

Dossier of Competition Distortions in Vietnam 2013-2014



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Contents

1. Introduction	1
Competition and the Benefits of Free Market	1
Competition Distortions	2
2. Background	5
The economic Environment in Vietnam	5
Competition Policy <i>vis-à-vis</i> Competition Law	6
3. Competition Distortions in Vietnam	9
Trade Policy	9
Industrial Policy	11
Financial Policies	13
Sectoral Regulatory Policies	14
The Telecommunications Market	15
The Transportation Market	17
The Energy Market	18
4. Unfair Competition	20
General Awareness	20
The Milk Market	21
Multi-level Marketing (MLM)	21
The Steel Market	22
5. Conclusions and Recommendations	23

1. Introduction

Competition and the Benefits of Free Market

Competition can be defined as a situation where sellers or firms independently endeavour to gain buyers' patronage through offering the most favourable terms in comparison to others. A firm is therefore said to compete with other firms in the same market if the decisions that it takes to maximise profits depend on either the steps taken by the other firms or on the prices that other firms are charging. In their pursuit to be ahead of the other, firms have to be always conscious of rivals' decisions and of course strive to better themselves and the others by means of innovation and/or other measures to increase their efficiency.



Based on the structural characteristics of the market, competition can be in different forms, such as perfect competition (large number of sellers and buyers, identical goods, free entry and free exit, symmetric information); monopoly (one single seller, large numbers of buyers, no close substitutes of the product, high entry barriers); monopolistic competition (large number of sellers and buyers, existence of close substitutable products, no entry barrier); and oligopolistic competition (very few sellers, large number of buyers, large number of branded products, high entry barrier). Perfect competition almost never exists in real life, the closest form being in the market for fast-moving consumer goods (FMCGs). Very often, we end up with either monopolistic competition, or monopolies, or worse cartelised markets, where a multitude of firms collude to act as a single monopoly.

The benefits of competition are three-fold: economic, social and environmental benefits.

"The most important single central fact about a free market is that no exchange takes place unless both parties benefit."

- Milton Friedman

First and foremost, competition in the market helps to boost economic efficiency. There are three types of economic efficiency: allocative efficiency, productive efficiency and dynamic efficiency. At a general level, allocative efficiency implies that firms produce what buyers want and at prices they are willing to pay for. However, in a monopoly market, allocative efficiency would be reduced, since consumers purchase less quantity of goods due to higher prices in comparison to what they would purchase in a perfectly competitive market. By combating monopolies and cartels, and protecting the competitive process in the market, the negative consequences of monopolies would be eliminated and thus allocative efficiency is improved. Meanwhile, productive or technical efficiency implies that output is maximised by using the most effective combination of inputs thereby minimising internal slack. The goal of productive efficiency implies that more efficient firms, which produce at lower costs, should not be prevented from taking business away from less efficient ones. Finally, dynamic efficiency is achieved through diffusion of new products and production processes over time, such that there is enhancement in social welfare. In a nutshell, competition fosters a healthier economic environment by driving inefficient enterprises out of the market and providing a stimulus for remaining ones to increase their efficiency and competitiveness. It pushes firms to seek opportunities for further reducing costs, improving product quality or introducing new technologies.

In terms of social benefits, competition benefits consumers both directly, through lower prices, better quality and an improved choice of products; and indirectly, through its impact on economic growth. Competition is also important for the effectiveness of government procurement, which has a direct bearing on social gains (for example, in the provision of rural infrastructure), as anti-competitive practices by suppliers can reduce what governments can achieve with the limited funds available which if freed up can be utilised towards other social infrastructure. Further, competitive markets are more likely to provide the poor with newer opportunities for employment.

In terms of environmental benefits, as environmental issues have become an increasingly important concern in the world, environmental protection would become a significant criterion that determines the competitiveness of firms. In an attempt to save costs and win the patronage of evermore environment-conscious consumers, enterprises need also make their business and their manufacturing activities more environmental-friendly.

Competition Distortions

Competitive forces work best in a market free from distortions. Markets may not be competitive due to private (i.e. anti-competitive behaviours of market participants, such as collusions, abuses of dominant position, anticompetitive mergers, etc.) or policy-induced distortions (i.e. competition-distorting policies, regulations, administrative decisions, and other government-imposed measures, etc.).

Private anti-competitive practices by firms are often easier to be detected, analysed and punished. There are generally two main types: restrictive business practices and unfair competition practices. While restrictive business practices are often related to or leading to a higher degree of market power being concentrated in the hands of one or a group of enterprises as compared to other peers to reduce, distort and prevent competition on the market (e.g. monopolisation, cartelisation, etc); unfair competition practices are fraudulent and unethical ways of doing business and making profits, which cause damages to the legitimate rights and interests of the State, other enterprises or consumers (e.g. misleading advertisements, spreading rumours in the market against competitors, etc.).

