

ANTI-BID RIGGING LAWS AND THEIR ENFORCEMENT IN VIETNAM: CRITICAL FAILURES AND REMEDIES

Submitted by

TRAN THANH TAM

LLB; BA

**A research proposal submitted in total fulfilment
of the requirements for the degree of
Master of Law (By Research)**

School of Law

College of Arts, Social Sciences and Commerce

La Trobe University

Bundoora, Victoria 3086

March 2017

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ABSTRACT

This thesis seeks to answer the questions of what the critical failures of anti-bid rigging laws and their enforcement in Vietnam are, and what should be done about them. The analysis undertaken to answer these questions reveals that failures of anti-bid rigging laws and their enforcement in Vietnam result both from deficiencies in the law and law enforcement mechanisms, and also from a range of underlying socio-economic and political issues.

The provisions governing bid rigging in the *Competition Law*, the *Public Procurement Law* and the *Penal Code* all contain shortcomings and ambiguities. More fundamentally, there are also inconsistencies and conflicts between these laws. Moreover, Vietnamese public procurement legislation and the administrative practices of public procurers unintentionally facilitate the formation and stability of bid rigging arrangements. Administrative practices, in particular, widen the scope of bid rigging. Of most concern is the practice of imposing unnecessary and excessive selection criteria leading to the limited participation of bidders. This is pervasive in Vietnam.

The analysis undertaken in this thesis also reveals that Vietnamese enforcement mechanisms are as problematic as the law in contributing to failures to detect and prevent bid rigging. Of greatest concern here is the quality and nature of the connections between and cooperation amongst Vietnamese competition authorities and public procurement agencies. While such cooperation is vital to strengthen anti-bid rigging enforcement mechanisms, this thesis argues that neither Vietnamese public procurement agencies nor Vietnamese competition authorities have successfully fulfilled their roles in cooperating to fight bid rigging.

The thesis also considers the context in which anti-bid rigging regulation operates. It demonstrates that challenges facing bid rigging enforcement arise not just from doctrine but also result from other issues, often closely connected with the socioeconomic and political context in Vietnam.

Given identified deficiencies in the anti-bid rigging effort in Vietnam, this thesis considers law reform alternatives. It suggests a number of critical additions and modifications to the law. In relation to anti-bid rigging enforcement, enhancing the cooperation between competition and public procurement authorities, as well as developing effective tools to detect and deter bid rigging, is recommended as essential.

STATEMENT OF AUTHORSHIP

Except where reference is made in the text of the thesis, this thesis contains no material published elsewhere or extracted in whole or in part from a thesis submitted for the award of any other degree or diploma.

No other person's work has been used without due acknowledgement in the main text of the thesis.

The thesis has not been submitted for the award of any degree or diploma in any other tertiary institution.

Tran Thanh Tam

Date: 2 March 2017

ABBREVIATIONS

ADB	Asian Development Bank
AMA	<i>Japanese Antimonopoly Act</i>
BRIAC	Bid Rigging Indicator Analysis System
CIBD	Certificate of Independent Bid Determination
CIPD	Certificate of Independent Price Determination
CMA	UK Competition and Markets Authority
CUTS	Centre for Competition, Investment and Economic Regulation
DOJ	US Department of Justice
ECJ	European Court of Justice
EU	European Union
FAR	<i>Federal Acquisition Regulation</i>
GDP	Gross Domestic Product
ICN	International Competition Network
FTC	US Federal Trade Commission
JFTC	Japan Fair Trade Commission
KFTC	Korean Fair Trade Commission
KONEPS	Korean online e-procurement system
ODA	Official Development Assistance
OECD	Organisation for Economic Co-operation and Development
MOIT	Ministry of Industry and Trade of Vietnam
PPA	Vietnam Public Procurement Agency
PPL	<i>Vietnamese Public Procurement Law</i>
SMEs	Small- and Medium-sized Enterprises
SOEs	State-owned enterprises
TFEU	<i>Treaty on the Functioning of the European Union</i>
UK	United Kingdom
UNCITRAL	United Nations Commission on International Trade Law
UNCTAD	United Nations Conference on Trade and Development
USC	<i>United States Code</i>
VACC	Vietnamese Association of Construction Contractors
VCA	Vietnamese Competition Authority
VCC	Vietnamese Competition Council
VCC	<i>Vietnamese Civil Code</i>
VCL	<i>Vietnamese Competition Law</i>
VND	Vietnamese Dong
VPC	<i>Vietnamese Penal Code</i>

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LINGUISTIC AND CITATION NOTES TO READERS

In reading this thesis, readers should note the following:

- Unless otherwise indicated, all translations of Vietnamese materials (both written and oral) were undertaken by the author.
- Except when in other authors' quotations, all Vietnamese words are written in the absence of diacritic marks (for example, 'Giao Trinh Luat Canh Tranh' instead of 'Giáo Trình Luật Cảnh Tranh').
- Most Vietnamese authors' names follow standard Vietnamese practice, which is in reverse order to English names. Specifically, a person's name is written as follows: last name, followed by middle name(s) (if any), and then first name. For example: Tran Thanh Tam (Tran is the last name, Thanh is the middle name, and Tam is the first name). Newspaper journalists may use their pen names, which include a middle name followed by a first name (for example, Nhat Minh).
- This thesis follows the citation rules contained in the Melbourne University Law Review and the Melbourne Journal of International Law, *Australian Guide to Legal Citation* – AGLC (3rd ed, 2010).

ACKNOWLEDGEMENTS

I am in debt to many people and organisations that have made this thesis possible.

My first thanks go to my supervisors, Dr David Wishart and Dr John Bevacqua for their tremendous support during my candidature, especially for their reviews of the manuscript in its various stages of development. Their forbearance, patience as well as academic experience have been invaluable to me. They were also very pleasant to work with.

During this project, I received comments and suggestions from many people other than my supervisors. I thank Professor John Gillespie and all participants at the conference held by the Asian Law Centre of the University of Melbourne and the Asia-Pacific Business Regulation Group of Monash University in August 2016 for their comments. I thank Dr Bui Ngoc Son - National University of Singapore for his useful comments in the preparation of my first publication draft.

I also offer my thanks to 17 Vietnamese state officials and experts who have been working in the Vietnamese Competition Administration Department, the Vietnamese Competition Council, the Vietnamese Association of Construction Contractors, the Economic Court – Ho Chi Minh City People’s Court, the Vietnam Public Procurement Agency, Department of Planning and Investment in Ho Chi Minh city and An Giang province as well as some universities in Vietnam. I thank them all for their participation in my interviews.

My study in Australia was funded by the Australia Awards. My field trip to Vietnam and numerous international conferences I attended was funded by La Trobe Law School. I thank them all for their generous support.

My appreciation also goes to my home university – Foreign Trade University – for their encouragement and support.

To my friends in Australia and in Vietnam for their friendship and support.

Finally, as always, to my mom in Vietnam for her love and care.

CHAPTER 1: INTRODUCTION

Collusion¹ in the public procurement market is a multi-faceted phenomenon generally considered to fall within the sphere of three different laws: competition law, public procurement law and criminal law. The effective integration of these laws is crucial to the success of a fight against bid rigging.

Under competition law, bid rigging can be defined as a form of hard-core cartel² where the bidding companies predetermine the winner among themselves before the tendering process actually begins. Accordingly, bidding companies engaged in bid rigging may engage in behaviours such as bidding at prices higher than the designated winner or submitting bids including special terms that are definitely unacceptable to the purchaser. Alternatively, they may decide not to join the bid or even withdraw the submitted bid so that the designated cartel member will win the bid. In return, the losing bid rigging participants will typically be reimbursed by the winning bidder via either monetary compensation or by subcontracting involvement in the project. They also may agree that the losing bidders will in turn be the winner in future bids.

Bid rigging may lead to artificial price increases of goods or services purchased by public procurers. Empirical research reveals that such conspiracies may raise prices by more than 20 per cent, which is even higher than other cartel behaviour such as price-fixing or market-sharing.³ Hence, bid rigging is seen as one of the most pernicious infringements of competition law, injuring not only the public procurer but also the final users of public services and taxpayers generally.

¹ It has also been referred as to bid rigging or collusive tendering.

² As stated by OECD:

[A] ‘hard core cartel’ is an anticompetitive agreement, anticompetitive concerted practice, or anticompetitive arrangement by competitors to fix prices, make rigged bids (collusive tenders), establish output restrictions or quotas, or share or divide markets by allocating customers, suppliers, territories, or lines of commerce.

OECD, *Recommendation of the Council Concerning Effective Action against Hard Core Cartels*, C(98)35/FINAL (14 May 1998) 3 <<http://www.oecd.org/dataoecd/39/4/2350130.pdf>>.

³ Office of Fair Trading (OFT) [UK], ‘The Development of Targets for Consumer Savings Arising from Competition Policy’ (Economic Discussion Paper 4, OFT 386, June 2002) 3; Luke M Froeb, Robert A Koyak and Gregory J Werden, ‘What Is the Effect of Bid-rigging on Prices?’ (1993) 42 *Economics Letters* 419; Jon P Nelson, ‘Comparative Antitrust Damages in Bid-Rigging Cases: Some Findings from a Used Vehicle Auction’ (1993) 38 *Antitrust Bulletin* 369.

In addition to being an anticompetitive behaviour, bid rigging is an irregularity of the tendering process under public procurement rules on the basis that it prevents public procurers, either local or central, from obtaining the best value for money. Bid rigging is accordingly the subject of administrative prohibition through enactment of various types of competition and public procurement laws.

Besides being administratively prohibited by competition and public procurement law, bid rigging conduct is also subject to criminal sanctions. However, there is little jurisdictional uniformity in the approaches to criminalisation of bid rigging behaviours. Besides being criminalised as a competition law offence, bid rigging conduct is sometimes condemned as a fraud offence or a public procurement offence. In some countries, it can even be prosecuted under two offences at the same time: as an antitrust law offence and as a fraud offence.⁴

Given the involvement of competition, public procurement and criminal laws in seeking to tackle bid rigging, the effectiveness of any regulatory regime needs to be considered through all three lenses. Effective control requires not only effective cartel law, leniency programs,⁵ enforcement procedures, institutions and appropriate sanctions but also pro-competitive public procurement rules with appropriate levels of transparency and close cooperation between public procurement agencies, competition authorities and criminal law enforcement.⁶ This thesis applies this multi-faceted lens to assess the Vietnamese bid rigging regulatory approach.

Much anecdotal evidence shows that bid rigging is prevalent in almost all economic sectors where public procurement takes place,⁷ and the Vietnamese public market is not exempt from such a practice. Indeed, it appears to be deeply entrenched in Vietnamese public procurement.

⁴ Dual prosecution mechanism can be seen in the US, the UK or Germany. See more at Chapter 2, section III.

⁵ Leniency program refers to an immunity from, or a reduction in penalty for antitrust violations in exchange for cooperation with the antitrust enforcement authorities. For an analysis of the leniency program in the Vietnamese public market, see Chapter 5, section III.

⁶ Robert D Anderson, William E Kovacic and Anna Caroline Muller, 'Ensuring Integrity and Competition in Public Procurement Markets: A Dual Challenge for Good Governance' in Sue Arrowsmith and Robert D Anderson, *The WTO Regime on Government Procurement: Challenge and Reform* (Cambridge University Press, 2011) 681, 703-716; John Temple Lang, 'Subsidiary and Public Purchasing: Who Should Apply Competition Law to Collusive Tendering and How Should They do It?' (1998) 4 *European Public Law* 55, 56.

⁷ Albert Sanchez Graells, 'Prevention and Deterrence of Bid Rigging: A Look from the New EU Directive on Public Procurement' in Gabriella M Racca and Christopher R Yukins (eds), *Integrity and Efficiency in Sustainable Public Contracts: Balancing Corruption Concerns in Public Procurement Internationally* (Bruylant, 2014) 171-98; Antonio Lopez Mino and Patricia Valcarcel Fernandez, 'Contracting Authorities Inability to Fight Bid Rigging in Public Procurement: Reasons and Remedies' in Gabriella M Racca and Christopher R Yukins (eds), *Integrity and Efficiency in Sustainable Public Contracts: Balancing Corruption Concerns in Public Procurement Internationally* (Bruylant, 2014) <<http://ssrn.com/abstract=2557008>> or <<http://dx.doi.org/10.2139/ssrn.2557008>>; Kai Hüscherlath, 'Economic Approaches to Fight Bid Rigging' (2012) 4(2) *Journal of European Competition Law & Practice* 185-91.

This has been corroborated through not only government reports⁸ and international academic studies⁹ but also media reports. Such bid rigging practices are particularly harmful as they may lead to the artificial price increase of goods or services in public procurement markets which account for around 22 per cent of Vietnam's GDP.¹⁰

More seriously, during the last two decades, a number of significant donations from developed nations and international institutions have been made to the Vietnamese government under the Official Development Assistance (ODA) program. The statistics of the ODA disbursements to Vietnam during the period from 2005 to 2014 show that the Vietnamese government received more than ten billion USD from major donors. Most of this aid money is used for infrastructure development and public procurement, where bid rigging is prevalent. Therefore, bid rigging combined with related corrupted practices not only negatively influence the efficiency of the ODA but also have potential to adversely affect the relationship between Vietnam and its major donors. Dealing effectively with bid rigging is, therefore, essential to maintaining and restoring the attractiveness of Vietnam as a destination for international aid and showing the commitment to donors to use public funds effectively.

I. Vietnam's anti-bid rigging laws

Bid rigging collusion in Vietnam is regulated by the *Vietnamese Competition Law* ('*Competition Law*' or VCL), the *Vietnamese Public Procurement Law* ('*Public Procurement Law*' or PPL) and the recently revised *Vietnamese Penal Code* ('*Penal Code*' or VPC).

The VCL was promulgated on 3 December 2004 in an effort to establish a legal framework for a more effective competitive economy as one of the mandatory requirements for Vietnam's accession to the World Trade Organization. The VCL was the outcome of a four-year drafting process with the technical support of the United Nations Conference on Trade and

⁸ Vietnam's Ministry of Planning and Investment, *Bao Cao Tong Hop Danh Gia Tinh Hinh Thuc Hien Luat Dau Thau* [Report on Assessment of Implementing the Public Procurement Law] (2012) 7 <<http://muasamcong.mpi.gov.vn/servlet/fileAttachment/FileDownload?fileId=407>>.

