



LEGAL UPDATE

COMPETITION LAW WILL IMPACT M&A ACTIVITIES AND OFFSHORE COMPANIES

On 12 June 2018, the Competition Law 2018 (**Competition Law 2018**) was adopted by the National Assembly. The law shall be effective from 1 July 2019.

One of the most important points is that the Vietnamese competition authorities in the future will no longer focus only on market share conditions, but they could also prohibit competition-restricting agreements and decide that an economic concentration is not allowed in case these *have or potentially have the effect of significantly restricting competition in the (Vietnamese) market*. This is expected to have an impact on mergers, consolidations, acquisitions, and joint ventures even when parties are established offshore.

The Competition Law 2018 will also be applicable to foreign companies, with or without a presence or subsidiary in Vietnam.

Below you will find the most significant changes.

1. Market Share

The Competition Law 2018 provides that for the determination of the market share on the relevant market, sales and purchase revenue, as well as volume of goods and services sold and purchased, will be relevant. For enterprises operating less than 1 year, this shall be calculated from the start date to the date of calculation of market share.

2. Dominant Position

Currently an enterprise is considered to have a dominant position if it has at least a market share of 30% and is capable of substantially restraining competition.

The Competition Law 2018 splits this and an enterprise is considered to have a dominant position if it has a market share of at least 30% or it has a '*substantial market power*'. To define this substantial market power, the authorities will look at various criteria, such as technology power, financial strength, IP rights, advantages in technology and technical infrastructure, etc.

The Competition Law already set out when 2-4 enterprises would have a dominant market position. New is that now

also for 5 enterprises a percentage is given, being 85% or more.

3. Agreements Restricting Competition

3.1 Assessment

The Competition Law 2018 lists again agreements that can restrict competition, such as those on fixing price and division of outlets. Some agreements are always prohibited. However, different from the Competition Law 2004, the market share is not important, but rather the fact that the agreements *cause or may cause substantial anti-competitive effects on the market*.

In addition to the agreements restricting competition set out in the Competition Law 2004, the Competition Law 2018 lists 3 additional ones, being agreements:

- preventing transactions with other organisations or individuals;
- restraining/restricting product market; product supply; services supply of other individuals; organisations and enterprises; and
- restricting competition in general.

These agreements will be prohibited if they *have or potentially have the effect of significantly restricting competition in the market*. This condition will be evaluated by the National Competition Commission based on factors such as the market shares of the enterprises participating in the agreements, barriers to market entry or expansion, and the increase in costs or time spent by customers.

In addition, the Competition Law 2018 distinguishes explicitly between horizontal and vertical anti-competitive agreements.

3.2 Exemption

An agreement can be exempt from the competition-restricting classification when it:

- Promotes technical and technological advances, raising the quality of goods, services;
- Increases the competitiveness of Vietnamese enterprises on the international market;
- Promotes the single application of quality standards and technical norms of product categories; or



- Agrees on conditions for contract performance, goods delivery and payment, which are not related to prices and price elements.

4. Economic Concentration

4.1 Definition

Under the Competition Law 2004, an economic concentration of enterprises is prohibited if the enterprises have a combined market share of 50% or more in the relevant market. The Competition Law 2018 has narrowed the scope and stipulates that an economic concentration will be prohibited if it causes or potentially can cause a significant impact to competition in Vietnam, and this impact cannot be remedied. This means that not only horizontal transactions will be covered by the Competition Law, but also vertical and mixed transactions.

4.2 Impact Assessment

The assessment of the significant impact of economic concentration on competition shall be based on various criteria. New is that it is possible to assess the positive impact of an economic concentration. For this, the authorities will consider the positive impact on the development of technology, science in accordance with policies and plans of state or on development of small and medium enterprises, or the increase in the amount of competition of Vietnamese enterprises in global market.

4.3 Broader Scope

The Competition Law 2018 will have a broader scope, and therefore impact, than the current law. Reason for this is that anti-competitive activities that are performed abroad but have an impact on the Vietnamese market will also be governed by the Competition Law 2018. There will be an impact on M&A deals between offshore entities and indirect equity interests in a Vietnam-based entity as these deals will fall under the oversight of the Vietnamese competition authorities.

5. Notification Economic Concentration

Currently, notification is required if the parties have a combined market share between 30-50% in the relevant market. Under the Competition Law 2018, the thresholds for notification will be flexible as the Government will be

responsible to provide and adjust the thresholds for total assets, total revenues, and total value of the transaction.

6. Leniency policy

There is also good news, as a leniency policy is introduced in this Competition Law 2018. So, in case an enterprise has engaged in an anti-competitive agreement, it may be entitled to leniency if it voluntarily reports this participation to the competent authority.

7. Penalties

The Competition Law 2004 regulates a general penalty for acts violating the law, being 10% of the total turnover of the violator in the financial year preceding the year in which the prohibited practice took place. In the Competition Law 2018, the maximum fine imposed to a breach in economic concentration will be 5% instead of the current 10%. The maximum fine imposed in case of unfair competition is VND2 billion and the maximum fine imposed in case of agreements restraining competition, abusing a dominant market position or monopoly position remains 10%.

8. Competent Authority and Publication of Decisions

The Competition Council and the Competition Authority shall be transformed into the National Competition Authority (NCA) which shall be the authority to receive, resolve and appraise an application dossier of exemption. Major decisions on granting an exemption or on settlement of a competition case will be published on the NCA's website within 90 days after the decision has become effective. The idea of more transparency in settlement of competition cases is welcomed and could improve compliance with the law. However, it is not clear what the meaning will be of these decisions for future cases and if old decisions will still be published.

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