Inappropriate regulations and policies by central and provincial governments leading to anti-competitive market outcomes is the other cause of competition distortions. These policy-induced distortions are usually more evasive and hard to be treated. One of the reasons is the lack of awareness on the part of the government regarding the anti-competitive outcomes of their decisions. Besides, government policies encompasses a wide range of areas, such as trade, investment, industry and many regulated sectors, such as telecommunications, energy, etc. which makes it even harder to recognise. The other major difficulty posed by these government-led distortions emanates from the fact that in most government policies, the distortive component is often accompanied with significant policy objectives and justifications, for example international competitiveness, the larger public interests or the achievement of other social or environmental objectives. However, such justifications cannot be presumed and need to be transparently and clearly communicated for an informed debate before a decision is reached. Unfortunately, this is seldom the case.

Last but not the least, it is increasingly recognised that the private anti-competitive practices are often facilitated by government interventions in the market place. When governments regulates, they may consciously or inadvertently permit anti-competitive conditions that may be taken advantage of by private firms. Therefore, it is important to analyse these two categories of competition distortions in a cause-effect relationship rather than separately.

The Project and the Report

This project entitled “Dossier of Competition Distortions in Vietnam”, supported by the Friedrich Naumann Foundation (FNF) and implemented by Consumer Unity & Trust Society (CUTS International) in Vietnam, is designed with an aim to foster a healthier economic environment through promoting increased knowledge of competition distortions and more active participation of relevant stakeholders in reducing these distortions on the market. It is thus not a research project but a strongly advocacy-oriented one, using “story-telling” with a bit of “food for thoughts” as the main approach.

In the three dossiers produced in three initial quarters of the year 2014, the project not only introduces and analyses relevant policies that have been or going to be implemented that may affect the competitive process either in a good or bad way, but also points the attention of targeted audience to anti-competitive practices of firms that are taking place in the market.

This analytic report is a synthesis paper that brings together all the works that have been done throughout the project and reflect on the most important issues that have come up during the period. An evidence-based research approach is embraced in order to inform decision-makers, the public, businesses and other stakeholders of how the competitive process in various markets is being affected and strengthen the capacity of those in dealing with competition distortions. Furthermore, recommendations are made so as to improve the effectiveness of government interventions in the market place for a free and transparent economic and regulatory environment.

2. Background

The Economic Environment in Vietnam

Before 1986, the Vietnamese economy mainly consisted of state-owned enterprises and collectively-owned enterprises. Any market rules in place would only apply to a fairly minor economic sector of small-scale private enterprises and households. The economy was State-subsidised and all economic activities were directed based on the “ask-give” mechanism. As the country was isolated from the international arena, foreign economic operations were solely determined and monopolised by the State-owned Enterprises (SOEs).



Being launched in 1986, the Renovation (*Doi Moi*) package transformed the country from a centrally-planned economy into a socialist-oriented market economy. The most significant change in the new policy environment was the development of a multi-sector economy, which recognises private ownership and market mechanisms, though still, under the management of the State and following a socialist orientation. In addition, an open-door policy in replacement of the closed approach helps to stimulate foreign direct investment (FDI) and international trade. Those immense reforms have brought remarkable achievements in terms of economic development to Vietnam. An average Gross Domestic Product (GDP) growth of 7.5 percent in the 2000-2005 period and the economy ranked at 58th largest position in the world in 2006 made Vietnam look like a little tiger economy in South-east Asia. A more competitive and dynamic economic environment has thus been created, which enables the market participation of various non-State sectors, such as privately-owned and foreign-invested enterprises. Thanks to the open-door policy, Vietnam has set up foreign trade relations with more than 160 countries. In addition to becoming a member of the World Trade Organisation (WTO), the country also expanded its diplomatic relations within the region through becoming members of the Association of South-east Asia Nations (ASEAN) in 1995, and the Asia-Pacific Economic Cooperation (APEC) framework in 1998, or signing a bilateral trade agreement with the US in 2001. With foreign trade relations becoming more open and the number of FDI projects being on the rise, the market for exports has greatly expanded.

The Vietnamese economy, however, is still predominantly made up of a great number of small and medium-sized enterprises (SMEs). Currently, there are more than 500,000 SMEs which account for 97.5 percent of total enterprises nationwide. Every year, SMEs account for around 40 percent GDP and attract 51 percent of the labour forces of the country. Despite the huge volume, these enterprises are often at a disadvantage in terms of technology, capital, human resource development and networking, which results in low competitiveness and productiveness. On the contrary, large state-owned enterprises (SOEs) are still controlling key areas of the country, which is seen as a means for securing the State's role in running the economy and ensuring stability and socio-economic development. SOEs account for a larger proportion of GDP, budget revenue, export volume and foreign investment project. However, SOEs have been said to be exposed to several weaknesses: backward technology, weak management capacity, low efficiency and competitiveness.

The ongoing restructuring process of SOEs in Vietnam has gained certain achievements, especially a sharp decrease in the number of enterprises, particularly small-scale SOEs. However, since 2006, SOEs have been re-organised and grouped into conglomerates (also called State economic groups), which seriously affected the direction of economic policies in Vietnam, while the allocation of resources are still very much based on the 'ask-give' mechanism. Despite their many preferences and privileges as compared to private enterprises, SOEs have not been functioning efficiently, failing to play a good role in leading socio-economic development in Vietnam. Many SOEs suffer from low managerial ability and have been slow in renewing business administration to meet international standards. A number of SOEs are found to have violated the State's regulations on business administration, causing huge capital and property losses for the State.