⁹ Martin Gainsborough, 'National Integrity Systems: Transparency International Country Study Report - Vietnam 2006' (Report, Transparency International, 2006) 25; David S Jones, 'Curbing Corruption in Government Procurement in Southeast Asia: Challenges and Constraints' (2009) 17 *Asian Journal of Political Science* 145, 154; David S Jones, 'Public Procurement in Southeast Asia: Challenge and Reform' (2007) 7 *Journal of Public Procurement* 3, 17.

¹⁰ This is the author's calculation based on data provided in the 2015 Report of Ministry of Planning and Investment on Implementation of Public Procurement Activities (unpublished document, on file with the author).

Development (UNCTAD) and the United Nations Development Program. While it is based on the model laws of UNCTAD and the World Bank as well as on the practical experiences of other countries, the VCL is principally patterned on the EU competition law model, particularly Articles 101 and 102 of the *Treaty on the Functioning of the European Union* (TFEU).¹¹

Article 8 of the VCL defines bid rigging as ‘an agreement in restraint of competition’ prohibited per se.¹² Like other jurisdictions such as the US, the EU and Australia, the enforcement of bid rigging is fully backed up by a system of sanctions as well as damages actions under the purview of the Vietnamese Competition Authority (VCA) and the Vietnamese Competition Council (VCC).

Given this comprehensive range of new regulatory mechanisms, it would be reasonable to expect that cartel infringements in general and bid rigging practices specifically would have come to light. However, there have been no bid rigging cases either investigated by the VCA or adjudicated by the VCC during the last ten years since the VCL came into effect on 1 July 2005. This is despite the evidence of the prevalence of such behaviour in the Vietnamese market as outlined above.

In tandem with competition law, bid rigging in Vietnam is also within the scope of the Vietnamese *Public Procurement Law*. A new *Public Procurement Law*, an amended version of the first *Public Procurement Law* as promulgated in 2005, was adopted in 2013. The current regulatory framework also references the US *Federal Acquisition Regulation* (FAR) and the model laws as well as guidelines promoted by international organisations such as The United Nations Commission on International Trade Law (UNCITRAL), the World Bank, the Asian Development Bank (ADB) and the Organisation for Economic Co-operation and Development (OECD).

On the basis that bid rigging is a form of private restriction of competition preventing public procurers from obtaining the best value for money, the current *Public Procurement Law* and

¹¹ Nguyen Thanh Tu, ‘Competition Law in Vietnam: A Paper or Young Tiger?’ (2012) 57 *The Antitrust Bulletin* 409, 415; Le Danh Vinh, Hoang Xuan Bac, Nguyen Ngoc Son, *Giao trinh Luat Canh tranh* [Textbook on Competition Law] (Hochiminh City National University, 2010) 59. See also, USVTC, *Competition Law Update* (2006) <<http://www.usvtc.org/updates/legal/PhillipsFox/CompetitionLawUpdate-July2006.pdf>>.

¹² The per-se rule in conjunction with the rule of reason are fundamental principles determining the legality of anti-competitive agreements. The per-se rule holds that certain anti-competitive agreements are so clearly economically harmful that they violate the law per se and therefore the courts or competition authorities will not consider any evidence of their reasonableness in a particular situation. For an analysis of this rule, see more at Jonathan M Jacobson, *Antitrust Law Developments* (ABA Publishing, 6th ed, 2007) 49-56; Howard Langer, *Competition Law of the United States* (Wolters Kluwer, 2nd ed, 2014) 38-40.

the relevant Decrees¹³ have built up a mechanism for handling this violation with the support of distinctive sanctions and competent public procurement bodies at both central and local levels. However, there have been only five official bid rigging cases adjudicated by the public procurement authority, all of which took place in just one of 63 provinces and cities in Vietnam. It is inconceivable that bid rigging behaviour would be confined to only one province, suggesting a lack of uniformity and effectiveness in the administration of the PPL. This, coupled with the overall very low number of official bid rigging cases, suggests that the PPL has been ineffective in combatting bid rigging.

In response to the wave of criminalising cartels and bid rigging around the globe, the recently revised *Penal Code* introduced criminal sanctions on individuals involved in bid rigging practices. Although this new regime has not been tested in practice,¹⁴ the assessment of factors constituting a bid rigging offence in the *Penal Code* also has revealed a number of shortcomings of this newly revised Code.¹⁵

Given the prevalence of bid rigging and the apparent failure of anti-bid rigging enforcement mechanisms in Vietnam, there is a need to examine all three current anti-bid rigging laws and their enforcement in the Vietnamese public market.

II. Literature review

While cartels have drawn much attention from Vietnam scholars,¹⁶ there has been very little written about bid rigging – a specific form of cartels. While studies of cartels may contribute

¹³ Under the Vietnamese legal system, Decrees are subordinate laws issued by the Government. One of their main functions is to give details and guide the implementation of Laws. See more at Article 19, *Law on Promulgation of Normative Legal Documents* 2015.

¹⁴ The revised Penal Code was enacted in 27 November 2015. However, its effect has been delayed by the National Assembly due to a number of technical errors and flaws. It is expected to be re-enacted by the end of 2017.

¹⁵ See Chapter 3, section III.

¹⁶ Nguyen Anh Tuan, 'A Review of Ten Years of Enforcement: Challenges and Prospects of the Vietnamese Cartel Regime' in Thomas Cheng; Sandra Marco Colino and Burton Ong (eds), *Cartels in Asia: Law and Practice* (Wolters & Kluwer, 2015); Nguyen Thi Nhung, *Phap luat dieu chinh cac thoa thuan han che canh tranh o Viet Nam hien nay* [Law Governing Agreement in Restraint of Competition in Vietnam] (Politics-Administration Press, 2012); Nguyen Thanh Tu, 'Competition Law in Vietnam', above n 11, 415; Nguyen Thi Van Anh, 'Mot so bat cap trong phap luat dieu chinh hanh vi han che canh tranh cua Viet Nam' [Several Shortcomings of Vietnamese Law on Competition Restriction Acts] (2011) 4 *Jurisprudence Journal* 3, 3-9; Mark Furse, 'Competition Law in Vietnam: A Critique' (2010) 33 *World Competition* 163, 168-70; Tran Thi Nguyet, 'Ve thoa thuan han che canh tranh' [Agreement in Restraint of Competition] (2008) 1 *State and Law Review* 47-54; Alice Pham, 'Development of Competition Law in Vietnam in the Face of Economic Reforms and Global Integration, The Symposium on Competition Law and Policy in Developing Countries' (2006) 26 *Northwestern Journal of International Law &*

to bid rigging literature from the perspective of preventing and detecting hard-core cartels, the absence of writings directed specifically at bid rigging constitutes a conspicuous gap in the existing literature. The prevalence of this behaviour in Vietnam, and the economic and social harms it causes outlined above, make a compelling case that this gap in the literature should be filled.

From the perspective of preventing cartels, some studies, including government reports, are in support of cartel criminalisation.¹⁷ It is argued that this mechanism would enhance deterrence of cartels, given that current administrative sanctions have not had a sufficiently deterrent effect.¹⁸ However, even among the advocates of criminalisation there is disagreement on the best approach. For example, while some strongly support putting criminal sanctions on both individuals and corporations,¹⁹ others argue that criminal sanctions should be imposed only on individuals, as administrative fines applied to corporations under the *Competition Law* may secure effective deterrence.²⁰ The latter view appears to have been accepted by Vietnamese regulators; the recently revised *Vietnamese Penal Code* introduced criminal sanctions on individuals involved in bid rigging collusion. This new regime, however, has not yet been tested in practice,²¹ and nature of the working arrangement between Vietnamese competition law enforcement authorities and criminal law enforcement authorities remain unclear. More specifically, how these authorities cooperate to identify and quantify the damage in bid rigging cases is still unknown.

In terms of cartel detection and enforcement, it has also been argued that leniency program should be granted to provide incentives for whistle-blowers within cartels to come forward.²² Following this suggestion, a leniency program is being developed under the aegis of Vietnam's

Business 547, 552-54; Vu Dang Hai Yen, 'Mot so van de ve thoa thuan han che canh tranh' [Some Issues Arising from Competition Restriction Agreements] (2006) 4 *Jurisprudence Journal* 3, 3-9.

¹⁷ Nguyen Anh Tuan, 'A Review of Ten Years of Enforcement', above n 16. See also Vietnam Competition Authority (VCA) and JICA, 'Review Report on Vietnam Competition Law' (2012) <<http://qlct.gov.vn/NewsDetail.aspx?ID=1429&CatID=244>>.

¹⁸ Nguyen Thi Nhung, above n 16, 211-213.

¹⁹ Ibid.

²⁰ Vietnam's Ministry of Industry and Trade, Official letter No 648 /BCT-PC on opinions on the revised Penal Code proposal (unpublished document, on file with the author) 5.

²¹ Doan Tu Tich Phuoc, 'Cartels targeted in Penal Code', *Vietnam Investment Review* (Vietnam), 25 Jan 2016, 10.

²² Nguyen Anh Tuan, 'Co so Ly luan Va Thuc Tien Ap Dung Chinh Sach Khoan Hong Theo Luat Canh Tranh Cua Mot So Nuoc Tren The Gioi va De Xuat Bo Sung Cho Viet Nam' [Theoretical Framework and Practices for Applying the Leniency Programme under Several Competition Legislations and Recommendations for Its Application in Vietnam] (2013) 1 *Legal Sciences Journal* 45; Phan Cong Thanh, Chinh sach khoan hong pha vo Cac-ten [Leniency Programme for Breaking Cartels] (2008) 2(117) *Journal of Legislative Research* 55; Nguyen Thi Nhung, above n 16, 211-213.

Ministry of Industry and Trade.²³ This program is still in development; as such, there have been no studies examining its effectiveness in unearthing cartel behavior such as bid rigging. However, several studies outside Vietnam suggest that this program may not be effective in the context of bid rigging given the weak enforcement against bid rigging in the Vietnamese public procurement market.²⁴

The seminal research on bid rigging under the VCL is Son's 2008 study.²⁵ Son identifies two traits in bid rigging practice in Vietnam. First, the detected bid rigging cases sometimes involve a mixture of horizontal and vertical collusion. While horizontal bid rigging takes place among bidding companies only, vertical bid rigging refers to collusion between bidding companies and public procurers. In the latter case, public procurers typically use their public powers, for example, to provide confidential information regarding public tenders so that one or some particular bidders win the bid. In return, these public officials may receive a bribe from the bidders. The vertical bid rigging agreement between public procurers and bidders is reached first, and then a horizontal agreement is reached with fellow bidders to give the appearance of authentic competitive bidding. In other words, collusion in bid rigging cases sometimes involves corruption. While the former falls within the ambit of the *Competition Law*, the latter is governed by the *Public Procurement Law*. Son argues that this reality makes it challenging for the newly established Vietnamese Competition Authority to combat complex collusive

²³ Doan Tu Tich Phuoc, above n 21, 10.

²⁴ Catarina Marvao and Giancarlo Spagnolo, 'What Do We Know about the Effectiveness of Leniency Policies? A Survey of the Empirical and Experimental Evidence' in Caron-Beaton-Wells and Christopher Tran (eds), *Anti-Cartel Enforcement in a Contemporary Age: Leniency Religion* (Hart Publishing, 2015) 57, 80; SR Koh and J Jeong, 'The Leniency Program in Korea and Its Effectiveness' (2014) 10 *Journal of Competition Law and Economics* 161; Jeroen Hinloopen and Adriaan R Soetevent, 'Laboratory Evidence on the Effectiveness of Corporate Leniency Programs' (2008) 39 *The RAND Journal of Economics* 607; Joe Chen and Joseph E Harrington, 'The Impact of the Corporate Leniency Program on Cartel Formation and the Cartel Price Path' (2007) 282 *Contributions to Economic Analysis* 59; Cécile Aubert, Patrick Rey and William E Kovacic, 'The Impact of Leniency and Whistle-Blowing Programs on Cartels' (2006) 24 *International Journal of Industrial Organization* 1241; Evguenia Motchenkova, 'The Effects of Leniency Programs on the Behavior of the Firms Participating in Cartel Agreements' [2004] *Tilburg University*; Eberhard Feess and Markus Walzl, 'An Analysis of Corporate Leniency Programs and Lessons to Learn for US and EU Policies' (METEOR, Maastricht Research School of Economics of Technology and Organizations, 2004) <<http://acle.uva.nl/binaries/content/assets/subsites/amsterdam-center-for-law--economics/cr-meetings/2005/working-papers-2005/walzl.pdf>>; Giancarlo Spagnolo et al, 'Divide et Impera: Optimal Deterrence Mechanisms against Cartels and Organized Crime' [2003] *University of Mannheim* <<http://citeseerx.ist.psu.edu/viewdoc/download?doi=10.1.1.456.7149&rep=rep1&type=pdf>>; Massimo Motta and Michele Polo, 'Leniency Programs and Cartel Prosecution' (2003) 21 *International Journal of Industrial Organization* 347.

²⁵ Nguyen Ngoc Son, *Co che Canh tranh va Su thong Dong trong Dau thau theo Luat canh tranh* [Competition Mechanisms and Acts of Bid Rigging in Vietnam Competition Law] (2006) (2) (33) *Khoa hoc phap ly* [Legal Sciences] <http://www.hcmulaw.edu.vn/hcmulaw/index.php?option=com_content&view=article&id=360:ccctvsttttltct&catid=104:ctc20062&Itemid=109>.

behaviour: the VCA is empowered only to investigate and scrutinise the horizontal element, which is difficult to disentangle from the vertical element. It is likely highly that these mixed collusive agreements are still undetected in practice, given that the VCA seems ill-equipped to deal with such cases.

