given the fact that Vietnam would remain one of the most promising growing markets, M&A activities in Vietnam's real estate sector are expected to continue surging in the coming time. The more M&A transactions take place, the more likely they will contribute to the continuing recovery of the real estate market and sustainable development of the macro economy. An expected result of M&A transactions is that projects will be implemented by more professional and financially-strong enterprises so as to boost project implementation. Foreign investors from many countries, such as Malaysia, Korea, Japan, and Singapore continue to eye the Vietnamese market and it is very much expected that the real estate market will warm up and grow in the coming times.

C. SECTORAL REFORM

4. Vietnam Airlines to conduct IPO in September

Vietnam Airlines CEO, Pham Ngoc Minh, said that the firm's value was assessed by two independent means, and the results had been reported to the Ministry of Transport and subsequently submitted to the Prime Minister.

By the book value, as of March 31, 2013, Vietnam Airlines had $57,156bn VND in assets (equivalent to US$2.744bn),

including $10,567bn VND (US$507mn) of State capital. The group also hired foreign consultants to evaluate its balance sheet, according to international standards. By their estimation, Vietnam Airlines is valued at $57,047bn VND, equivalent to US$2.74bn, which closely aligns with the first estimate.

Vietnam Airlines is also finalising its equitisation plan to submit to the Ministry of Transport. "This plan does not change much. We anticipate that after the Initial Public Offering (IPO), the State will hold about 70 to 80 percent of the capital. But this proportion must also be decided by the Prime Minister", said Minh.

http://m.english.vietnamnet.vn/fms/business/99051/vietnam-airlines-to-conduct-ipo-in-september.html

Food for Thought

If the equitisation plan of Vietnam Airlines (VNA) is approved, it would be a special case in the history of state-owned enterprises (SOEs) equitisation in the country. According to economists, equitisation, by its nature, aims to change enterprises' business strategies and reform corporate governance to help companies develop more strongly. From the legal perspective, according to the Decree No. 187/2004/ND-CP of November 16, 2004 on transformation of SOEs into joint-stock companies, the objectives of equitisation are to "mobilise capital of individuals, economic organisations and social organisations at home and abroad to raise the financial capability" and "harmonise the interests of the state, enterprises, investors and labourers of enterprises". However, the privileges that Vietnam Airlines asked for is unjustifiable. It not only wants to preserve the entire surplus obtained from the additional share issuance (which is equal to the State's capital in Vietnam Airlines, or 75 percent of the corporation's chartered capital) but also wants the Government to give free guarantee for its 100 percent loans to buy aircraft and aircraft engines. It can be easily understood that one of the important goals of Vietnam Airlines' equitisation is to raise capital and strengthen its investment capacity to compete with other airliners. However, it is necessary that any decision or plan on the part of the Government must be for the sake of the whole country, not for the vested interests of any group or an individual. Therefore, given the current context, it is advisable that relevant costs and benefits of the proposed plan should be taken into serious account and an implementation plan should be carefully formulated and monitored by the Government. One recommendation is that Vietnam Airlines should think of borrowing capital from commercial banks or other joint stock companies, instead of depending on the Government, as always. In case Vietnam Airlines wants to borrow State capital for the purpose of reinvestment, factors, *such as loan mechanism, interest rate, interest rate allocation and risk management must be made very clear and transparent so as to avoid the give-and-take mechanism that has existed for a long time in Vietnam.*

5. Fossil fuel subsidies need to be phased out

"Fossil fuel subsidies should be phased out and a price set on carbon", the UN Development Programme (UNDP) in Vietnam recommended in a discussion paper launched on June 18, 2014.

The paper entitled "Green Growth and Fossil Fuel Fiscal Policies in Vietnam-Recommendations for a Roadmap for Policy Reform" argues that despite the Government's commitment towards green growth and restructuring the energy sector including price reform, there are still substantial indirect subsidies on fossil fuels in the country.