In general, the business environment in Vietnam is not yet fully liberalised, thus impeding foreign enterprises to invest in Vietnam. The 12th Doing Business report of the World Bank (WB), titled "Doing Business 2015: Going Beyond Efficiency", indicates that Vietnam only ranks 78th, falling six places from the previous year's report and in fact, Vietnam is falling behind regional countries, such as Malaysia and Thailand. Legal burdens are one of the main reasons that make Vietnamese business environment less attractive than others. Hence, it is necessary that any regulations that make a negative impact on the economy should be eliminated.

Competition Policy *vis-à-vis* Competition Law

Competition policy and law are the two main instruments that ensure that the outcomes anticipated from competition are optimally realised. These two terms 'competition policy' and 'competition law', though complementary, are yet two distinct concepts that are not always necessarily synonymous and inter-changeable as often thought. This should be well noted for the purpose of this report.

Competition law, by definition, comprises of legislations, judicial decisions and regulations specifically aimed at creating institutions (i.e. competition authorities) for preventing anti-competitive business behaviour. Competition law provides for specific measures to deal with private competition distortions, precisely restrictive business practices (including anti-competitive mergers and acquisitions, abuse of dominance and anti-competitive agreements among companies) and unfair competition practices.



Meanwhile, competition policy is essentially understood to refer to a package of reforms and policies that government put in place to have an impact on competition in the national/local market by directly affecting the behaviour of enterprises and the structure of industries. It refers to a set of government laws and regulations that enhance competition or competitive outcomes in the markets, through creating conducive entry and exit conditions, reducing controls in the economy and fostering greater reliance on market forces. Competition policy can encompass such policies as international trade policy, industrial policy, privatisation reform policy, regulatory policy, consumer protection policy, etc.

On one hand, having a tight trade policy may restrict competition in the market, and might result in the manipulation of the market by dominant domestic firms. On the other hand, trade liberalisation results in an influx of goods into the economy, which could also have a huge impact on the nature and extent of competition in the market, and thus encourage domestic competition as well. Therefore, a country's international trade policy often plays a key role in shaping out the nature of competition in the markets.

Industrial policy, which focusses on the entry into and establishment of a business in a market, is also very important in shaping up competition. If a country has a restrictive industrial policy regime in which entry and growth of firms is subjected to stringent licensing conditions and monitoring, few firms would enter the industry and the resulting level of competition would be low. An effective competition policy advocates for the removal of obstacles and facilitates investment flows by providing a predictable legal and regulatory environment that reduces the scope of arbitrary decision-making, thereby instilling transparency in the system.

The opening up of different sectors like telecommunications, electricity, water, etc. to the participation of private players saw the need for the introduction of economic regulatory frameworks in these sectors, and also the establishment of various independent regulators. Through their regulatory roles, these regulatory bodies' actions

and recommendations have a direct impact on competition, given that they determine entry condition (through licensing) and viability (through tariff regulation). Some of them, especially those established before the establishment of competition authorities, have mandates extending to the handling of competition issues in their respective sectors. Thus, a country's approach towards regulatory reforms through its policies will determine the nature of competition to prevail in the economy.

Vietnam has adopted a Competition Law in the year 2004, which provides for the establishment of two agencies: the Vietnam Competition Administration Department (VCAD) within the Ministry of Industry and Trade as the investigative arm, and the Vietnam Competition Commission (an Inter-ministerial Committee comprising of representatives of different line ministries, State agencies and sectoral regulators, chaired by the Minister of Industry and Trade) as the adjudicative body; to regulate, prevent, deal with and punish private anti-competitive practices (restrictive business practices and unfair competition practices alike) in the market and also to restore the competitive process in various markets to its normal functionings. This Law also stipulates the business operations of enterprises operating in the State-monopolised sectors and domains and Acts that State management agencies are prohibited from performing to prevent competition in the market.

The country has not adopted a formal competition policy as of date.

3. Competition Distortions in Vietnam

Trade Policy

Competition principles already exist in various WTO agreements, such as the GATS (General Agreement on Trade in Services), the Anti-dumping Agreement, the TBT (Technical Barriers to Trade) Agreement, the TRIPS (Trade-Related Aspects of Intellectual Property Rights) Agreement, and the Safeguards Agreement. In the TBT Agreement, Article 3.4 requires that “Members shall not encourage private organisations to discriminate against foreign products with regard to testing and certification contrary to the national treatment principle”.

In the Anti-dumping Agreement, Article 3.5 states that “the administering authority must take into consideration restrictive business practices when determining injury to a domestic industry if there are such practices”. Article 9.1 of the GATS requires that the WTO Members take measures to ensure that a monopoly supplier of services within their territories does not abuse its market power in such a manner as to be inconsistent with the most-favoured-nation (MFN) principle of the WTO. Article 40 of the TRIPS Agreement states that Members are authorised to “enact domestic laws to combat restrictive provisions involved in technology licensing agreements”. Article 11.1 of the Safeguards Agreement prohibits Members from encouraging or supporting the adoption or maintenance by private enterprises of measures equivalent to voluntary export restraint exercised by the government.