Second, Son argues that most bid rigging cartels arise among state firms. This is because state monopolies take advantage of their substantial capital, strong monopoly position and collaborative relationship with other state firms to become involved in bid rigging conspiracies.²⁶ In addition, state firms have recourse to close personal connections with competent public procurers, enabling them to acquire confidential information about the relevant bidding packages.²⁷ Gillespie explains this close relationship by citing the statement of one of the managers in a Vietnamese State-owned company as follows:²⁸

Even after có phần hoa [privatization] the government is still involved in making high-level appointments in the firm and the construction department is still the firm's controlling body. But in reality we have known each other for such a long time we are like brothers and I don't have a cấp trên [higher level] that I report to. The firm consults (xin ý kiến) about large construction tenders but when we meet we mix talk about business with talk about our families and other things that have nothing to do with business.²⁹

While Son deals with competition law, current scholarly work that deals with public procurement law is scant. This is surprising given that, as outlined above, bid rigging is deeply entrenched in Vietnamese public procurement.³⁰ One interesting legal³¹ and economic³² issue

²⁶ Tran Thang long, *The Application of Competition Law to Vietnam's State Monopolies: A Comparative Perspective* (PhD Thesis, La Trobe University, 2011) 263.

²⁷ The close relationship between senior managers of State-owned companies and provincial and government procurers has been established during the command economy and reinforced through regular social meetings. See more at John Gillespie, 'Managing Competition in Socialist-transforming Asia: The Case of Vietnam' in Michael W Dowdle, John Gillespie and Imelda Maher (eds), *Asian Capitalism and the Regulation of Competition-Towards a Regulatory Geography of Global Competition Law* (Cambridge University Press, 2013) 164, 178.

²⁸ John Gillespie, 'Localizing Global Competition Law in Vietnam: A Bottom-Up Perspective' (2015) 64 *International and Comparative Law Quarterly* 935, 948.

²⁹ Ibid.

³⁰ Gainsborough, above n 9, 25; Jones, 'Curbing Corruption', above n 9, 154; Jones, 'Public Procurement in Southeast Asia', above n 9, 17.

³¹ William E Kovacic, *The Antitrust Government Contracts Handbook* (Chicago, ABA Section of Antitrust Law, 1990) and PA Trepte, 'Public Procurement and the Community Competition Rules' (1993) 2 *Public Procurement Law Review* 93, 114.

³² George J Stigler, 'A Theory of Oligopoly' (1964) 72 *Journal of Political Economy* 44, 48; Gian Luigi Albano et al, 'Preventing Collusion in Procurement' in Nicola Dimitri, Gustavo Piga and Giancarlo Spagnolo (eds), *Handbook of Procurement* (Cambridge University Press, 2006) 347, 350-58, R Preston McAfee and John McMillan, 'Bidding Rings' (1992) 82 *American Economic Review* 579; OFT, *Assessing the Impact of Public*

identified in many overseas studies is the proposition that public procurement regulation itself is an integral factor in the formation and stability of bid rigging. For instance, while the principle of transparency embedded in most of the public procurement rules contributes to deterring corruption and enhancing the fairness of public procurement mechanisms, it is also recognised as a catalyst for bid rigging practices.³³ As identified by the OECD:

In certain instances, however, transparency is inconsistent with the need to ensure maximum competition within the procurement process. Transparency requirements can result in unnecessary dissemination of commercially sensitive information, allowing firms to align their bidding strategies and thereby facilitating the formation and monitoring of bid rigging cartels.³⁴

In addition, opaque and unnecessary evaluation requirements used by public procurers may lead to restricted bidder participation and thus facilitate bid rigging conspiracies.

There has not been conclusive research on whether and how the Vietnamese public procurement rules facilitate bid rigging collusion. However, a few studies on the 2005 *Public Procurement Law* have made suggestions. For example, some researchers posit that the emphasis on transparency in the *Public Procurement Law* may inadvertently contribute to the formation and stability of bid rigging.³⁵ Similarly, Tuan and Debenham³⁶ point out that the tender evaluation method in the Vietnamese procurement system – which is beneficial to only large, experienced bidders – may unintentionally encourage collusion by decreasing the number of small- and medium-sized enterprises (SMEs) participating in the tender. It should be noted that while the insights provided by the authors of these studies are useful, viewed collectively they fall short of providing an overall view of factors facilitating bid rigging. Moreover, these studies were conducted before the new *Public Procurement Law* took effect on 1 July of 2014, hence there is a need to re-examine their findings in the new regulatory environment.

Sector Procurement on Competition (2004) 79-81; Paul Klemperer, 'Competition Policy in Auctions and "Bidding Markets"' (Working paper, 2005) <<http://www3.nd.edu/~tgresik/IO/Klempererantitrust.pdf>>.

³³ OECD, *Roundtable on Competition Policy and Public Procurement* (2011) 16 <<https://www.oecd.org/daf/competition/sectors/48315205.pdf>>.

³⁴ Ibid.

³⁵ Sangeeta Khorana, 'Potential Accession to the GPA: Cost-Benefit Analysis on Vietnam' (Paper presented at the 5th International Public Procurement Conference, Seattle USA, 17-19 August 2012) <<http://www.ippa.org/IPPC5/Proceedings/Part7/PAPER7-3.pdf>>. See also Sangeeta Khorana and Nishikant Mishra, 'Transforming Vietnam: a Quest for Improved Efficiency and Transparency in Central Government Procurement' (2014) 42 *Policy and Politics* 109.

³⁶ La Anh Tuan and John Debenham, 'Online Tender Evaluation: VietNam Government e-Procurement System' in Andrea Ko et al (eds), *Advancing Democracy, Government and Governance* (Springer, 2012) 45.

Regarding the correlation between the VCL and the PPL, Thanh's 2014 study is the first attempt to clarify the relationship between the VCL and the PPL. He argues that conflicts exist between the two laws, especially in relation to prosecution procedures and sanctions.³⁷ However, his limited discussion fails to scrutinise specific conflicts between the two laws or to offer solutions. A recent official VCA report supports Thanh's viewpoint on conflicts between the VCL and the PPL.³⁸ This reports, however, aims to identify conflicts rather than assess them critically or provide recommendations for addressing them.

III. Research question

As the preceding literature review shows, there is a lack of independent and rigorous recent study of bid rigging in the Vietnamese context. This thesis addresses this gap by analysing and assessing the current Vietnamese anti-bid rigging laws and their enforcement. More specifically, the thesis first scrutinises all three current laws as well as their enforcement in the Vietnamese public market. Second, it offers a number of recommendations from both competition and public procurement law perspectives as to how enforcement against bid rigging in the Vietnamese public market can be improved.

In short, the questions this thesis addresses are: What are critical failures in Vietnamese anti-bid rigging laws and their enforcement, and what should be done about them?

This is broken down as follows:

1. What are the critical failures in Vietnamese anti-bid rigging laws?

1.1. What is the legal framework applicable to bid rigging in Vietnam?

1.2. Are there any shortcomings and/or ambiguities in anti-bid rigging laws in Vietnam?

If so, what are they?

³⁷ Phung Van Thanh, Quy dinh ve dam bao canh tranh trong dau thau theo luat dau thau va mot so danh gia so sanh trong moi lien he voi phap luat canh tranh [Mechanism to Ensure the Competitiveness of Bidding according to Public Procurement Law and Several Assessments in Comparison with Competition law] (*Vietnam Competition Authority News*) 22 December 2012

<<http://www.vca.gov.vn/NewsDetail.aspx?ID=2845&CateID=274>>.

³⁸ VCA, Bao Cao Ra Soat Phap Luat Canh Tranh va Phap Luat Chuyen Nganh [Report on Assessing the Compatibility between Competition Law and Other Specific Laws] (Hanoi, 2014) (unpublished document, on file with the author) 55-60.

- 1.3. To what extent do public procurement laws and administrative practices of public procurers facilitate bid rigging practices in Vietnam?
2. What are the critical failures in the anti-bid rigging enforcement in Vietnam?
 - 2.1. What are the peculiarities of bid rigging practices in Vietnam and their impact on anti-bid rigging enforcement?
 - 2.2. What are effective tools in detecting and deterring bid rigging, and to what extent have these tools been applied in Vietnam?
 - 2.3. What are challenges enforcement authorities face in the fight against bid rigging?
 - 2.4. What are challenges in private enforcement of bid rigging in Vietnam?
3. What reforms should be made to improve the current legal regulations as well as the anti-bid rigging enforcement mechanisms in Vietnam?

IV. Scope of the thesis

As outlined above, this research centres on bid rigging collusion in the context of public procurement, although it is submitted that collusion exists both in public and private markets. The main reason for this limited scope is due to the importance of public procurement. It is a key variable in determining development outcomes and plays a strategic role in providing more effective public services as well as driving domestic economic growth.³⁹ Public procurement is particularly important when looking at Vietnam, where it accounts for 22 per cent of the country's GDP.⁴⁰

Second, this thesis is mostly concerned with horizontal bid rigging cartels among bidding companies. Vertical bid rigging collusion, as outlined in the preceding literature review, does not fall within the ambit of this research although it is referred to at several points to portray a more complete picture of Vietnamese public market. The rationale for this exclusion is that vertical bid rigging conspiracies themselves are outside the scope of the Vietnamese

³⁹ World Bank Group, *Benchmarking Public Procurement 2016: Assessing Public Procurement Systems in 77 Economies* (2016) 1 <<http://bpp.worldbank.org/~media/WBG/BPP/Documents/Reports/Benchmarking-Public-Procurement-2016.pdf>>.

⁴⁰ This is the author's calculation based on data provided in the 2015 Report on Implementation of Public Procurement Activities (unpublished document, on file with the author).

competition law.⁴¹ Similarly, the definition of bid rigging in the PPL no longer includes vertical collusions.⁴² In other words, vertical collusions are governed by anti-corruption laws rather than anti-bid rigging laws.

Lastly, in addition to Vietnamese legislation, this thesis also refers to anti-bid rigging laws of three different legal systems, The US, the EU and Japan, to give a more detailed and elaborate scrutiny of the anti-bid rigging enforcement.⁴³ The jurisdictions have been chosen for the following reasons.

The US has been selected simply because the US's antitrust enforcement against bid rigging has been very successful. As such, bid rigging has become by far the most frequent basis for antitrust criminal prosecutions involving as much as 70 per cent of the cartel cases indicted by the US Department of Justice (DOJ) Antitrust Division. For a number of years now, the DOJ has placed a strong enforcement focus on bid rigging in government contracts. Hence the US approach provides a useful measuring stick to assess the relative effectiveness of the Vietnamese approach to regulating bid rigging.

Similarly, bid rigging in the public procurement market has emerged as the chief priority of the Japan Fair Trade Commission (JFTC). Of the 134 cases in which the JFTC took legal measures, 59 were involved in bid rigging in government tendering.⁴⁴ This implies that the recognised prevalence of bid rigging in Japan has parallels with Vietnam.⁴⁵ In addition, experiences and lessons from Japan are especially pertinent, given that Vietnam is arguably adopting the East

⁴¹ Nguyen Ngoc Son, [Competition Mechanisms and Acts of Bid Rigging], above n 25.

⁴² Article 89 of the PPL clearly defines bid rigging as:

3. Collusion with each other in bidding, including the following acts:

a) Agreeing on bidding withdrawal or withdrawal of bidding application already been submitted previously so that one party or parties in agreement win bid;
b) Agreeing to let one or many parties to prepare bid dossier for parties of bidding so that one party may win bid;
c) Agreeing on refusal for goods provision, refusal for signing contract of sub-contractor, or forms which cause other difficulties to parties which refuse to participate in agreement.

⁴³ Despite being largely carried out in Australia, this research does not select Australia as a jurisdiction for comparison. This is mainly because of the limited number of bid rigging cases detected in Australia. Key bid rigging cases in the Australian public market are the following: *ACCC v TF Woollam & Son Pty Ltd* [2011] FCA 973; (2011) 196 FCR 212; [2011] ATPR 42-367; *ACCC v Admiral Mechanical Services Pty Ltd* [2007] FCA 1085; *ACCC v McMahon Services Pty Ltd* [2004] FCA 1425; [2004] ATPR 42-031; *Schneider Electric (Aust) Pty Ltd v ACCC* [2003] FCAFC 2; (2003) 127 FCR 170; 196 ALR 611; [2003] ATPR 41-957; and *ACCC v CC (NSW) Pty Ltd (No 8)* [1999] FCA 954; (1999) 92 FCR 375; 165 ALR 468; [1999] ATPR 41-732.

⁴⁴ Masako Wakui, 'Bid Rigging Initiated by Government Officials: The Conjunction of Collusion and Corruption in Japan' in Thomas Cheng; Sandra Marco Colino and Burton Ong (eds), *Cartels in Asia: Law and Practice* (Wolters & Kluwer, 2015).

⁴⁵ The prevalence of bid rigging in Vietnam is analysed in section I of Chapter 4 of the thesis.

Asian Model, which focuses on a broadly comparable combination of free trade principles coupled with continued government intervention to boost the economy.⁴⁶

Unlike the US and Japan, the enforcement rate of bid rigging at the European level has been low. Since 1962, only five decisions issued by the European Commission have regarded bid rigging. However, the EU has very recently modernised its public procurement system. It is suggested that the changes and improvements in the new 2014 EU Directive⁴⁷ may contribute to avoiding distortion of competition and preventing bid rigging in the public procurement market.⁴⁸ Furthermore, the adoption of the new Directive 2014/104/EU on antitrust damages actions may contribute to the development of private enforcement of cartels, including bid rigging. It is also highlighted that the current VCL heavily relied on the EU competition model. As identified earlier in part I of this chapter, the VCL is principally embodied in Article 101 and Article 102 of the TFEU. Therefore, the EU jurisdiction, particularly its recent revisions and amendments, may provide immediate lessons for Vietnam.

V. Methodology

The major methodologies deployed to support the arguments made in this thesis are: law reform research, comparative law, and empirical research in the form of in-depth interviews.

First, this thesis scrutinises critical failures of anti-bid rigging laws and their enforcement in Vietnam and makes recommendations for future law reform in Vietnam. Hence, a law reform approach is essential to the key objectives of this thesis. According to The Pearce Committee, law reform research can be described as ‘research which intensively evaluates the adequacy of existing rules and which recommends changes to any rules found wanting’.⁴⁹ Law reform

⁴⁶ See more at Thomas Jandal, *Vietnam in the Global Economy: The Dynamics of Integration, Decentralization, and Contested Politics* (Lexington Books, 2013) 1.

⁴⁷ Directive 2014/24/EU of the European Parliament and of the Council of 26 February 2014 on public procurement and repealing Directive 2004/18/EC.

