

Competition Distortions Dossier

July-September, 2018

1. Milo Threatens to Sue Ovaltine over Defamatory Advertising Campaign

Recently, a photo of two billboards from chocolate powder competitors, Milo and Ovaltine, went viral on social media. The Milo copy reads ‘A champion made by Milo’, while the tagline for Ovaltine reads, “As long as you enjoy it, you do not need to be champions”. The two characters in the Ovaltine banner also directly points toward the Milo banner, further strengthening the association between the two across the busy intersection.

Nestle, Milo’s parent company, later sent a complaint to the Ministry of Culture, Sports and Tourism of Vietnam and the Vietnam Competition Authority (VCA) accusing Friesland Campina — the company that owns Ovaltine and is in charge of its communications strategy — of violating the advertising law by infringing Milo’s copyright and engaging in unfair competition.

Besides the billboard, Ovaltine also released a series of advertisement posters seemingly criticising the ‘champion ethos’ that has been central to Milo’s brand identity. These posters also utilise green colour and other visual cues that are often associated with Milo’s advertisements.



<https://saigoneer.com/saigon-arts-culture/arts-culture-categories/14615-milo-threatens-to-sue-ovaltine-over-defamatory-advertising-campaign>

Food for Thought

This is not the first time that Nestlé has faced problems with their competitors. In 2012, Trung Nguyen Group conducted an analysis about its product – G7 instant coffee, in which Trung Nguyen presented a screenshot from the website of Nestlé with a title: ‘9-year-old G7 has won over 100-year-old Nestlé’. Trung Nguyen earlier organised a give-away event at the Independence Palace in Ho Chi Minh City, giving consumers a try of two types of instant coffee, one is the product of Trung Nguyen and another one is the product of Nestlé, asking consumers to choose. The result was that 89 percent of consumers chose Trung Nguyen and only 11 percent chose Nestlé. The dispute was later resolved with Trung Nguyen having to subtly correct the information. Its slogan ‘G7 – the number one instant coffee in Vietnam’ got an additional qualifier saying ‘3 in 1’.

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Back to the Ovaltine case, there is however not enough legal ground to conclude that the behaviour of Ovaltine constitutes an unfair competition practice. According to Clause 4, Article 3 of the Competition Law Vietnam 2004, unfair competition acts mean 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, the legitimate rights and interests of other enterprises or consumers. Strictly speaking, Ovaltine did not exactly defame/attack any specific Milo products, or provide any untruthful information about the competitor company.

Some however opined that Ovaltine has committed to 'discrediting other enterprises', as per Article 43 of the Competition Law Vietnam 2004, because their slogans 'distorted' the message Milo wants to convey to consumers from 'being the champion' to 'achievement obsession'. With their expectation that kids will become champions, parents accidentally created undue pressure and thus negatively influenced the normal growth and development of the kids. This would have a certain impact on the reputation and business of Milo, which is evident from the public comments following the incident, which even resulted in some consumers changing their preferred products. If they are found to have engaged in unfair competition by the competent State agencies, Ovaltine might have to pay heavy fine.

2. Vingroup Acquires the Supermarket Chain Fivimart

VinCommerce, a subsidiary of Vietnam's largest privately-run conglomerate Vingroup, has completed the acquisition of the supermarket chain Fivimart from Nhat Nam Trade Company, according to local media reports.



On September 27, Aeon, a major Japanese retailer announced its decision to offload 30 percent stake in Fivimart for a third party, ending the four-year partnership between the two. However, details of the transaction were not disclosed.

After completing the deal, the Fivimart supermarket chain along with its 23 supermarkets will be renamed to VinMart, focussing on fresh, healthy food and consumption goods coming from its own brand.

The deal is in line with VinCommerce's target of having 200 VinMart supermarkets and 4,000 VinMart+ convenience stores by 2020. After acquiring Fivimart, VinCommerce now owns a network of 100 Vinmarts and 1,400 VinMart+ nationwide.