Besides, competition provisions are also incorporated into many regional trade agreements (RTAs) and free trade agreements (FTAs) (hereinafter commonly referred to as “FTAs”) recently concluded in the work. The push for competition provisions to be included in FTAs is particularly strong in those negotiations led by the United States (US) or those agreements to which the US is a signatory party, such as the case of the Trans-Pacific Partnership (TPP) Agreement.

Being a WTO member and having bilateral agreements, whether in affect or being negotiated, with many countries, Vietnam is in a process of wide and deep integration into the global and regional economy. The country is also proactively participating in TPP negotiations, which are expected to finish in the current year. In that context, the implementation of liberal trade policies is much hoped to create a free economic environment for trade opportunities for all the sectors alike.

However, some of the trade and investment policies adopted so far in furtherance of these objectives may have anti-competitive dimensions. These distortions may be in the form of protectionism through tariff or non-tariff barriers as follows:

Tariff constitutes a principal barrier to trade in many countries including Vietnam. Tariff is mainly levied on imported and exported products, which served two purposes: (i) to ensure revenue for the State budget and (ii) to protect domestic products. High tariff imposed on imported products would inevitably drive up their prices, hence, domestic products are more competitive in terms of price as compared to imported ones. In the automobile sector, it is a fact that a car assembled in Vietnam is much more expensive than the same one imported, for example from the US, due to the high tariffs. The tax on a complete automobile would be 4-5 times higher than the import duty on components and spare parts. Imposing high tariffs is not only an unfair treatment to consumers who have to pay the higher price but to foreign companies in competition with local ones.

Due to Vietnam's commitment of opening the market for services regionally and internationally, tariff measures are no longer favored. However, non-tariff barriers are becoming more prevalent. Non-tariff barrier is another kind of barrier against imported products. Non-tariff barriers can be defined as measures other than tariffs that restrain or disturb free international trade. These can be categorised in two main groups: administrative barriers and technical regulations. Technical regulations are commonly-used tools for ensuring quality and protecting domestic consumers by countries around the world.

However, they could also be misused in favour of domestic industries to block out imports. Eventually, the regulations become 'technical barriers to trade', working to shield a market from import competition. Such barriers are also applied in the automobile sector. It was proposed in 2014, by the Ministry of Industry and Trade in the revised version of the Vietnam Automobile Development Plan to 2020, that stricter control on imported cars, such as strict criteria in terms of import agents' financial capability and storage or qualified warranty and maintenance system should be exercised. Rigorous testing procedures towards imported cars would also be performed. This stance on the part of the government is in the context that following the ASEAN Trade in Goods Agreement (ATIGA), the import tariffs of completely built-up cars (CBU) from the ASEAN region to Vietnam will be reduced to 50 percent in 2014, then to 35 percent in 2015, 20 percent in 2016, 10 percent in 2017 and to nil in 2018.

The ENT (Economic Needs Test – a test that foreign retailers have to pass to establish their second and subsequent outlets in Vietnam) is another type of administrative barrier used by the Vietnamese Government to control the development of foreign distribution networks in Vietnam. Not being clearly defined in the GATS, the ENT

has for long been considered as a barrier to market access under its Article XVI. As Vietnam is a promising market for retail development in the coming years, it is important that ENT should be made more justified and transparent so as to encourage the participation of foreign suppliers in the retail market in Vietnam, while protecting the legitimate economic interests of the country and its people.

Industrial Policy

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 doing business. The right was made clearer in the 2013 Constitution, which says all Vietnamese citizens are allowed to do business in all sectors that are not banned by law. Accordingly, the Enterprise Law 2005 also provides that citizens are entitled to do business in accordance with the laws while the amended law specifies that citizens would be entitled to do business in all sectors. This would be reflected through sectors not given in investment certificate, reducing cumbersome procedures for businesses and eliminating large volume of works for business registration office in local departments of planning and investment.



Since 1986, regulations regarding foreign investment in Vietnam have been substantially relaxed. The introduction of the Law on Foreign Investment of Vietnam in 1987 has created a fundamental legal framework for foreign investment activities in Vietnam. Several changes and supplements have also been made ever since, with the aim of creating a more favorable environment for Vietnam to attract and use efficiently foreign investment capital. In recent years, Vietnam has attracted an increasing number of FDI. The main reason that makes Vietnam an attractive destination for investment is its low-cost labour and opening market. As of July 2014, Vietnam had 16,813 FDI projects with a total registered capital of over US\$242.4bn, more than half of which had been disbursed. Foreign direct investment does not only bring high profits to foreign investors, but also play an important role in raising capital, technology transfer, increasing managerial skills, and employment generation, hence, contribute to socio-economic development in Vietnam.

However, there is still much to do to improve the business environment in Vietnam. The main issue is a lack of business freedom for individuals and enterprises. Currently, Vietnam business environment is still below the average in ASEAN and the main bottlenecks are administrative procedures that cause great obstacles for businesses and investors.