⁴⁸ Sanchez Graells, ‘Prevention and Deterrence of Bid Rigging’, above n 7; Alberto Sanchez Graells, *Public Procurement and the EU Competition Rules* (2nd edition, Hart Publishing 2015) 29; Amanda Claeson, ‘Modernisation of Public Procurement: Making the Public Market More Competitive and Collusion Proof?’ (Master Thesis, Lunds University, 2014).

⁴⁹ Dennis Pearce, Enid Campbell and Don Harding, *Australian Law Schools: A Discipline Assessment for The Commonwealth Tertiary Education Commission: A Summary* (1987) 6. Reform-oriented Research, together with Doctrinal Research and Theoretical Research is confirmed by the Pearce Committee as one of three fundamental legal research methodologies. A fourth methodology has been added in Canada – ‘fundamental research’. This non-doctrinal method has been defined as ‘research designed to secure a deeper understanding of law as a social phenomenon, including research on the historical, philosophical, linguistic, economic, social or political

research methodology has been illustrated by Hutchinson as commonly consisting of four main steps.⁵⁰ First, it starts by identifying, scrutinising and verifying the relevant legal problems. Second, consultations with stakeholders like government agencies, legal professionals or the community view are undertaken to ascertain the problems and ascertain potential remedies. Third, further comparisons with other jurisdictions are made to provide potential alternative experiences and approaches for law reform to address the relevant legal problems. The last step is to bring together a statement of the problem, an outline of key arguments for and against reform and an identification of possible law reform options.

Although the aforementioned process is set out mainly for the law reform agencies, the adoption of this method is evident throughout the thesis. This is particularly true of the examination of the current anti-bid rigging laws including the VCL, the PPL and the VPC contained in the first four chapters (Chapter 3, Chapter 4, Chapter 5 and Chapter 6) for the purpose of evaluating the adequacy and effectiveness of existing laws and anti-bid rigging enforcement in Vietnam. This examination is then extrapolated to make a cogent proposal for law reform in Chapter 7. A number of interviews with government agencies, academics and other stakeholders have also been conducted to reaffirm the problems and find out the solutions for these problems. This process adopts the ‘in-depth interview’ method considered separately below.

Consideration of extra-jurisdictional sources have been also made and categorised as part of the comparative law method which has also been specifically adopted in this thesis. The fact that comparative law has been used either as an aid for legislators or as a tool for law reform has been emphasised by many comparative law scholars.⁵¹ In particular, this thesis is based on the comparative approach in order to garner some recommendations for the improvement of current enforcement regime in Vietnam. As already noted, the three selected foreign jurisprudences examined in this thesis to compare with the Vietnamese legislation are the US, the EU and Japan. The rationale for this choice has been outlined in section IV of this chapter.

implications of law’: see Social Sciences and Humanities Research Council of Canada, *Report to the Social Sciences and Humanities Research Council of Canada by the Consultative Group on Research and Education in Law* (1983) 66.

⁵⁰ Terry Hutchinson, *Researching and Writing in Law* (LawBook, 3rd ed, 2010) 66-70.

⁵¹ Konrad Zweigert and Hein Kotz, *Introduction to Comparative Law* (Oxford University Press, 3rd ed, 1998) 16; Peter De Cruz, *Comparative Law in Changing World* (Routledge-Cavendish, 3rd ed, 2007) 20; Henrik Spang-Hanssen, *Legal Research Methods in the US and Europe* (DJOF Publishing Copenhagen, 1st ed, 2008) 240; Geoffrey Wilson, ‘Comparative Legal Scholarship’ in Mike McConville and Wing Hong Chui (eds), *Research Methods for Law* (Edinburgh University Press, 2007) 87.

Last, but by no means least, in-depth interviews have been conducted to give a full account of bid rigging in the Vietnamese public market. The author conducted a total of 17 interviews with six groups of stakeholders within Vietnam in August 2016. These groups were:

Group 1: Three key officials holding top- and medium-level leadership positions at the Vietnam Competition Authority (VCA) and one key official of the Vietnam Competition Council (VCC)

Group 2: Four key officials holding top- and medium-level leadership positions at the Vietnam Public Procurement Agency (PPA); two key officials at the local Public Procurement agencies in Ho Chi Minh city and An Giang province where all of the bid rigging cases were detected.

Group 3: Two members of the Criminal Bill Editing Group (Tổ biên tập Dự án Bộ luật hình sự sửa đổi (the Editing Group)

Group 4: One key official at the Vietnamese Association of Construction Contractors (VACC)

Group 5: One Judge at the Economic Court – Ho Chi Minh City People’s Court

Group 6: Three legal scholars in the field of competition law in Vietnam

All of the interviews were recorded, transcribed and translated by the author. These were then analysed through narrative analysis. More specifically, the responses from the interviews were sorted and reformulated to non-specifically and non-identifiably quotes in the thesis to ensure neutrality and objectivity of interviewees’ opinions.⁵² The list of interview questions and interview schedule are presented in the Appendixes 1 and 2, respectively.

VI. Contribution of the thesis

This is the first comprehensive study of bid rigging in the Vietnamese context. It directly contributes indispensable new knowledge on effective enforcement mechanisms against bid rigging in the Vietnamese public procurement market. In addition, the approach of providing a comprehensive dual perspective of both competition and public procurement rules further distinguishes this study as novel and important. Further, the comparative approach providing

⁵² All interviews strictly followed the procedures described in the author’s application for ethics approval from the La Trobe University College of Arts, Social Sciences & Commerce Human Ethics Sub-Committee.

insights from jurisdictions that are leaders in the field and the laws of which have informed the current Vietnamese rules is both innovative and significant.

Second, the review of the *Vietnamese Competition Law*, the *Vietnamese Public Procurement Law* and the *Vietnamese Penal Code* and its recognition of critical gaps in knowledge will, for the first time, give scholars holistic insights into the current Vietnamese regulatory framework of anti-bid rigging cartels.

Finally, this research will be an invaluable aid to Vietnamese law-makers as it plans to offer constructive recommendations for the reform of the current legal framework with regard to competition and public procurement, which is one of the important tasks of the government in pursuit of a healthy competitive environment in Vietnam.

VII. Thesis structure

The thesis is structured into five chapters, plus an Introduction and a Conclusion. Chapter 2 provides an overview of bid rigging in the public procurement market. It analyses specific features of bid rigging from the perspectives of competition law, public procurement law and criminal law. By reference to the US, EU and Japanese competition laws, the chapter argues that although hailing from the subset of price-fixing and/or market allocation cartels, bid rigging is now widely recognised as a separate competition law infringement. From a public procurement law perspective, factors contributing to the formation and facilitation of bid rigging in the public procurement market are identified.⁵³ This chapter also argues that the degree of criminalisation of bid rigging is a reflection of local factors, the articulation of which may help to explain the degree and effectiveness of cartel enforcement in that jurisdiction.

Chapter 3 sets out the Vietnamese legal regime governing bid rigging in the public procurement market. The *Vietnamese Competition Law*, the *Vietnamese Public Procurement Law* and the *Vietnamese Penal Code* are examined each in turn. The chapter then examines whether there are any shortcomings and ambiguities in these laws. The relative shortcomings of the Vietnamese anti-bid rigging laws are exposed through a comparative study of the US, the EU and Japanese regulatory approaches.

⁵³ These factors will be then applied in Chapter 4 to investigate whether the Vietnamese public procurement regulation and policy themselves facilitate bid rigging collusions.

Chapter 4, 'Bid rigging in the Vietnamese procurement market' consists of two core parts. The first part focuses on bid rigging practices in Vietnam. It examines the number of bid rigging cases adjudicated and argues that such cases are just the tip of the iceberg insofar as the prevalence of bid rigging practices in Vietnam is concerned. It further identifies peculiarities of bid rigging in the Vietnamese context that may impact on the fight against bid rigging. The second section examines whether and to what extent Vietnamese public procurement legislation and the administrative practices of public procurement authorities facilitate bid rigging. This examination leads to the conclusion that current Vietnamese public procurement laws and administrative practices do facilitate bid rigging through imposing unnecessary and excessive selection criteria leading to the limited participation of bidders, regulation of joint bidding, compulsory information disclosure and communication between bidders backed by public procurers in the pursuit of transparency and anti-corruption policies

Chapter 5 looks at how Vietnamese anti-bid rigging laws are being enforced. More specifically, it examines the deterrent impact of sanctions for bid rigging and scrutinises the relationship between competition law enforcement authorities, public procuring authorities and criminal law enforcement authorities in dealing with bid rigging. Several tools in detecting and deterring bid rigging in the US, the EU and Japan, such as Certificate of Independent Bid determinations, e-government procurement mechanisms, and leniency programs, are also analysed to see which would be most effective as anti-bid rigging enforcement tools in the Vietnamese context.

Chapter 6 turns attention to policy discussion on private enforcement against bid rigging in Vietnam. It first critically analyses the legal framework for anti-bid rigging private enforcement and finds it underdeveloped. It then identifies challenges contributing to the lack of current private enforcement in Vietnam. Again, where appropriate, the experiences of the US, the EU and Japan are contrasted and discussed with a view to providing direction on how to make such enforcement better in Vietnam.

The conclusion in Chapter 7 reviews the main findings in previous chapters and makes suggestions for Vietnamese policy makers to improve anti-bid rigging regulation and enforcement in Vietnam. It also advances the proposition that failures of anti-bid rigging laws and their enforcement in Vietnam result not only from strictly legal matters of the law and law enforcement mechanisms but also from other factors. One such factor is the lack of independence of the Vietnamese competition authorities. Another factor is the involvement of State-owned enterprises (SOEs) in corruption-tainted bid rigging cases.

CHAPTER 2: OVERVIEW OF BID RIGGING IN THE PUBLIC PROCUREMENT MARKET

As elaborated in Chapter 1, bid rigging is a kaleidoscopic phenomenon with three different aspects, the combination of which raises several legal issues which are explored and scrutinised in this thesis in the context of the Vietnamese law. In order to underpin this exploration and scrutiny, this chapter sets out the general background information of bid rigging in the context of the three respective perspectives: competition law, public procurement law and criminal law.

The chapter begins with the definition and classification of bid rigging from the competition law approach. It considers whether bid rigging is a separate competition infringement or a subset of price-fixing and/or market allocation cartels by reference to the US, EU and Japanese jurisdictions. It goes on to consider bid rigging in the context of public procurement by identifying factors contributing to the facilitation of bid rigging. Finally, the chapter elaborates on the recognition of bid rigging as a fraud offence and the global wave of criminalisation of cartels.

I. Bid rigging – An approach from competition law

This part aims to identify bid rigging as a competition law infringement. It consists of two main sections. The first section provides a definition of bid rigging and its peculiar features. The second section examines whether bid rigging is widely recognised as a distinct infringement under the competition law or is just a derivate of price-fixing and/or market allocation cartels - an especially important distinction in the Vietnamese legal framework in relation to bid rigging; this is discussed in section I.B of chapter 3

For the purpose of this section, the development of bid rigging enforcement in the US, the EU and Japan is scrutinised to find the answer.

A. Definition and classification

1. Definition

The concept of bid rigging is ubiquitous. It can be found in the handbooks of world-wide competition authorities, international organisations and legal scholarship. In general, it is considered to happen ‘when businesses that would otherwise be expected to compete, secretly

conspire to raise prices or lower the quality of goods or services for purchasers who wish to acquire products or services through a bidding process.⁵⁴

From the competition rule perspective, bid rigging is widely recognised as a form of hard-core cartels.⁵⁵ It, however, bears mentioning that in several jurisdictions – including major economies such as China and Indonesia – bid rigging under competition law embraces not only horizontal cartels but also vertical conspiracies.⁵⁶

While horizontal bid rigging centres on conspiracy among businesses, vertical bid rigging centres on collusion between businesses and public procurers. The latter is often referred to as corruption and, in most nations, is caught by other laws such as criminal law or a specific law.⁵⁷ The enforcement of this kind of collusion is accordingly commonly entrusted to the judiciary or anti-corruption bodies rather than to competition authorities.⁵⁸

Given the potential breadth of the definition of bid rigging, bid rigging captures the features of cartels and also possesses the following distinctive characteristics:

i. Expressly anticompetitive consent among rivals

Like other forms of cartel such as price-fixing, output restriction or market allocation, bid rigging is intrinsically an explicit consent among competitors to act anticompetitively. Given the purpose of preventing, restricting and distorting the competition in the market, such explicit consent can take various forms such as contract, memoranda of understanding, verbal agreement or exchange of information. This kind of collusion needs distinguishing from tacit collusion, which is also pervasive in public procurement markets.⁵⁹ Tacit collusion occurs when

⁵⁴ OECD, *Guidelines for Fighting Bid Rigging in Public Procurement - Helping Governments to Obtain Best Value for Money* (2009) <<http://www.oecd.org/competition/cartels/42851044.pdf>>.

⁵⁵ As stated by the OECD:

[A] ‘hard core cartel’ is an anticompetitive agreement, anticompetitive concerted practice, or anticompetitive arrangement by competitors to fix prices, **make rigged bids (collusive tenders)**, establish output restrictions or quotas, or share or divide markets by allocating customers, suppliers, territories, or lines of commerce [emphasis added].

OECD, above n 2.

⁵⁶ AM Tri Anggraini, ‘Law Enforcement in Bid Rigging in Indonesia’ (Paper presented at the 3rd Asian Law Institute Conference, Shanghai, 25-26 May 2006) <<http://portal.kopertis3.or.id/bitstream/123456789/1247/1/LAW%20ENFORCEMENT%20IN%20BID%20RIGGING%20IN%20INDONESIA.pdf>>; Stephan E Weishaar, *Cartels, Competition and Public Procurement: Law and Economic to Bid-rigging* (Edward Elgar Publishing, Cheltenham, 2013).

⁵⁷ In the case of Japan, vertical collusion is caught by the *Japanese Involvement Prevention Act* promulgated in 2002.

⁵⁸ OECD, *Collusion and Corruption in Public Procurement* (2010) 31 <<https://www.oecd.org/competition/cartels/46235884.pdf>>.