According to the paper, Vietnam's energy prices are low as compared to other countries in the region. Although there have been significant price increases, average retail prices remained the same during 2008-2013, and are in fact lower than the previous five-year period, when measured against 2002 prices taking into account inflation.

The paper emphasises that fossil fuel fiscal reform requires a lot more than price increases. Liberalising prices, under monopolistic conditions in the absence of strong and independent regulators would further increase inefficiencies without addressing the core obstacles to private and foreign investments into the energy sector.

http://dangcongsan.vn/cpv/Modules/News/NewsDetail.aspx?co_id=30293&cn_id=659034

Food for Thought

The energy market plays a very important role in the economy, providing strategic inputs for the production and provision of almost every type of goods and services. The elimination of fossil fuel subsidy as suggested by the UNDP paper is, in fact, in line with the Government's economic restructuring process. Its benefit is multi-fold as it will reduce the fiscal burden for the State budget, enhance energy efficiency and security, and reduce negative environmental and health impacts, etc. Energy subsidies can be implemented by means of price subsidy to domestic consumers of coal, electricity, and gasoline, or low interest or preferential loans for energy SOEs, reduced taxation or deferred tax liabilities for energy SOEs. In Vietnam, electricity accounts for the largest share of energy subsidy (70 percent), meanwhile coal and gasoline price subsidies decrease as the prices move towards market levels.

In Vietnam, fuel price is actually operating under the market mechanism, under the management of the State. The intervention of the Government is confined to ensure energy security, macro-economic stability and harmonisation of all stakeholder benefits. However, market-distorting factors, such as price subsidy or price cross-subsidy mechanism should be eradicated. Instead, indirect State intervention should be made so as to harmonise the interests of the State, businesses and consumers. Therefore, a more appropriate fuel price policy must be carefully designed, taking into account of all factors, long-term and short-term, objective and subjective and more importantly, having regard to the opinions of economic experts as well as consumers.

Nevertheless, to eradicate fuel subsidy, the paper seems to be more focussed on the importance of fuel price increases, whilst it is pointed out by many economists that comprehensive reform of the energy market, which is still distorted by monopoly of SOEs, such as EVN, Petrolimex, and PVN should be the top priorities. It should be noted that "fuel sector is characterised by state monopoly and corporate monopoly, which is a very rare model in the world. Hence, price reform should go hand in hand with sector reform and SOE reform in these sectors so as to serve the interests of all stakeholders including the State, businesses and consumers alike".

D. COMPETITION LAW

6. Tourism firms investigated for attempting to monopolise Russian tourist market

Bach Van Mung, Director of the Competition Administration Department of the Ministry of Industry and Trade, opened the case against Anh Duong Company based on a complaint lodged by its competitor ABTours in April 2014, using evidence gathered in May.

Nguyen Ngoc Luong, General Director of ABTours, said Anh Duong, which partners with Russia-based Pegas Touristik to bring Russian tourists to Vietnam had booked out all hotels in Nha Trang and nearby Phan Thiet and Phan Rang towns and the Southern island of Phu Quoc.

Anh Duong's contracts with the hotels required them to exclusively accept bookings from Russian, Ukrainian and other Russian Commonwealth tourists provided by Anh Duong only.

Many hotels refused clients from ABTours or other agents despite having available rooms. Some agreed to offer such rooms at inflated prices.

http://www.talkvietnam.com/2014/06/vietnam-investigates-tourism-firm-for-attempting-monopolize-russian-market/