For a long time, business licenses have been an administrative tool frequented by Vietnamese government agencies. During their operations in Vietnam, enterprises have to follow not only general conditions set forth in the laws and other implementation decrees but also specific conditions created by ministries or local authorities. 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. Moreover, the underlying objectives of many licenses and conditions are not clear and rationalised.

According to the Organisation for Economic Cooperation and Development (OECD), business license is one type of administration tools 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 of the country is being revised with an attempt to create a fair and favorable business environment for enterprises. Therefore, reconsidering the list of prohibited and conditional business lines is vital to bring a revolutionary change to the business environment in Vietnam.

Besides, under the current Investment Law, foreign firms when making their first investment in Vietnam must submit an investment project proposal associated with the establishment of an economic entity. The investment certificate issued to the foreign investor is also regarded as the business registration certificate. Though the combination of the investment and business registration certificates is meant to simplify procedures for foreign investors, in reality, it has caused a big headache for foreign investors because these two papers are vastly different in their legal natures. While the amendments are thought of as an attempt on the part of the policy-makers to attract much-needed investment into the Vietnamese economy by supporting foreign investors, it also raised controversy as investors fear that it will limit their rights in certain procedures related to land allocation, construction and the environment. In general, it is suggested that so as to attract a steady flow of investment in Vietnam, the government should work out more comprehensive and consistent measures to ensure a favorable economic environment for foreign investors to work in Vietnam.

Land regulations are also a matter of concern to foreign-invested businesses as it is a factor affecting the cost of investment through land prices. They would either encourage foreign investors to invest more in the domestic market or serve as a significant barrier

to market entry that protect incumbents and reduce competition. 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 which came into effect on July 1, 2014, 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.

Financial Policies

The Vietnamese financial system has been playing a vital role in the development and economic growth of the country since “*Doi Moi*” in 1986. However, since the global financial crisis, the country’s banking and financial system has been under stress, exposing much weakness, severely affecting the whole economy. Additionally, the wave of financial liberalization raises questions about the competitiveness of Vietnamese



commercial banks in competition with foreigners. State-owned commercial banks and foreign banks are found to be superior in the competition with joint-stock commercial banks and domestic banks respectively. In addition, the foreign investment in banks seems to increase competitiveness of a commercial bank.

Previously, the holding of a foreign investor in a credit institution was capped at 15 percent, or 20 percent for exception cases which had to be approved by the Prime Minister. The Decree No. 01/2014/ND-CP, which came into force on February 20, 2014 now regulates that a single foreign strategic investor is now allowed to possess up to 20 percent holdings and the cumulative stake of all foreign investors in a local credit institution cannot exceed 30 percent of the institution’s charter capital. Though the Decree is expected to increase the foreign capital flow into the banking sector of Vietnam, the rate of holdings is still lower than the expectation of many banks, that being 49 percent. Given that the banking market is under pressure and restructuring is an urgent task of the country, foreign capital should be infused into Vietnamese banks, especially inefficient and weak ones. However, the rate of 20 percent shows a significant barrier to foreign participation in the market, which might slow down the speed of restructuring.

Another aspect of the industry restructuring is the growing trend of M&A. Six to seven banks were planned to be restructured in 2014, raising the total number of banks to be dissolved and withdrawn to about seven to 10 banks. M&A is believed to help dealing with current problems of local banks. But one should also remember that merger of weak banks or acquisitions of weak banks by strong banks may results in the bigger size of a few State-owned commercial banks, and eventually causing competition/concentration problems in the long run. In that case, the whole banking system is threatened as it would be difficult for the government to monitor and control these banks. In addition, they would become too large to adapt to market changes, which is not good for the whole system.

In another instance, the gold market in Vietnam experienced a turning point when the Decree 24 on gold trading management, taking effect in May 2012, stipulates that gold bar trading is only permitted at gold firms and credit institutions licensed by the central bank. It is apparent that competition would be restricted as the Decree favours only a few large traders and thousands of small gold shops are no longer allowed to produce gold jewellery. Such monopoly might lead to rigid pricing failing to catch up with world market developments, leaving big chances for licensed commercial banks and gold firms to make colossal profits.

Sectoral Regulatory Policies

The root of many current economic problems has largely stemmed from the vague definition of the long-term development path of Vietnam – a socialist-oriented market economy, which is characterised by the existence of State monopolies.

State monopoly refers to the market situation when the State intervenes to shield large monopolistic or oligopolistic businesses, usually controlled or owned by the State, from the forces of market competition, and sometimes even the scrutiny of competition law.

Dominant position in the market is not bad *per se* as it stimulates enterprises to maximise their profits. The race to win the dominant position might even help to promote effective competition. Therefore, holding a dominant position is not banned by law. The Competition Law 2004 of Vietnam only prohibits abuse of dominant position, which causes harm to the competitive process.

With regard to restrictive business practices, there are two factors that determine whether enterprises abuse their dominant position in the market or not, which is a market share of over 30 percent in the relevant market or the ability to restrict competition considerably. However, due to the characteristics of Vietnam's State monopolies, the enforcement of Competition Law regarding restrictive business practices is further complicated. In fact, abuse of market dominance by State monopolies is more pernicious than similar conduct committed by private firms.