⁵⁹ Carmen Estevan de Quesada, ‘Competition and Transparency in Public Procurement Markets’ (2014) 23 *Public Procurement Law Review* 231.

participants adapt their behaviours on the basis of following the actions of competitors without express agreement among them. While bid rigging is under the ambit of cartel provisions, tacit collusion is still a debatable issue under competition rules.⁶⁰

ii. *Stability*

The stability of bid rigging has been identified both in empirical and non-empirical studies.⁶¹ In general, the stability of a cartel engaged in bid rigging depends on the likelihood that deviations may be detected by cartel members and the severity of the punishment imposed on deviators.⁶² With regard to the former, the higher the possibility of detecting deviations from their collusion, the more stable the cartel.

This is an important observation in the public procurement context because under the public procurement rules, winning bids must be publicly announced with full identification of the prices and specifications of the winners. This facilitates the immediate detection of cheating among cartel members.⁶³ For example, if one bid rigger cheated other bid rigging member by bidding with a lower price compared to the agreed price to win the bid, it would be soon detected when the public procurers announced the bid result. In terms of the latter, severe punishments will prevent cheaters from deviating. Practices show that once detected, bid riggers will face severe punishments imposed by the remaining cartel members. More specifically, the cartel members may bid with a lower price than the one the ousted bidder can afford so that the ousted bidder cannot win the bid. They may also persuade subcontractors and suppliers to refuse to sign the subcontracting contracts and supply the goods or services needed to perform the bid.⁶⁴ These punishments that may drive the deviators to financial loss and,

⁶⁰ Ibid 234.

⁶¹ A Heimler, 'Cartels in Public Procurement' (2012) 8 *Journal of Competition Law and Economics* 849; Penelope Alexia Giosa, 'Debarment and Leniency Programme: Can Two Birds Be Killed with One Stone?' (Paper presented at Centre For Competition Policy (CCP) PhD Workshop, Norwich, 7-8 June 2016); Jeffrey E Zimmerman and John M Connor, 'Determinants of Cartel Duration: A Cross-sectional Study of Modern Private International Cartels' (Working paper, 2 August 2005) 22 <https://papers.ssrn.com/sol3/papers2.cfm?abstract_id=1158577>.

⁶² Danish Competition Authority, *The Nature and Impact of Hardcore Cartels* (2011) 7 <<http://sandbox.forbrug.dk/IndholdKFST/Nyheder/Pressemeddelelser/2011/~media/723E1F40CC094097A1D3C1D47A486B15.pdf>>; William E Kovacic, 'Antitrust Policy and Horizontal Collusion in the 21st Century' (1997) 9(2) *Loyola Consumer Law Review* 97, 104.

⁶³ Stigler, above n 32, 44, 48; Kara L Haberbush, 'Limiting the Government's Exposure to Bid Rigging Schemes: A Critical Look at the Sealed Bidding Regime' (2000) 30 *Public Contract Law Journal* 97, 101; PE Areeda and H Hovenkamp, *Antitrust Law: An Analysis of Antitrust Principles and Their Application* (Aspen Law & Business, 2003) 72.

⁶⁴ Haberbush, above n 63, 4.

potentially even more seriously, to bankruptcy will contribute to the stability of bid rigging cartels.

Conner and Zimmerman's empirical research affirms that, in comparison with other hard-core cartels such as price-fixing or market-allocation cartels, bid rigging cartels are much more stable.⁶⁵ There are two reasons for this. First, detecting deviation of this collusion is much easier than that of other cartels due to the transparency principle of public procurement rules.⁶⁶ Second, bid rigging occurs in highly concentrated markets where the total market share is normally locked up by a few local companies due to high transportation costs (eg, the construction industry) and thus reduces the costs for operating cartels.⁶⁷

(iii) Potential to harm

The pernicious influence of bid rigging collusion on public procurement markets can be gauged through three main factors: the incidence of bid rigging; overcharges in bid rigging cases and bid rigging stability.⁶⁸ While the third element was elaborated in the previous section, two remaining elements deserve further discussion.

As for the first element, although the incidence of existing bid rigging collusion behaviour cannot be precisely measured, the results of enforcement actions against bid rigging behaviour indicates that such practices are pervasive in developed and developing countries.⁶⁹ Anecdotal evidence shows that 'collusion... is pervasive in almost all economic sectors where procurement takes place, [it] maybe has a special relevance in markets where the public buyer is the main or sole buyer, such as roads or other public works, constructions, healthcare markets, education, environmental protection and defence markets'.⁷⁰

⁶⁵ Zimmerman and Connor, above n 61, 22.

⁶⁶ Transparency is one of the principal main goals of public procurement regulations to protect the tendering process from corruption. For an explanation of transparency in the public tender, refer to section II.A of this chapter.

⁶⁷ Zimmerman and Connor, above n 61, 23.

⁶⁸ Hüschelrath, 'Economic Approaches to Fight Bid Rigging', above n 7.

⁶⁹ For example, during the period from 1988 to 1992, bid rigging cases prosecuted by the US Department of Justice accounted for 54 per cent among indictments. See Sue Arrowsmith, *The Law of Public and Utilities Procurement* (Sweet & Maxwell, 2nd Edition, 2005); Julian L Clarke and Simon J Evenett, 'A Multilateral Framework for Competition Policy?' in Simon J Evenett and the Swiss State Secretariat of Economic Affairs (eds), *The Singapore Issues and the World Trading System: The Road to Cancun and Beyond* (Staatssekretariat für Wirtschaft (seco), 2003)

<https://www.researchgate.net/profile/Simon_Evenett/publication/36384913_Is_there_a_Case_for_New_Multilateral_Rules_on_Transparency_in_Government_Procurement/links/5543856c0cf24107d3962f0d.pdf#page=84.

⁷⁰ Albert Sanchez Graells, 'Competition Law and Public Procurement' in J Galloway (ed), *Intersections of Antitrust: Policy and Regulations* (OUP, 2016) <http://papers.ssrn.com/sol3/Papers.cfm?abstract_id=2643763>.

The pervasiveness of bid rigging conspiracies was demonstrated in Connor's 2010 empirical study.⁷¹ He found that bid rigging cases account for 20 per cent of all international cartel cases collected for his research.⁷² Given that this rate is confounded with geographic extent or industry type, it is still relatively modest when compared with bid rigging cases detected at national level. For instance, the statistics from the competition authority in Japan, JFTC, reveal that bid rigging accounted for 44 per cent of cartel cases during the period from 2006 to 2012.⁷³ An earlier study in the US also shows that bid rigging was prevalent, occupying more than 70 per cent of all criminal cartel cases investigated by the DOJ from 1988 to 1992.⁷⁴ A possible explanation for the huge gap in detected bid rigging cases at international and domestic level is that bid riggers are normally companies which are all localised in the jurisdiction where the tender occurs rather than among companies located in different countries.⁷⁵ Also, many public tenders have a national focus; thus, the number of bid rigging cases is higher in enforcement statistics of national authorities.⁷⁶

It is worth noting that these statistics may be an illusion, as the reality is that even if the bid rigging incidence could be precisely captured, the prevalence of this sort of behaviour will evolve and change over time, given that it is not a static, fixed phenomenon. Also, while the statistics clearly reveal the omnipresence of bid rigging in developed countries such as the US or Japan, there are a limited number of studies identifying this issue in developing countries, which are more susceptible to bid rigging than the rest of the world.⁷⁷

Turning to the second factor, bid rigging may lead to the artificial price increase of goods or services in some markets, particularly in public procurement markets (which account for around 15 per cent GDP of OECD countries⁷⁸ and even higher percentages of GDP in developing and transitional economies⁷⁹).

⁷¹ John M Connor, 'Price-Fixing Overcharges: Legal and Economic Evidence: Revised 2nd Edition' (Working paper, SSRN, 27 April 2010) 107 <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1610262>.

⁷² His survey is collected from 381 international cartels during the last three decades from 1888 to 2009.

⁷³ Wakui, above n 44.

⁷⁴ Froeb, Koyak and Werden, above n 3, 419.

⁷⁵ This is also the case for the EU where bid rigging cases investigated by the EU commission are still rare but pervasive at the EU member level. See more at Heimler, above n 61, 849.

⁷⁶ Huschelrath, above n 68, 2.

⁷⁷ CUTS Centre for Competition, Investment and Economic Regulation, 'The Basics of Bid Rigging' (2008) 2 <<http://www.cuts-international.org/pdf/ccier-7-2008.pdf>>.

⁷⁸ OECD, *Guidelines for Fighting Bid Rigging*, above n 54.

⁷⁹ For example, the higher percentage can be the cases of Malaysia, Philippines, India, Indonesia with 25 per cent, 29 per cent, 30 per cent and 30 per cent, respectively. For more on bid rigging in Malaysia see: OECD, *Roundtable on Competition Policy*, above n 33.

The empirical study of Froeb, Koyak and Werden shows that bid rigging in the US market may increase the price of goods and services in the range of 23.1 per cent to 30.4 per cent, and a typical bid rigging may raise prices at a rate exceeding 20 per cent for over four years.⁸⁰ The study appears to show that the effects of bid rigging behaviour can be relatively long term. This may be the reason why the DOJ has emphasised that bid rigging has ‘potentially devastating impacts on the US economy’ and that it may ‘rob purchasers, contribute to inflation, destroy public confidence in the economy, and undermine our system of free enterprise’.⁸¹

Similarly, the ratio of price rises attributable to bid rigging in the EU is in the range of 15-20 per cent.⁸² These figures suggest that the cost of bid rigging collusions may do substantial harm, not only to public procurers but also to the final users of public services and taxpayers.

Another empirical research study led by Clarke and Evenett collecting data from seven developing countries⁸³ concludes that only small reductions in the amount of such behaviour in the public market would more than cover the cost of cartel enforcement in those developing countries.⁸⁴ Considering that the costs of cartel enforcement are substantial,⁸⁵ this research implies that the overcharge of bid rigging behaviours is even much more substantial than the cost of cartel enforcement.

2. Classification

As touched upon in section 1 above, bid rigging conspiracies are complex and durable hard-core cartels, particularly harmful in the context of public procurement. These conspiracies are often made in a variety of ways to prevent competent authorities from detecting and investigating them. Therefore, this section will aim to identify and elaborate the most common patterns of such conspiracies.

It is widely acknowledged by competition authorities and worldwide academics that bid rigging can take various forms. They include cover bidding, bid suppression, bid rotation, market allocation and subcontracting.

⁸⁰ Froeb, Koyak and Werden, above n 3, 419; See more at Nelson, above n 3, 369; For the impact of bid rigging on prices in certain industries in the US, see more at Gregory J Werden, ‘Sanctioning Cartel Activity: Let the Punishment Fit the Crime’ (2009) 5(1) *European Competition Journal* 19, 19-22.

⁸¹ United States Department of Justice (DOJ), ‘An Antitrust Primer for Federal Law Enforcement Personnel (Revised: April 2005) 1 <<https://www.justice.gov/atr/file/761666/download>>.

⁸² OFT, ‘The Development of Targets for Consumer Savings’, above n 3, 57.

⁸³ The countries included in this research are India, Kenya, Pakistan, South Africa, Sri Lanka, Tanzania and Zambia.

⁸⁴ Clarke and Evenett, above n 69, 127.

⁸⁵ Anderson, Kovacic and Müller, above n 6, 703.

*Cover bidding*⁸⁶ occurs when bid participants concur with other bidders that they will submit bids higher than the designated winner or submit bids including special terms that are definitely unacceptable to the purchaser.⁸⁷ The aim of bid participants in such conspiracies is to give the appearance of authentic competitive bidding⁸⁸ so that the designated winner will be chosen without any suspicion. It is highlighted that cover bidding is the most common of all bid rigging behaviours prosecuted by competition authorities in the world.⁸⁹

Bid suppression is the case that either some conspirators reach agreement to desist from bidding or they withdraw the bid they submitted before.⁹⁰ This scheme will ensure or increase the possibility of bid winning of the designated firm among the competitors.⁹¹

Bid rotation is employed when all bid riggers correspond to take turns at winning bids either through cover bidding or bid suppression. Bid rotation is more common in cartels with few participants than in ones with numerous participants because the mechanism of bid rotation is quite difficult.⁹²

Market allocation can be applied when bid participants carve up the market and come to an arrangement that they will not compete for each other's markets.⁹³ Such an arrangement can be made on the basis of the allocation of certain customers or geographic areas.

Subcontracting can be seen as a compensating mechanism where the bid losers will be reimbursed by the winner via subcontracting contract after their intentional bid failure.⁹⁴ This practice is also stated by the OECD:

⁸⁶ Cover bidding is also known as complementary, courtesy, token or symbolic bidding. OECD, *Guidelines for Fighting Bid Rigging*, above n 54, 2.

⁸⁷ This form of bid rigging can be found in case law of the US and the EU. In the EU: Decision of the EC 92/204/EEC of 5.02.1992 (IV/31.572 and 32.571 - Building and construction industry in the Netherlands) [1992] OJ L 92/1; Decision of the EC 73/109/EEC of 02.01.1973 (IV/26 918 - European sugar industry) [1973] OJ L140/17. In the US: *US v Champion Int'l Corp*, 557 F 2d 1270 (9th Cir), cert denied 434 US 938 (1977).

⁸⁸ DOJ, 'Price-Fixing, Bid-Rigging and Market Allocation Schemes: What They Are and What to Look For – An Antitrust Primer for Procurement Professionals' <<http://www.usdoj.gov/atr/public/guidelines/211578.htm>>.

⁸⁹ See the United States Sentencing Commission Guidelines manual at <http://www.ussc.gov/sites/default/files/pdf/guidelines-manual/1987/manual-pdf/1987_Guidelines_Manual_Full.pdf>.

⁹⁰ See the European Case T-29/92 *Vereniging van Samenwerkende Prijsregelende Organisaties in de Bouwnijverheid and others v Commission (SPO)* (1995) ECR II-00289.

⁹¹ Caron Beaton-Wells and Brent Fisse, *Australian Cartel Regulation – Law, Policy and Practice in an International Context* (Cambridge University Press, 2011) 123.

⁹² McAfee and McMillan, above n 32, 579, 580.

⁹³ Decision of the EC 1999/60/EC of 21 October 1998 (IV/35.691/E-4 - Pre-Insulated Pipe Cartel) [1999] OJ L 24/1.

⁹⁴ Commission Decision (Case COMP/E-1/38.823) *Elevators and Escalators OJ* (2008) C 75/19; *US v Alliant Tech Systems Inc and Aerojet-General Corporation* <<https://www.justice.gov/atr/case-document/file/628391/download>>.