<http://www.hanoitimes.vn/investment/news/2018/10/81e0cd94/vingroup-acquires-supermarket-chain-fivimart/>

Food for Thought

Fivimart is one of the leading retailers that have been operating for more than 10 years in Vietnam, whose supermarket stores are usually located in densely populated residential areas with high commercial potential. After it entered into a cooperation arrangement with Aeon, the Japanese retailer, Fivimart's revenue has improved significantly over the years. The company's total revenue increased in 2017 as compared to 2015. However, Fivimart's expectation to become the biggest supermarket chain in Vietnam gradually proved to be unattainable when it could open at only one more location in Hanoi. Meanwhile, being born less than four years with the acquisition of OceanMart, the supermarket system of Vingroup has been getting rapid growths. With its strong financial capacity, Vingroup has rapidly expanded their Vinmart supermarket chain and Vin+ mini supermarket across the country.

In newly emerging markets like Vietnam, the development of the modern retail sector usually goes through four stages. In the first stage, domestic retailers often dominate the market, while foreign distributors are only beginning to enter. In the next stage, foreign distributors would speed up to expand the market, while domestic retailers only wait and observe passively. The third stage is the time for domestic retailers to revive and accelerate their expansion. Finally, domestic retailers would dominate the market once again. In order to compete successfully in the third and fourth stages, domestic retailers usually have to join forces with each other to create strong alliances against the increasing competitive pressures from foreign distributors.

The partnership between Fivimart and Vingroup can be seen as a strategic attempt of domestic retailers to compete against foreign distributors in the third and fourth stages of sectoral development. This deal is also expected to help increase the proportion and competitiveness of Vietnamese products throughout the distribution network in the country. The retail sector in Vietnam has been fully liberalised under the country's accession commitments to the World Trade Organisation (WTO), and is attracting a healthy inflow of foreign investment. Therefore, there should not be any immediate concerns about potential monopolisation of the sector despite the increasing trend of mergers and acquisitions therein.

3. Vietnam Pay TV Firms Face a Facebook Football Threat

The Vietnam Government should not allow Facebook to stream English Premier League (EPL) matches, an alarmed Vietnam Pay TV Association said.



In a letter to the Ministry of Information and Communications, VNPayTV said authorities should not allow the social media company to broadcast the EPL in Vietnam unless it complies with the Competition Law and requirements related to censorship, editing and Vietnamese translation. As of now, Facebook, which has over 60 million users in Vietnam, would violate the Competition Law by having a monopoly over the broadcast of matches on the Internet in the country.

Current regulations define any agency that broadcasts television programmes as a press agency. VNPayTV said therefore Facebook must also comply with the Press Law and provide Vietnamese commentary for the matches.

The global media reported last July that Facebook had acquired rights to stream the EPL in multiple Asian countries for £200mn (US\$262mn). The deal would reportedly allow its users in Vietnam, Thailand, Laos, and Cambodia to watch all matches online from the 2019-2020 season until 2022-2023. But it is unclear if they have to pay to watch the matches or it is free.

VNPayTV's letter also calls on the Ministry to license foreign over-the-top (OTT) media services like Netflix and Amazon Video for the time-being. It said the Ministry should crack down on Competition Law violations by OTT media services and Pay TV firms and consider blocking services by foreign providers that are monopolistic.

<https://e.vnexpress.net/news/business/industries/vietnam-paytv-firms-face-a-facebook-football-threat-3810159.html>

Food for Thought

The General Agreement on Trade in Services (GATS) of the WTO defines four modes of supply for the provision of services in the context of international trade. The first covers trade in services in which the supplier is not present in the same WTO Member's territory as the consumer. The other three cover trade in services in

which the producer and the consumer of the service are present together within the same WTO Member.

Until recently, Mode 1, or 'cross-border supply', has attracted little attention, in part because its practical and economic importance was rather limited. Attention focussed principally on Modes 3 (commercial presence) and 4 (presence of natural persons). However, as a result of technological developments, Mode 1 has gained increasing importance. A number of services whose provision once required physical proximity between the consumer and the supplier can now be traded via the Internet or other networks. This includes, for example, E-banking, computer and IT services, many forms of professional and consultancy services, travel agency services, hotel bookings, and sales of air tickets, as well as many other consumer and producer services.