In Vietnam, the abuse of dominance by State monopolies typically involves access to essential facilities in sectors like telecommunications, energy, transport, etc. Strategic behaviours aimed at preventing the market entry of competitors by State monopolies are of special concern because of their adverse influence on the legislative process, such as lobbying for the imposition of market barriers. Vietnam's State monopolies are thus complicit in the implementation of the economic policies of the State and reciprocal relationships exist between the State and sectoral regulators.

One major consequence of such policies favouring SOEs is that the private sector and foreign investors have been placed at a disadvantage. However, as these are major industrial producers and exporters of manufactured goods, their disadvantageous position has weakened the country's international competitiveness. It is a fact that even though their importance in the national economy has declined, SOEs still occupy a strong position in many areas; enjoy preferable access to capital, land and other resources; and operate under soft budget constraints. SOEs have received favoured treatment and have been sheltered from global competition. This is a source of inefficiency for SOEs themselves and for the economy as a whole. And since 2006, SOEs have been allowed to reorganise and group into conglomerates (called State economic groups), which have affected the direction of economic policies in Vietnam and distorted the allocation of resources. The main concerns include the 'ask-give' mechanism that promotes rent-seeking granted from preferentials or business preferentials; and bureaucratic mechanism that does not take into account of international best practices in corporate management and huge investment from the State budget.

The Telecommunications Market

The most important legal document in this sector is the Law on Telecommunications, which came into effect on July 01, 2010, replacing the Ordinance on Post and Telecommunication dated May 23, 2003. The Law on Telecommunications governs telecommunications activities relating to investment and business in the telecommunications sector. The Government, on 6 April, 2011, promulgated the Decree No. 25/2011/ND-CP, detailing and providing guidelines for the implementation of a number of articles of the Law on Telecommunications of 2009 ("Decree 25"). In addition, there are also other subordinate guidelines issued by sectoral authorities.



The Ministry of Information and Communications (MIC) is the State body in charge of telecommunications. Chapter II on Telecommunications Business of the Law on

Telecommunications deals with telecommunications businesses; investment in telecommunications; competition among and ownership in telecommunications businesses. These provisions aim to boost competition and enable all economic sectors to do telecommunications business in an equal, fair and transparent environment, under the socialist-oriented market mechanism.

The telecommunications market in Vietnam is changing fast with great potential in accordance with the whole country development ever since Vietnam transformed into the market economy two decades ago. Initially, the telecommunications market had only one service provider, the Vietnam Post & Telecommunications Corporate (VNPT) (owning both MobiFone and VinaPhone, the two mobile phone networks at the time, besides the market for fixed line connections), which engaged in both network infrastructure management and other services. In 1995, when the new participation of SPT and VIETTEL (both government-owned companies) encouraged more competition, the market underwent a growth boom and consumers benefited as a result. However, VNPT remained virtually in a dominant position at that time. The second turning point was in 2003 when State monopoly was replaced by free competition, which means more players participating in the market. However, since then a number of foreign firms, such as Sweden's Comvik, South Korea's SK Telecom and most recently Russia's VimpelCom known for the brand Beeline have pulled out of the market.

The main reason for the withdrawal of foreign investors is that the telecommunications market is oligopolistic and State policies do not really support newcomers. As top three national telecom providers – Viettel, MobiFone, and VinaPhone – account for 95 percent of market share, even foreign companies with advantages of technology and huge capital cannot compete. The market is not truly competitive as in many cases, foreign companies are given limited frequency resources, putting them at a disadvantage during competition. Another factor is that Vietnam's telecom market is characterised by cut-throat price competition. Without State subsidies, it would be hard for these foreign companies to gain high revenues, hence discourage their development.

In such oligopolistic market, collusion between firms could be detrimental to consumers. In a recent case, Viettel, MobiFone and VinaPhone simultaneously increased their monthly subscription fee for 3G services by 20 percent and the fee for unlimited packages by 40 percent, which was approved by the Ministry of Information and Communications. Despite the announcement made by the Vietnam Competition Administration Department, which revealed that these companies did not violate Competition Law, the price hike undoubtedly caused harm to consumers' interests given that the price does not commensurate with the quality of the service. It is very much expected that the recent restructuring plan to separate MobiFone from VNPT may provide foreign investors the opportunity to invest in MobiFone through the

equitisation process; bringing a major change to the telecommunications sector. The step taken by the government is expected to break the existing monopoly and promote fair competition among market participants. In a more competitive environment, consumers will benefit the most in terms of wider choices, lower prices and better services. Nevertheless, much more is need to be done on the part of the government to remove barriers so as to engage stakeholders in the restructuring process and encourage market entry by private and foreign service providers.

The Transportation Market

The aviation market in Vietnam is an absolute monopolised one. Established in the 1950s, Vietnam Airlines (VNA) is currently the national flag carrier and holds a dominant position in the market for air passenger transport. Until the end of 2013, the total market share of Vietnam Airlines is 61.4 percent meanwhile that of its main competitor, Vietjet Air is 25 percent. The most immediate consequence of this monopoly is that VNA has a power in setting the fares high, which are not necessarily in accordance with increasing quality. Such price hikes will not only affect the interests of individual passengers but will also raise other enterprises' expenses, which will be ultimately transferred to consumers.