Bid-rigging schemes often include mechanisms to apportion and distribute the additional profits obtained as a result of the higher final contracted price among the conspirators. For example, competitors who agree not to bid or to submit a losing bid may receive subcontracts or supply contracts from the designated winning bidder in order to divide the proceeds from the illegally obtained higher priced bid among them.⁹⁵

However, it is noted that subcontracting is not necessarily anticompetitive if its purpose is not to restrict or distort the competition when awarding the main contract.⁹⁶

Although it has not been officially classified as a form of bid rigging, *joint bidding*⁹⁷ in certain circumstances is closely connected to bid rigging. Joint bidding refers to the situation where two or more bidding companies submit a single bid together and put forward a contract to which all of them are signatories. This practice may offer genuine benefits to both public procurers and bidders, which is clearly stated in the US legislation:

(a) Contractor team arrangements may be desirable from both a Government and industry standpoint in order to enable the companies involved to (1) complement each other's unique capabilities and (2) offer the Government the best combination of performance, cost, and delivery for the system or product being acquired.

(b) Contractor team arrangements may be particularly appropriate in complex research and development acquisitions, but may be used in other appropriate acquisitions, including production.⁹⁸

It is also addressed in the EU:

Horizontal co-operation agreements can lead to substantial economic benefits, in particular if they combine complementary activities, skills or assets. Horizontal co-

⁹⁵ OECD, *Recommendation of the Council on Fighting Bid Rigging in Public Procurement* (2012) <<http://acts.oecd.org/Instruments/ShowInstrumentView.aspx?InstrumentID=284&InstrumentPID=299&Lang=en&Book=False>>.

⁹⁶ Robert D Anderson and William E Kovacic, 'Competition Policy and International Trade Liberalisation: Essential Complements to Ensure Good Performance in Public Procurement Markets' 2009 18(2) *Public Procurement Law Review* 80.

⁹⁷ It is usually referred to as a bidding consortia or joint venture. In the US, joint bidding is known as a 'teaming arrangement', which specifically refers to arrangements in government contracts. However, this term is much broader in meaning as it refers not only 'joint bidding' but also 'subcontracting' as stipulated in 48 CFR 9.601:

Contractor team arrangement, as used in this subpart, means an arrangement in which -

(1) Two or more companies form a partnership or joint venture to act as a potential prime contractor; or

(2) A potential prime contractor agrees with one or more other companies to have them act as its subcontractors under a specified Government contract or acquisition program.

⁹⁸ See 48 CFR 9.602.

operation can be a means to share risk, save costs, increase investments, pool know-how, enhance product quality and variety, and launch innovation faster.⁹⁹

However, as mentioned earlier, joint bidding is widely linked with anticompetitive agreements as it can distort the competitive environment in public procurement markets.¹⁰⁰ For example, in *FTC v B&J School Bus Services, Inc.*,¹⁰¹ three school bus transportation companies submitted a joint bid to offer bus service for children in the Kansas City, Missouri School District. It was alleged that because few bids were submitted, the School District had to accept the joint bid as they had ‘no choice’. The Federal Trade Commission (‘FTC’) then detected that these companies did not integrate their operations and make any capital contributions to the venture. The FTC concluded that the purpose of this joint bid was to allow the companies to avoid competing with each other and to allocate the market share between themselves. A similar example arose in a recent case in Poland,¹⁰² where the two largest bidding companies in Bialystok submitted a joint bid in a tender for collecting and transporting municipal waste. The investigations revealed that while both companies could individually meet the requirements to bid independently, they tried to get involved in a consortium to share the market and exclude the competition among them.

These examples explain why many major jurisdictions including the US and the EU have enacted regulations governing joint bidding practices.¹⁰³

⁹⁹ Guidelines on the applicability of Article 101 of the *Treaty on the Functioning of the European Union* to horizontal co-operation agreements (‘Horizontal Cooperation Guidelines’).

¹⁰⁰ See more on the connection between joint bidding practices and competition policy at A Estache and A Iimi, *Joint Bidding in Infrastructure Procurement* (World Bank Policy Research Working Paper No 4664, 2008); V Krishna and J Morgan, ‘(Anti-)Competitive Effects of Joint Bidding and Bidder Restrictions’ (Princeton University, Woodrow Wilson School Discussion Paper in Economics No 184, 1997) and A Iimi, ‘(Anti-)Competitive Effect of Joint Bidding: Evidence from ODA Procurement Auctions’ (2004) 18 *Journal of the Japanese and International Economies* 416; Sanghyun Lee, ‘Implementing a Reasonable Rule for Imposing Criminal Penalty on Joint Bidders in Public Bid: Critical Comment on South Korea’s Case’ (2010-2011) 19 *Currenta: International Trade Law Journal* 24.

¹⁰¹ 116 FTC 308 (1993)
<https://www.ftc.gov/sites/default/files/documents/commission_decision_volumes/volume-116/ftc_volume_decision_116_january_-_december_1993pages_206-319.pdf>.

¹⁰² This case was the first consortium case handled by the Polish antimonopoly authority. The decision was released on 31 December 2012 and has been upheld by the judgement of Warsaw Court of Appeal on 8 June 2016. See more at <www.lexology.com/library/detail.aspx?g=c44a4ff3-3380-4d3d-a49e-5c64209828af>.

A similar case has just been released in Denmark. The Danish Competition Appeals Tribunal confirms that a joint bid between two-road contractors was an anti-competitive agreement infringing Section 6 of the *Danish Act on Competition* and Article 101 TFEU. See more at <<https://webgate.ec.europa.eu/multisite/ecn-brief/en/content/danish-competition-appeals-tribunal-confirms-consortia-agreement-between-two-road>>.

¹⁰³ In the US, the ‘Antitrust Guidelines for Collaborations Among Competitors’ are the legal basis for agencies to assess the legality of joint bidding, while in the EU, such practices are governed by the Guidelines on the applicability of Article 101 of the *Treaty on the Functioning of the European Union* to horizontal co-operation agreements.

B. Bid rigging: A price-fixing cartel, a market-sharing cartel or a separate competition law infringement?

Intrinsically, bid rigging conspiracies involve behaviour that can be characterised as price-fixing, market allocation or a combination of two these hard-core cartels.¹⁰⁴ It is the case that when bidders agree to submit bids at price higher than the designated winner (cover bidding), this form is nothing more than a price-fixing agreement. By the same token, when bid participants divide up the market and agree not to compete for each other's markets, this collusion is conspicuously similar to market-sharing arrangements. By reference to the US, the EU and Japanese jurisdictions, this part aims to answer whether, from a regulatory point of view, bid rigging is best dealt with as price-fixing, a market-sharing cartel or as a separate competition law infringement.

Despite the fact that the term 'bid rigging' had been bandied about in US antitrust cases, it had not been recognised in the United States as a distinct offence until the antitrust guideline¹⁰⁵ was first promulgated on 1 November 1987. Prior to that, bid rigging referred to 'merely a descriptive term for a subset of price-fixing case'.¹⁰⁶

Since the 1987 antitrust guideline was adopted with the purpose of singling out bid rigging for more severe punishment than other forms of cartels, bid rigging has been identified as a distinct offence.¹⁰⁷ However, this guideline failed to define bid rigging. As a consequence, in the enforcement of US antitrust guidelines, while the terms 'bid rigging' and 'non-competitive bid' were used interchangeably, it is arguable whether an agreement to submit identical bids

¹⁰⁴ Areeda and Hovenkamp, above n 63, 71-7.

¹⁰⁵ Since its first adoption in 1987, it has been amended several times; the newest version was adopted in 2011. For the 1987 and 2011 versions, see <http://www.usssc.gov/sites/default/files/pdf/guidelines-manual/1987/manual-pdf/1987_Guidelines_Manual_Full.pdf> and <<http://www.usssc.gov/guidelines/2015-guidelines-manual/archive/2011-2r11>>.

¹⁰⁶ See *US v Heffernan* 43 F3d 1144, 1147 (7th Cir 1994).

¹⁰⁷ §2R1.1. Bid rigging. Price-Fixing or Market-Allocation Agreements Among Competitors:

- (a) Base Offense Level: 9
- (b) Specific Offense Characteristics
 - (1) If the conduct involved participation in an agreement to submit non-competitive bids, increase by 1 level

constitutes illegal bid rigging or price-fixing.¹⁰⁸ Accordingly, in the 1994 case of *US v Heffernan*¹⁰⁹ Posner J stated:

This kind of ‘bid rigging’ is indistinguishable from ordinary price fixing, in which competitors get together and agree to sell at a uniform price. Which is all that happened here. To punish Heffernan more heavily than an ordinary price fixer merely because his customers asked for ‘bids’ rather than ‘offers’ would be irrational.¹¹⁰

His Honour argued that while bid rigging should be understood as bid rotation, an agreement to submit identical bids should be categorised as a form of price-fixing which deserves a less severe punishment than bid rigging. In contrast to the argument of Posner J, the US government approach (which is now fully identified in official guides compiled by DOJ¹¹¹) has been that bid rigging covers all forms of collusion in a bidding process including the submission of identical bids.

Although investigated bid rigging cases in the European Union are not as prevalent as in the US, they have been litigated since the 1973 case *Suiker Unie*.¹¹² It is noted, however, that the term ‘bid rigging’ was not used in either the text of the European Commission decision or the Judgment of the European Court of Justice (ECJ) in such cases. Even nearly 20 years later, in the 1992 high-profile SPO case,¹¹³ the situation remained unchanged when bid rigging was

¹⁰⁸ Joseph C Gallo, Joseph L Craycraft, and Steven C Bush, ‘Guess Who Came to Dinner: An Empirical Study of Federal Antitrust Enforcement for the Period 1963-1984’ (1985) 2 *Review of Industrial Organization* 106, 126-27.

¹⁰⁹ James Heffernan, who is vice-president of a steel drum-making company, together with some executives of competing companies colluded to offer identical prices on several types of drums to two large purchasers. He was then charged with imprisonment of 24 months in accordance with Section 1. 15 USC of the *Sherman Act*.

¹¹⁰ See *US v Heffernan* 43 F3d 1144, 1157 (7th Cir 1994).

¹¹¹ DOJ, ‘Price-Fixing, Bid-Rigging and Market Allocation Schemes’, above n 88.

¹¹² A number of French, Belgian and German suppliers in the sugar industry colluded to share out the quota of sugar to be offered for export and the amount of refunds for which application would be made at the time of the invitations to tender for refunds on export to EU non-member countries. This kind of behaviour constituted a breach of Article 85 of the EC Treaty (Currently Article 101 of the *Treaty on the Functioning of the European Union*. See more at Joined Cases C-40 to 48, 50, 54-56, 111, 113 and 114/73 *Cooperative Vereniging Suiker Unie UA v Commission* (1975) ECR 1663

<<http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A61973CJ0040>>.

¹¹³ The SPO (Association of Co-operating Organisations for Price-regulation in the Construction Industry)—the Dutch umbrella-association of 28 construction associations—set up rules and regulations which were alleged to fix tender prices and share market allocations among bidding companies by designating the winning bidder. These rules led to the artificial increase of bid price and prevented the participation of other bidding companies outside the Netherlands. See more at Commission Decision (92/204 EC) Building and Construction Industry in the Netherlands OJ (1992) L92/1

<<http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:31992D0204&from=EN>>

considered to be equivalent to price-fixing.¹¹⁴ In *Pre-Insulated pipe*,¹¹⁵ the Commission claimed that bid rigging was merely one of the factors employed to assess the infringement's gravity.¹¹⁶ It can be inferred from such cases that bid rigging has been judicially recognised in the EU as an aspect of cartel behaviour rather than a particular form of stand-alone anticompetitive infringement.¹¹⁷

Similarly, the wording of the EU Leniency Program Notice¹¹⁸ issued in 1996 does not mention bid rigging as a separate competition infringement when stipulating that 'secret cartels between enterprises aimed at fixing prices, production or sales quotas, sharing markets or banning imports or exports are among the most serious restrictions of competition encountered by the Commission'.¹¹⁹

However, the viewpoint concerning bid rigging has changed since the EU leniency program was amended in 2002 and 2006. Accordingly, the wording of the two latest versions enumerated bid rigging together with other anticompetitive behaviours, although it is implied that such a conspiracy is a form of market allocation.¹²⁰ However, the matter is still a live question because, in contrast to the Leniency Program Notice, the wording of the revised Guidance on the Method of Setting Fines¹²¹ does not list bid rigging as a separate form of

¹¹⁴ Similar to the *Suiker Unie* case, the term 'bid rigging' was not mentioned in the Judgement of the ECJ either. Instead, it was replaced by the term 'price-fixing'. See more at Case T-29/92 *Vereniging van Samenwerkende Prijsregelende Organisaties in de Bouwnijverheid and others v Commission (SPO)* (1995) ECR II-00289, para 158 <<http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:61992TJ0029&from=EN>>.

¹¹⁵ In this case, seven producers of pre-insulated pipes were accused of engaging in a complex of anti-competitive agreements including bid rigging during the period from 1991 to 1994. The EC Commission ultimately held that the plaintiffs' behaviour constituted the infringement under Article 85 of the EC Treaty.

¹¹⁶ Decision 1999/60 (Pre-Insulated Pipe Cartel) [1999] OJ L24/1 165(a) <<http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A31999D0060>>.

¹¹⁷ Marsela Maci, 'Bid Rigging in the EU Public-procurement Markets: Some History and Developments' (2011) *European Competition Law Review* 406, 412.

¹¹⁸ The program was adopted under the form of EC Commission Notice on the non-imposition or reduction of fines in cartels cases. That program specifies the requirements for cartelists who cooperate with the Commission during its investigation into the cartel to get the exemptions or reductions of fines. See more at <<http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:31996Y0718%2801%29&from=EN>>.

¹¹⁹ See more at <<http://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX:31996Y0718%2801%29>>.

¹²⁰ The 2002 Commission Notice stipulates: 'This notice concerns secret cartels between two or more competitors aimed at fixing prices, production or sales quotas, sharing markets including bid-rigging or restricting imports or exports.'