Facebook is currently operating as a cross-border provider of social media services. And since the company does not have a physical presence in Vietnam, it is not currently bound by any laws, regulations or actions by the competent State agencies of the country, including the Press Law or the Competition Law of Vietnam. Furthermore, it is difficult to forcefully argue that the livestreaming of EPL matches by this social service provider is equivalent to the broadcasting of television programmes. There is currently no clear legal provision in Vietnam on this matter. As a result, the allegations made by VNPayTV against Facebook and this Association's proposal to forbid the livestreaming of EPL matches in Vietnam (as well as other Southeast Asian countries) appear to be legally unfounded and unrealistic.

From a competition angle, by a cursory look, the near-monopoly that Facebook currently possess over social media services in Vietnam by itself does not constitute a violation of the Law on Competition 2004. It is only when the company abuses its significant market power, restricts competition and inflicts harms on consumers that the competition authorities could take appropriate actions. And even in that case, the matter needs to be thoroughly investigated before a conclusion on the violations by Facebook could be reached.

4. Committee for State Capital Management makes Debut

The Committee for Management of State Capital (CMSC) has just made its debut on September 30, 2018. Established by the Government, the committee has one Chairman and at most four Vice Chairmen appointed or dismissed by the Prime Minister.

CMSC will manage State capital and assets at 19 corporations and groups. The corporations and groups have a total State capital of US\$36bn and a total value of assets which were equal to 50 percent of the total State capital and assets of the country's State-owned Enterprises (SOEs).

<http://dtinews.vn/en/news/018/58612/committee-for-state-capital-management-makes-debut.html>

Food for Thought

The functions, tasks, powers and structure of the Committee for Management of State Capital (CMSC) are stipulated in the Decree No. 131/2018/ND-CP. Accordingly, this committee is a governmental agency assigned by the Government to manage State capital and assets. The Committee is tasked to formulate and submit to the Government and the Prime Minister the overall strategy for investment and development of enterprises under the management of the Committee in accordance with Vietnam's socio-economic development strategies.

Regarding the relations with the State management agencies, the Committee shall exercise their



representative rights and responsibilities with 19 enterprises in accordance with the Law on the Management of State Capital; comply with the regulations of the Government and the Ministry of Finance on the financial management systems of enterprises, as well as the financial supervision mechanism for these 19 enterprises.

With regards to the principle of assigning responsibility for management of enterprises in the transition process, the Decree's provisions are in accordance with the provisions of the Law on the Management of State Capital. At the same time, the hand-over of the documents on the right of ownership representative from Ministries, Ministerial-level agencies, governmental agencies and

provincial/Municipal People's Committees shall preserve the status quo.

However, to operate the monitoring and management system, innovation is extremely necessary. The reason is that it will be difficult for CMSC to manage the State capital effectively if they are considered as a State management agency with rigid principles. The Committee should closely cooperate with leading technology companies to apply advanced management tools using digital technologies.

The Committee should also develop strategies, determine the performance targets of each enterprise and promote the equitisation process. At the same time, it is necessary to help these 19 enterprises to improve their labour productivity, increase their competitiveness, manage and develop capital source to make the turnover of the next year higher than that of the previous year. Particularly, during the transfer process, it is indispensable to enhance publicity, transparency in business activities, avoid corruption and wasteful losses.

In addition, there is currently no consistent, complete and up-to-date database on State capital and assets at SOEs, as well as no full list of state-owned enterprises falling within the scope of management of each representative agency. This leads to the situation where the ownership representative agency does not have sufficient information to carry out its supervisory functions, to assess risks and timely adjust its policies.

Therefore, the possible consequences are that State capital cannot be utilised, even overlooked, causing waste, especially in multi-ownership enterprises. In order to better manage and develop these capital and assets, the 'super committee' needs to build big database, information technology infrastructure and apply digital technologies to do their functions. Moreover, the Committee also needs to build a team of analysts and evaluators with appropriate expertise and capacity to make timely and accurate decisions to prevent the risk of losses and inefficient projects.

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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