Recently, the equitisation plan of VNA has been approved by the Prime Minister. Notably, the State would continue holding a 75 percent stake in Vietnam Airlines. It may be good from the economic perspective, which is to raise financial capability of the company but bad from the competition perspective as it does not bring a significant change to the competitive process in the market. Undoubtedly, consumers are the first to benefit from a more competitive environment, especially when Vietnam Airlines has dominated the market for a long time. With the existence of competition, passengers can have more choices and better-quality services that suit their needs as well as their financial capability.

Likewise, in the railway industry, Vietnam Railways holds a monopoly over the sector, controlling both infrastructure and the business. It is said that Vietnam Railways is highly vulnerable to corruption, as they use the maintenance fund to award contracts to one of their subsidiaries without bidding and regardless of the cost. In addition, Vietnam Railways even allows unlicensed companies to rent their train cars. Due to the monopoly status of Vietnam Railways, the railway sector in Vietnam lags behind other transportation sectors, such as aviation, road, etc. in terms of revenue, quality, infrastructure, employment generation or reliability. In fact, monopoly and subsidy are the main issues to be blamed for the lack of development of the railway sector.

The more the State subsidises the sector, the more it becomes old-fashioned and eventually it would contribute less to the whole economy. Hence, it is high time that monopoly should be abandoned and privatisation is often said to be the quickest and most effective measure to bring changes. However, to revive the Vietnamese railway

industry, it is of utmost importance that the government should work out solutions to increase productivity, improve infrastructure and upgrade services.

The Energy Market

Transparency is essential to the contestability of any market. The issue related to the energy market is a lack of transparency in provision and distribution of essential goods, such as power and petrol. State subsidies are commonly-used protectionist measures in the sector. 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 toward market levels. According to the recent paper entitled “Green Growth and Fossil Fuel Fiscal Policies in Vietnam- Recommendations for a Roadmap for Policy Reform”, which was issued by the UNDP (United Nations Development Programme), Vietnam’s energy prices are low as compared to other countries in the region.



However, to be more competitive compared to other countries, Vietnam is supposed to eliminate fossil fuel subsidy so as to reduce the fiscal burden for the State budget, enhance energy efficiency and security, and reduce negative environmental and health impacts, etc. The intervention of the Government should be only confined to ensuring energy security, macroeconomic stability and harmonisation of all stakeholder benefits. Therefore, efforts must be made to address the core obstacles to private and foreign investments into the energy sector.

With regard to the petrol market, in many cases the price is not in line with the markets due to the high concentration of dominant enterprises. In fact, the main import-export activities are mostly done by ten (10) enterprises, which have a network of retail shops and distribution channel through general agents and agents engaging in this industry all over the country. Petrol and oil, being an essential item which could possibly have a widespread and far-reaching effect to other industries, serves as the lifeline of each country in terms of national economy and defense. Like many countries, in Vietnam, the industry has oligopolistic market structure and is under “strict price supervision” for the purpose of price stabilisation.

In the power market, the Electricity of Vietnam (EVN) is the sole distributor in Vietnam and accounts for 55 percent of the country generation capacity or up to 70 percent market share. It is anticipated that the corporation will continue to control a majority

stake in the nation's market for the next ten years. The distribution monopoly can only be eased when the market becomes more competitive and more large investors enter into it. Since January 2012, Vietnam has taken the very first steps to end electricity monopoly by proposing to apply a competitive power market mechanism, under which various companies can compete to win the right to generate and sell electricity. The process is ongoing though a suitable model for such a competitive market is still not worked out yet. Without streamlined and drastic solutions on the part of the government, it is likely that monopoly will still continue, harming the interests of consumers and the national economy as a whole. The first and foremost task is to establish an independent electricity regulatory authority with full-fledged power for more effective supervision and monitoring of the competitive market as of now the current management rests on the Electricity Regulatory Authority of Vietnam under the purview of the Ministry of Industry of Trade.

4. *Unfair Competition*

Unlike practices in restraint of competition, in the Competition Law 2004 of Vietnam, unfair competition practices are defined on the basis of whether they are going against “business ethics” and whether they have as objectives the infringement of the interests of some specific target groups. According to Article 3.4 of the Law, unfair competition practices mean “competitive practices of an enterprise during the business process, which are contrary to the general standards of business ethics and which cause or may cause damages to the state interests, the legitimate rights and interests of other firms or consumers.” From its Article 40 to Article 48, the Competition Law lists out and describes specific traits of prohibited unfair competition practices, namely: (i) Misleading instructions; (ii) Infringement of business secrets; (iii) Coercion in business; (iv) Disparagement of other firms; (v) Disrupting business activities of other firms; (vi) Advertisement for purposes of unfair competition; (vii) Promotions for purposes of unfair competition; (viii) Discrimination by associations; and (ix) Illegal multi-level selling of goods.