The 2006 Commission Notice stipulates:

This notice sets out the framework for rewarding cooperation in the Commission investigation by undertakings which are or have been party to secret cartels affecting the Community. Cartels are agreements and/or concerted practices between two or more competitors aimed at coordinating their competitive behaviour on the market and/or influencing the relevant parameters of competition through practices such as the fixing of purchase or selling prices or other trading conditions, the allocation of production or sales quotas, the sharing of markets including bid-rigging, restrictions of imports or exports and/or anti-competitive actions against other competitors.

¹²¹ Guidance on the Method of Setting Fines was first adopted in 1998 by the EU Commission to define the method for calculating the fines imposed on infringers violating Article 101 and 102 of the TFEU. The revised version

horizontal anticompetitive agreement. Although both of these legal documents generally complement each other, this incompatibility is puzzling, given that they were both issued by the Commission in the same year.

In Japan, although bid rigging was clearly identified in the *Japanese Monopoly Act (AMA)*,¹²² the practice of interpretation of this law¹²³ as well as Japanese case law¹²⁴ has recognised bid rigging as a separate infringement rather than a derivative of price-fixing or market allocation. In addition, the guidelines adopted by the Japan Fair Trade Commission seem to reinforce the separation of bid rigging infringement in the AMA. Specifically, according to the Guidelines concerning the activities of firms and trade associations with regard to public bids, the JFTC concluded that bid rigging behaviours conducted either by firms or trade associations constitute a distinct offence under Section 3 or Section 8.1(i) of the AMA.¹²⁵ In this respect, the Japanese approach is quite different from the initial approach to competition law enforcement adopted by the US and the EU. However, the difference can be explained by the pervasiveness of bid rigging in Japan's history¹²⁶ as well as the priorities of the JFTC's enforcement against bid rigging.¹²⁷

updated in 2006 offered significant changes compared to the first version. However, the wording of this guideline has still excluded bid rigging as a stand-alone cartel infringement when stipulating that 'horizontal price-fixing, market-sharing and output-limitation agreements, which are usually secret, are, by their very nature, among the most harmful restrictions of competition...' See the full text of this guideline at <[http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex:52006XC0901\(01\)](http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex:52006XC0901(01))>.

¹²² The law does not list the forms of cartels such as price-fixing, bid rigging, output restriction or market allocation. Instead, Article 2.6 of the AMA stipulates that:

[t]he term 'unreasonable restraint of trade' as used in this Act means such business activities, by which any enterprise, by contract, agreement or any other means irrespective of its name, in concert with other enterprises, mutually restrict or conduct their business activities in such a manner as to fix, maintain or increase prices, or to limit production, technology, products, facilities or counterparties, thereby causing, contrary to the public interest, a substantial restraint of competition in any particular field of trade.

See more at

<http://www.jftc.go.jp/en/legislation_gls/amended_ama09/index.files/The_Antimonopoly_Act.pdf>.

¹²³ Kazukiyo Onishi indicates: '[Article 2.6] has been interpreted to mean anti-competitive horizontal restraints including hard-core cartels such as price fixing and bid rigging': Kazukiyo Onishi, 'Can the New Antimonopoly Act Change the Japanese Business Community – The 2005 Amendment to Antimonopoly Act and Corporate Compliance' (Asia Pacific Economic papers No 373, Australia-Japan Research Centre 2008) 5.

¹²⁴ A number of bid rigging cases such as the case of *Kyowa Exeo* or the case of *Zip Code Readers* regarded bid rigging as a distinct offense under the AMA. See more at Shingo Seryo, 'Cartel and Bid Rigging' (Documents for Training Course on Competition Law and Policy, JICA, 2004).

¹²⁵ This guideline was adopted by the JFTC in 1994 and replaced the 1984 version, namely: 'The Antimonopoly Act Guidelines Concerning the Activities of Trade Associations of the Construction Industry in Relation to Public-Works'. See more at

<http://www.jftc.go.jp/en/legislation_gls/imonopoly_guidelines.files/publicbids.pdf>.

¹²⁶ Etsuko Kameoka, *Competition Law and Policy in Japan and the EU* (Edward Elgar, 2014) 41.

¹²⁷ Hideo Nakajima, 'Prevention of Bid Rigging in Public Procurement in Japan' (ICN Cartel Workshop, 2014)

See more at

<http://www.ftc.gov.tw/icncartel2014/pdf/2014.10.01.%20Plenary%20I%20%20%20Hideo_Nakajima_Slides.pdf>.

To sum up, while bid rigging has been a distinct infringement under the Japanese legislation, it was not considered a separate hard-core cartel in the first years of competition enforcement in the US and the EU. Specifically, it was generally acknowledged as a subset of price-fixing and/or market allocation. Nonetheless, this traditional viewpoint has been superseded by the new approach where bid rigging is not treated under the general provisions of price-fixing and/or market allocation. This change raises the question of why bid rigging conspiracies need separate regulation when their nature is arguably no different from price-fixing and/or market allocation. Areeda and Hovenkamp provide a plausible answer, arguing that separate regulation is warranted because the stability of bid rigging cartels may make them more harmful than ‘ordinary’ price-fixing.¹²⁸ This proposition is based on the Stigler’s study¹²⁹ (discussed above), which discovered that the higher the possibility of detecting deviations from their collusion is, the more stable cartels are. Under the public procurement rules, winning bids must be publicly announced; this facilitates the immediate detection of cheating among cartel members. This viewpoint is also backed up by Connor and Zimmerman’s empirical research affirming that bid rigging cartels are much more stable than other cartels.¹³⁰ Another reason emphasised by Posner¹³¹ is that bid rigging is more likely to eliminate all competition than normal price-fixing cartels. Also, it is submitted that bid rigging may be particularly harmful if it affects public procurement as alluded to by the OECD:

Collusion in public tenders, or bid rigging, is among the most egregious violations of competition law that injures the public purchaser by raising prices and restricting supply, thus making goods and services unavailable to some purchasers and unnecessarily expensive for others, to the detriment of final users of public goods and services and taxpayers.¹³²

On balance, the experience in the EU, US and Japan, together with the literature, provide strong support for the proposition that best practice in effectively regulating bid rigging behaviour is to establish rules specifically dealing with bid rigging rather than as a subset of cartels or other anticompetitive behaviours more generally.

¹²⁸ Areeda and Hovenkamp, above n 63, 72.

¹²⁹ Stigler, above n 32, 44-48.

¹³⁰ Zimmerman and Connor, above n 61, 22.

¹³¹ Richard A Posner, ‘A Statistical Study of Antitrust Enforcement’ (1970) 13 *Journal of Law and Economics* 365, 419.

¹³² OECD, *Recommendation of the Council on Fighting Bid Rigging*, above n 95, 2.

II. Bid rigging – An approach from public procurement law

This part identifies factors *facilitating* bid rigging in public procurement markets. In Chapter 4 of this thesis, these factors will be applied to investigate whether the Vietnamese public procurement regulation and administrative practices of public procurers themselves facilitate bid rigging collusion.

A. Factors facilitating bid rigging derived from public procurement rules and administrative practices of public procurers

The assumption that public procurement regulation itself is an integral contributing factor to the formation and stability of bid rigging has been persuasively evidenced from the economic perspective¹³³ and has been also affirmed by legal doctrine.¹³⁴ For example, in most of its publications related to public procurement and bid rigging, the OECD invariably stresses that the public procurement environment is a breeding ground for bid rigging schemes:¹³⁵

The formal rules governing public procurement can make communication among rivals easier, promoting collusion among bidders. While collusion can emerge in both procurement and ‘ordinary’ markets, procurement regulations may facilitate collusive arrangements.¹³⁶

Similarly:

Recognising that some public procurement rules may inadvertently facilitate collusion even when they are not intended to lessen competition.¹³⁷

In tandem with public procurement rules, administrative practices of public procurement authorities can unwittingly facilitate bid rigging collusion. It is alleged that competition distortions caused by such practices are much pervasive than those resulting from public procurement rules.¹³⁸

¹³³ Stigler, above n 32, 44-8; Albano et al, above n 32, 350-58; McAfee and McMillan, above n 32, 579; OFT, *Assessing the Impact*, above n 32, 79-81; Klemperer, above n 32.

¹³⁴ Kovacic, *The Antitrust Government Contracts Handbook*, above n 31 and Trepte, ‘Public Procurement’, above n 31, 93, 114.

¹³⁵ OECD, *Public Procurement – The Role of Competition Authority in Promoting Competition* (DAF/COMP (2007) 34) 7.

¹³⁶ Ibid.

¹³⁷ OECD, *Recommendation of the Council on Fighting Bid Rigging*, above n 95, 2.

¹³⁸ Sanchez Graells, *Public Procurement*, above n 48, 245.

As Sanchez states:

Most of the restrictions will take place as a result of the decisions that public purchasers make within the discretionary limits set up by public procurement regulations. In other words, even if it might seem that there are very few restrictions derived from public procurement regulations in books, it is submitted that there is wide scope for the generation of competition distortions by public procurement regulations in practice.¹³⁹

The following are the aspects of the rule and practices that facilitate bid rigging: rules contributing to restriction of potential bidder's participation and entry; rules facilitating the communication among bidders; other rules related to subcontracting and joint bidding; and public procurement goals and policies.

(a) Rules and administrative practices contributing to restriction of potential bidder's participation and entry

The restriction of potential bidders' participation and entry barriers have been identified as key factors originating from general market structure greatly facilitate bid rigging.¹⁴⁰

Regarding the number of bidders, Nobel laureate George J Stigler postulated the relationship between the number of market participants and possibilities of collusion among them.¹⁴¹ Accordingly, the small quantity of competitors makes it much easier to reach an agreement. This proposition has been stressed by literature on game theory on the basis that more potential sellers prevents them from easily reaching an arrangement.¹⁴² For example, as elaborated by Weishaar:¹⁴³

The number of bidders also influences bidding behaviour and thus the possibility to form a cartel. The larger the number of actual and potential competitors, the more difficult it is to form a cartel. The reasons for this are straightforward. First, reaching a cartel agreement requires more complex negotiations between all members, which is thus more

¹³⁹ Ibid 24.

¹⁴⁰ For a review of structural factors facilitating collusion in general, see more at Massimo Motta, *Competition Policy: Theory and Practice* (Cambridge University Press, 2004) 142-150.

¹⁴¹ Stigler, above n 32, 44-8;

¹⁴² Jean Tirole, *The Theory of Industrial Organization* (MIT Press, 1988).

¹⁴³ Weishaar, above n 56, 97.

difficult. Second, the expected pay-offs of cartel membership are lower if cartel proceeds must be shared with more members.¹⁴⁴

It can be understood that the complexity of negotiations among bidders will be substantially diminished and their expected pay-offs will be higher if the number of bidders is small.

Turning to entry barriers, they can be referred to as the hurdles that prevent companies from entering a market or industry. They are relevant in this study as entry barriers can have the effect of restricting the number of participants in public tenders. The correlation between entry barriers and bid rigging has been identified by the OECD, who have stated that:

[i]f entry in a certain bidding market is costly, hard or time-consuming, firms in that market are protected from the competitive pressure of potential new entrants. The protective barrier helps support bid-rigging efforts.¹⁴⁵

In addition to this, entry barriers may unwittingly make bid rigging collusion more stable. More specifically, they may help effortlessly control the retaliation schemes among the incumbent bidders so that they can detect any deviating bidders. The possibility of detecting the deviations is the key contributing factor in cartel stability.¹⁴⁶

One of the restrictions on bidder participation as well as imposition of entry barriers in the public market is derived from the domestic or local content requirements under public procurement rules. These provisions are common in the public procurement rules of both developed and developing countries.¹⁴⁷ Typically, foreign bidders will be eligible if they commit to buy some components from domestic firms.¹⁴⁸ Such limitations will decrease the incentives for foreigners to join the bid because the possibility of winning the public contracts may be quite low. In addition, foreigner bidders are simply not allowed to submit certain bids in several jurisdictions.¹⁴⁹ For instance, under Article 15 of the Vietnamese *Public Procurement Law*, foreign bidders are not allowed to participate in tenders except in some limited circumstances.¹⁵⁰ Similarly, in the Philippines, before the *Government Procurement Reform*

¹⁴⁴ Ibid.

¹⁴⁵ OECD, *Designing Tenders to Reduce Bid Rigging* 7
<<http://www.oecd.org/competition/cartels/42594504.pdf>>.

¹⁴⁶ Stigler, above n 32, 44-8.

¹⁴⁷ Florence Naegelen and Michel Mougeout, 'Discriminatory Public Procurement Policy and Cost Reduction Incentives' (1998) 67 *Journal of Public Economics* 349.

¹⁴⁸ Francis Ssennoga, 'Examining Discriminatory Procurement Practices in Developing Countries' (2006) 6 *Journal of Public Procurement* 218, 219.

¹⁴⁹ Jones, 'Public Procurement in Southeast Asia', above n 9, 9.

¹⁵⁰ Article 15: International bidding

Act was adopted in 2003, foreign bidders were not eligible to participate in public tenders, as only bidders owned by Filipinos and registered in Philippines were allowed to join bids.¹⁵¹ Obviously, practices such as these will limit potential bidder participation, which may facilitate the formation of bid rigging collusion.

Second, unclear and unnecessary requirements used by public procurers to choose qualified bidders can indirectly facilitate bid rigging. For example, some public procurers prefer working with big bidders rather than smaller ones to reduce any commercial risks incurred. Such public procurers can therefore tend to over-emphasise requirements related to the previous experience and past performance of bidders.¹⁵² Such practices prevent small bidders from submitting bids and, thus, increase incentives for collusion among smaller bidders.

(b) Rules and administrative practices related to subcontracting and joint bidding

Subcontracting is an effective tool for public procurers to encourage minor bidders' participation.¹⁵³ However, subcontracting is also recognised as one of many effective tools to facilitate bid rigging. This can happen when the winning bidder subcontracts work to other cartel members in return for them agreeing not to bid or submit a cover bid. In this regard, subcontracting arrangements facilitate distribution of collusion proceeds among bid riggers.¹⁵⁴ An example confirming this fact is a case reported by the Swedish Competition Authority¹⁵⁵ in which, in a public tender for the supply of power poles, the designated winner agreed to compensate the losing bidders by buying half of the supplies needed to fulfil the contract from these companies via subcontracting arrangements.