Food for Thought

It is clearly stipulated in the Competition Law 2004 of Vietnam that enterprises that hold the dominant position on the market are prohibited from "imposing conditions on other enterprises to conclude goods or services purchase or sale contracts or forcing other enterprises to accept obligations, which have no direct connection with the subject of contracts", and from "preventing new competitors from entering the *market". Meanwhile, according to Article 11 of the Competition Law, enterprises shall be considered to hold the dominant position in the market if they have the market shares of 30 percent or more on the relevant market or are capable of restricting competition considerably. The 'bases for determining the capability of enterprises to substantially restrain competition in a relevant market', according to Article 22 of the Decree No. 116/2005/ND-CP providing detailed regulations for the implementation of a number of articles of the Law on Competition, include a number of factors. These include the financial resource of the enterprise, its founders, and parents, its technological capacity, its intellectual property portfolio, and the scale of its distribution network. Interestingly, the representative of Anh Duong company is said to argue that the relevant market should be determined based on the total amount of foreign tourists in Vietnam, and therefore Anh Duong does not possess 30 percent of market shares.*

Having 30 percent market shares in the relevant market or not, by signing exclusive contracts with hotels, Anh Duong Company is said by many to have violated the right to business freedom of hotels, restricted competition among tour operators and limited consumers' right of choice. Moreover, Pegas Touristik also signed contracts directly with eight hotels in Nha Trang, which contains similar allegedly 'anti-competitive' provisions to that of Anh Duong's contracts with 40 hotels. One possible consequence of such acts is that the price of these tours will be increased sooner or later, since tourists have no viable options to choose from. In the long run, these binding provisions in the contracts may cause detrimental consequences to the whole tourism industry of Khanh Hoa province. Currently, there is much concern that Anh Duong is actually a "black yard" of Pegas Touristik hotel, not a partner in practice.

The case is currently under investigation by the Vietnam Competition Authority.

7. New decree details fines for Competition violators

Vietnam will impose fines of up to US$9,478 on violators of the Competition Law, according to the Decree No. 71/2014/ND-CP, which will take effect from September 15, 2014.

According to the decree, recently signed by Prime Minister Nguyen Tan Dung, firms and trade associations will be fined a sum equal to 10 percent of their revenue in the financial year before their breach was committed if they form cartels, abuse dominant market positions, or monopolies.

The maximum fines for acts of unfair competition are $100mn VND (US$$4,739) for individuals and $200mn VND (US$9,478) for corporations.

Besides imposing a fine and issuing a warning, depending on the nature and degree of the violation, the competition authorities may also revoke business licences, confiscate assets or require the violator pay for damages.

http://www.vir.com.vn/news/en/top-news/new-decree-details-fines-for-competition-violators.html

Food for Thought

The point of having a Competition Law in place is to create and maintain a fair business environment, restrict monopoly, protect consumers and contribute to economic development. Although the Competition Law of Vietnam has been promulgated for almost 10 years, anti-competitive practices including both unfair competition acts and restrictive competition acts are still burgeoning in the country. One of the main reasons to be blamed is the lack of strong sanctions that deter and punish enterprises from wrongdoings and protect consumers and other competitors. The sanctions stipulated in the Decree No. 120/2005/NĐ-CP are not perceived as not having enough deterrent effect. Specifically, in the Decree 120, in respect to practices in restrain of competition, a fine up to 5 percent of the turnover will be imposed on each offender; fine up to 10 percent will be applied in some specific cases. In respect to unfair competition practices and other violations, fines are not calculated basing on turnover, but on the type of violation and the corresponding fixed band of monetary amounts to a maximum of $100mn VND. The new Decree shows the latest move on the part of the Government with an attempt to deal with anti-competitive practices more drastically. Only when the fines are punitive enough, enterprises are forced to weigh between benefits and costs of their own practices. It is expected that the number of anti-competitive practices will be reduced accordingly, and interests of both consumers as well as legitimate enterprises can be protected.

To effectively enforce the Competition Law, it is also important that the supervision and monitoring tasks of relevant government agencies be enhanced. Besides, it is a fact that many enterprises still do not know much about the provisions of the Competition Law as well as their implementation. Due to ignorance of their own rights and obligations, they are both likely to commit anti-competitive practices and suffer from damages when they occur. It is necessary that enterprises need to equip themselves with knowledge about the legal framework in general and Competition Law in particular to protect their own rights, as well as respect the rights of other stakeholders.

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