General Awareness

However, though the Law on Competition took effect in 2005, only 1.6 percent of surveyed enterprises said that they fully understand the law, while 92 percent said they are aware but not clear. Meanwhile, more than 70 percent of enterprises have not established their own legal divisions, making it difficult for them to fight against unfair competition. It is a fact that unfair competition in businesses is on the rise and is becoming complicated. Sanctions applied to unfair competition practices have not been strong enough.

In addition, there are not enough officials in charge of monitoring and dealing with unfair competition practices in the Vietnam Competition Administration Department. As a recent update, the Decree 71/2014/ND-CP stipulating regulations for dealing with violation of competition matters, which came into effect on September 15, is much hoped to impose higher penalties in the form of warnings and fines. 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.

The Milk Market

The milk market in Vietnam is said to be quite distorted. Vietnamese consumers seem to favour foreign milk powder brands as these accounts for up to 80 percent of the volume of the entire milk market. A study conducted by the Consumer Protection Division, under the Vietnam Competition Administration Department found the prices of imported powder milk in Vietnam to be 20 to 40 percent



higher than that in other Asian countries. In many cases, the input price did not increase but milk prices in the market had risen at a very high rate.

One competition distortion pointed out in the study is that most of foreign milk firms authorised a local companies to exclusively import and distribute their products in Vietnam. That practice evidently reduces the opportunities to import and distribute milk products of potential market players, hence, significantly restricts the number of importers and distributors of imported milk brands. Besides, milk importers and distributors tend to invest a huge amount in advertisements, which defeats local milk companies. Due to the lack of competition in the market, the price is usually set high that causes consumers to suffer the most. Besides, due to the lack of information about prices and product quality, it is very hard for consumers to choose between different products.

Multi-level Marketing (MLM)

According to statistics by the Ministry of Industry and Trade, the total number of people engaged in MLM in Vietnam comes up to approximately one million. This is not a small number, especially given that a lot of fraudulent practices of MLM companies have recently been uncovered. MLM is an advanced and modern sales form allowed in many countries in the world. However, when entering Vietnam, it has become an unfair competition act undertaken by some unscrupulous people. To be more competitive on the market, instead of encouraging participants or agents to sell products for distributors and earn money based on commission, they entice as many people to join the programme as possible by supplying false information on the benefits of participation as well as the utilities of goods. Profits, or rather economic rents, thus are not gained through selling any product or service but by recruiting more people into the network. In many cases, agents are also required to obtain a huge sales volume themselves and pay high commissions.

The Steel Market

In the steel market in Vietnam, steel producers are facing a hard time as the demand for consumption and investment reduces and the real estate market remains stagnant. High level inventory, increasing material costs together with fierce competition from cheap Chinese products are some of the key factors to be blamed. However, in any case, the act of steel producers reducing steel price lower than production cost is not justifiable. Actually, it is rather an unfair competition act that could distort the market as local competitors are eliminating each other and putting themselves into further losses.



5. Conclusions and Recommendations

All things said and done, it is evidently necessary to eliminate competition distortions, so that a healthy and favorable economic environment can be realised in Vietnam where all business entities can benefit from a level playing field. This is the reason why the adoption of a Competition Law is essential to regulate firms' conducts, prohibit restrictive business practices and unfair competition practices, which impede the competitive process and hamper the legitimate rights and interests of the State, other market players as well as consumers. However, having a Competition Law does not necessarily mean increased competition and competitiveness. Effective implementation of the law is only conducive to the development of a market-based economy driven by a vibrant private sector.

To promote industrial efficiency and economic growth, it is important that a Competition Policy be adopted in Vietnam, or at least competition principles being imbibed throughout the policy-making process, at all stages and levels. A National Competition Policy would focus on boosting the competitive business environment in which firms operate and ensure favourable outcomes. All other economic policies then need to be harmonised and linked to competition policy.

The greatest impediments to effective implementation of competition law and policy are the lack of political commitments, and the political and economic influence of entrenched interest groups. In a country where State monopolies prevails like Vietnam, the government is often caught in a conflict of interests when it comes to State enterprise reform and privatisation. Therefore, competition advocacy – advising, influencing, and participating in government economic and regulatory decision-making to promote more competitive industry infrastructure, firm behaviour and market performance – plays an important role to prevent such behaviour or at least subject it to greater accountability, transparency and public consultation.

In this regard, our main recommendations for the time being are as follows:

- The Vietnamese competition authorities (the VCAD and the VCC) should be independent and insulated from political influence. It should become a single ministerial body and be separated from the MoIT. This would bring about a powerful and capable enforcement body dealing with the anti-competitive

behaviours of firms, especially that conducted by State monopolies. In addition, this would help the Vietnamese competition authorities to keep up with the continuing development and greater involvement of State monopolies in the market.

- It is also important that the supervision and monitoring tasks of relevant government agencies be enhanced. Policy-makers should be also be made aware of the anti-competitive outcomes of their decisions through the use of more rigorous competition advocacy, either by the competition authorities, research institutions, think tanks or civil society organisations.
- 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 and
- Sanctions must be punitive enough to deter and punish enterprises from wrong-doings and protect the consumers and other competitors.