1. International bidding shall be held to select tenderer only when it meets one of the following conditions:

- a) The donor of bidding package requests for holding international bidding;
- b) Tender packages for procurement of goods where the goods are not yet able to be manufactured domestically or able to be manufactured but fail to meet technical, quality or price requirements. Cases of common goods, already imported and offered for sale in Vietnam, do not organise international bidding;
- c) Bidding packages for providing advisory service, non-advisory service, construction and installation, mixtures of provisions, where domestic tenderers are not able to satisfy the requirements of bidding package performance.

¹⁵¹ Jones, 'Public Procurement in Southeast Asia', above n 9, 13.

¹⁵² OFT, 'Evaluation of the Impact of the OFT's Investigation into Bid Rigging in the Construction Industry' (Research report, Europe Economics, 2010) <<http://www.europe-economics.com/publications/bidrig.pdf>>.

¹⁵³ It is clearly stated in the EU Directive 2004/ 18/EC: 'In order to encourage the involvement of small and medium-sized undertakings in the public contracts procurement market, it is advisable to include provisions on subcontracting' and also in the US FAR at Subpart 19.7-The Small Business Subcontracting Program.

¹⁵⁴ Weishaar, above n 56, 103.

¹⁵⁵ Swedish Competition Authority, *Osund konkurrens i offentlig upphandling - Om lagöverträdelse som konkurrensmedel* (2013) 151 [Unfair Competition in Public Procurement, on Illegal Actions as a Means of Competition].

Examples such as this serve to illustrate that without appropriate restriction and close supervision provided by public procurement rules, subcontracting may be the breeding ground for bid rigging collusion. Policy-makers have been criticised for not adequately dealing with this issue. For example, the subcontracting mechanism under previous EU Directive 2004/18/EC on public procurement was criticised for its under-deterrence towards bid rigging because of the absence of provisions related to the recognition of subcontractors' identity.¹⁵⁶ More specifically, Article 25 of this Directive was the only provision governing subcontracting and it read as follows:

[T]he contracting authority may ask or may be required by a Member State to ask the tenderer to indicate in his tender any share of the contract he may intend to subcontract to third parties and any proposed subcontractors.

In summary, the Directive was considered deficient because, although it required contracting authorities to be informed of the amount that may be subcontracted, it did not require tenderers to specify to whom they intended to subcontract.¹⁵⁷

Similarly, joint bidding mechanisms¹⁵⁸ aim at maximising the efficiency of public procurement by allowing two or more bidders bidding together as a single entity.¹⁵⁹ However, like subcontracting, joint bidding can also serve as a tool of distributing cartel profits. In most cases of anticompetitive joint bidding, although bid riggers are, in fact, capable of submitting independent bids by themselves, they still get involved as a bidding consortium to win the bid.¹⁶⁰

(c) Public procurement goals and policies

(i) Clashes among main goals of public procurement regulation: Transparency (eg Anti-corruption) vs Competition (eg Anti-Bid rigging)

The specified procurement goals of every nation and even every procuring unit within a nation are different from each other due to the discrepancies in economic, social and political

¹⁵⁶ Weishaar, above n 56, 107.

¹⁵⁷ This shortcoming has been solved with the introduction of the new EU Directive 2014/24/EU when stipulating at Article 71.5 as follows:

...the contracting authority shall require the main contractor to indicate to the contracting authority **the name, contact details and legal representatives of its subcontractors**, involved in such works or services, in so far as known at this point in time [emphasis added].

¹⁵⁸ It is usually referred to as a 'bidding consortia' or 'joint venture'.

¹⁵⁹ Christopher Thomas, 'Two Bids or not to Bid? An Exploration of the Legality of Joint Bidding and Subcontracting' (2015) *Journal of European Competition Law & Practice* 1.

¹⁶⁰ For an analysis of joint bidding, refer to section I.A of this chapter.

settings.¹⁶¹ However, it has been widely recognised that competition, integrity and transparency are the main goals of public procurement regulation.¹⁶² It is also noted that these goals of public procurement cannot be achieved in tandem: there are always trade-offs among them. While transparency contributes to deter corruption and enhance the fairness of public procurement mechanisms, it is equally recognised as a possible catalyst for bid rigging practices.¹⁶³ As stated by the OECD:

While transparency of the process is considered to be indispensable to corruption prevention, excessive and unnecessary transparency in fact facilitates the formation and successful implementation of bid rigging cartels. The extent to which transparency is a desirable aspect of a procurement process therefore depends on the circumstances, and may require trade-offs between best practice approaches to avoidance of collusion and corruption¹⁶⁴

Notwithstanding, the principle of transparency can be found embedded in provisions of public procurement rules.¹⁶⁵ First, transparency can typically be found throughout public procurement disclosure policies. The public procurement rules of most jurisdictions require the publicising of bidding information before and after bidding processes. However, arguably, disclosing excessive information such as name and price offered by all bidders and score or rank obtained by all bidders can increase the risk of bid rigging. This is because this sensitive information may allow cartel bid-rigging members to detect deviations by cartel members and apply severe punishments to those members accordingly.

Second, transparency also relates to the communication between public procuring authorities and bidders.

¹⁶¹ Khi V Thai, 'Public Procurement Re-examined' (2001) 1 *Journal of Public Procurement* 26.

¹⁶² SL Schooner, 'Desiderata: Objectives for a System of Government Contract Law' (2002) 11 *Public Procurement Law Review* 104-106; PA Trepte, *Regulating Procurement. Understanding the Ends and Means of Public Procurement Regulation* (Oxford University Press, 2004) 3; Arrowsmith, above n 69, x; F Weiss and D Kalogeras, 'The Principle of Non-Discrimination in Procurement For Development Assistance' (2005) 14 *Public Procurement Law Review* 1, 2-3 and 6; S Brown, 'APEC Developments – Non-binding Principles of Value for Money and Open and Effective Competition' (1999) 8 *Public Procurement Law Review* 16.

¹⁶³ Albert Sanchez Graells, The Difficult Balance between Transparency and Competition in Public Procurement: Some Recent Trends in the Case Law of the European Courts and a Look at the New Directives (Research Paper No 13-11, University of Leicester School of Law, 2013) <https://papers.ssrn.com/sol3/papers2.cfm?abstract_id=2353005##>; Simona Gherghina, 'Public Investments and the Application of Articles 101 and 102 TFEU' in Adriana Almasan and Peter Whelan (eds), *The Consistent Application of EU Competition Law: Substantive and Procedural Challenges* (Springer International Publishing, 2017) 98.

¹⁶⁴ OECD, *Roundtable on Competition Policy*, above n 33.

¹⁶⁵ For a detailed analysis of anticompetitive impacts of transparency rules included in the EU Directive 2014/24/EU, see de Quesada, above n 59, 229-44.

In an effort to enhance transparency, many public procurers tend to frequently organise clarification meetings and/or on-site visits for bidding participants. Such practices can also contribute to enhancing the communication among bidders, thus facilitating bid rigging behaviours.

(ii) Clashes between main goals of public procurement law with other secondary policies: Competition (Anti-bid rigging) vs Social-political policies

It is worth noting that public procurement has been used as a policy tool to pursue non-economic goals besides its main goals. They include promotion of domestic or local businesses, environmental protection policy, innovation policy, industrial policy and other policies that have been referred as to secondary policies.¹⁶⁶ Some of these policies may diverge from the main goals of public procurement arena and limit the competition in public procurement, including promoting bid rigging collusion.

For example, while pursuing the industrial policy in favour of protecting domestic enterprises, many governments put some restrictions on foreign bidder's participation that may decrease the number of potential bidders and therefore facilitate bid rigging.

Or in the event that the government aims at environmental protection policy or innovation policy, they may apply specific criteria to choose the qualified bidders, which leads to the decrease of bidders and accordingly makes the bid rigging collusion more stable.

III. Bid rigging: An approach from criminal law

Criminalising cartel behaviours is not a new phenomenon. In fact, cartels had been criminalised under English common and statutory law since at least the 1200s.¹⁶⁷ Yet, it was not until 1889 that criminalisation of cartel conduct had been introduced in modern competition law in Canada. One year later, America criminalised such practices with the adoption of the *Sherman*

¹⁶⁶ OECD, *Recommendation of the Council on Public Procurement* (2015) 6 <<http://www.oecd.org/governance/ethics/OECD-Recommendation-on-Public-Procurement.pdf>12>.

¹⁶⁷ For the historic roots of cartel criminalisation, see more at John M Connor, Albert A Foer and Simcha Udwin, 'Criminalizing Cartels: An American Perspective' (2010) 1(2) *New Journal of European Criminal Law* 199, 205. Nicholas Green, 'The Road to Conviction - The Criminalisation of Cartel Law' in Barry Hawk (eds) *Annual Proceedings of the Fordham Corporate Law Institute International Antitrust Law & Policy* (Juris Publishing, 2004) 13, 13-22.

Act¹⁶⁸ and became the most active jurisdiction of prosecuting cartels and bid rigging. However, outside of North America, cartel criminalisation seemed to gain little attention from legislators. As the US President Franklin D Roosevelt said in his 6 September 1944 letter to the US Secretary of State:

The Sherman and Clayton Acts have become as much a part of the American way of life as the due process clause of the constitution... Unfortunately, a number of foreign countries,... do not possess such a tradition against cartels. On the contrary, cartels have received encouragement from some of these governments...

However, during the last 20 years, more than 30 countries have imposed criminal sanctions on cartel offenders and this list seems to be on the increase.¹⁶⁹ The proliferation of the criminalisation of hard-core cartels is undoubtedly linked with the global trend towards enhancing the sanctions on cartels, which was significantly influenced by the US¹⁷⁰ and supported by intergovernmental organisations such as the OECD,¹⁷¹ International Competition Network (ICN)¹⁷² and the European Commission.¹⁷³ This trend aims to enhance deterrence,¹⁷⁴ support national processes of cooperation in law enforcement¹⁷⁵ and aid leniency programs.¹⁷⁶

¹⁶⁸ The *Sherman Act*, passed by the US Congress in 1890, is the most important Federal Antitrust Statute. It provides the foundation for dealing with conduct restraining business competitors. The Act has been described by the US Supreme Court as ‘a comprehensive charter of economic liberty aimed at preserving free and unfettered competition as the rule of trade’. See more at *Northern Pacific Railway v United States*, 356 US 1, 4 (1958).

¹⁶⁹ Gregory C Shaffer, Nathaniel H Nesbitt and Spencer Weber Waller, ‘Criminalizing Cartels: A Global Trend?’ in John Duns, Arlen Duke and Brendan Sweeny (eds), *Research Handbook on Comparative Competition Law* (Edgar Elgar, 2015).

¹⁷⁰ Julie Clarke, ‘The Increasing Criminalization of Economic Law – A Competition Law Perspective’ (2011) 19(1) *Journal of Finance Crime* 76, 81; Scott Hammond and Ann O’Brien, ‘The Evolution of Cartel Enforcement over the Last Two Decades: The U.S. Perspective’ in Małgorzata Krasnodębska-Tomkiel (ed), *Changes in Competition Policy over the Last Two Years* (Warsaw, 2010).

¹⁷¹ OECD, *Recommendation of the Council Concerning Effective Action against Hard Core Cartels*, above n 2; OECD, ‘Hard Core Cartels: Third Report on the Implementation of the 1998 Council Recommendation’ (2005).

¹⁷² See more in the work to date by the Cartels Working Group at <<http://www.internationalcompetitionnetwork.org/library.aspx?search=&group=2&type=0&workshop=0>>.

¹⁷³ Mario Monti, ‘Fighting Cartels Why and How? Why Should We Be Concerned with Cartels and Collusive Behaviour?’ (3rd Nordic Competition Policy Conference, Stockholm, 11-12 September 1990); Neelie Kroes, ‘Tackling Cartels – a Never-ending Task’ (Anti-Cartel Enforcement: Criminal and Administrative Policy – Panel session, Brasilia, 8 October 2009).

¹⁷⁴ Connor, Foer and Udwin, above n 167, 199. OECD, *Cartel Sanctions against Individuals* (2003) Canadian Submission 49; Israeli Submission 68; Norwegian Submission 79 and US Submission 100 <<https://www.oecd.org/competition/cartels/34306028.pdf>>.

¹⁷⁵ Michael O’Kane, ‘International Cartels, ‘Concurrent Criminal Prosecutions and Extradition: Law, Practice and Policy’ in Caron Beaton-Wells and Ariel Ezrachi (eds), *Criminalising Cartels – Critical Studies of an International Regulatory Movement* (Hart Publishing, 2011).

¹⁷⁶ Christopher Harding, Caron Beaton-Wells and Jennifer Edwards, ‘Leniency and Criminal Sanctions in Anti-Cartel Enforcement: Happily Married or Uneasy Bedfellows?’ in Caron Beaton-Wells and Christopher Tran, *Anti-Cartel Enforcement in a Contemporary Age: Leniency Religion* (Hart Publishing, 2015).

A. Criminalisation of cartels and bid rigging: The reflection of local factors¹⁷⁷

Despite its expansion, there is no systematic approach of cartel criminalisation. In other words, regulations on criminalising cartels and bid rigging vary from country to country. In some countries, penal sanctions on cartel behaviours are imposed on both individuals and corporations,¹⁷⁸ compared to only individuals in other countries.¹⁷⁹ In other cases, criminal sanctions are restricted to particular forms of competition infringements: for instance, only bid rigging in the case of Italy, Poland, Austria, Germany and Hungary;¹⁸⁰ only market sharing, monopolies and bid rigging in the case of Croatia; or only ‘monopoly’ in the case of Chile.¹⁸¹

As a serious infringement in both competition law and public procurement law, criminalisation of bid rigging behaviours does not have a uniform pattern either. Besides being criminalised as a competition law offence, bid rigging conduct is condemned as a fraud offence or a public procurement offence. In some countries, it can even be prosecuted under two offences at the same time: an antitrust offence and a fraud offence.¹⁸²

1. Criminalising bid rigging as a fraud offence

Besides being an antitrust offence, bid rigging is also criminalised as fraud offence in major jurisdictions such as the US, the UK or Germany.

Under the US legislation, fraud is defined as ‘any intentional deception ... including attempts and conspiracies to effect such deception for the purpose of inducing ... action or reliance on that deception’.¹⁸³ Bid rigging is, therefore, a subset of fraud as it constitutes a secretive scheme with the intention of defrauding the public purchasers by creating the appearance of competition. Under the fraud federal statutes, bid rigging often involves many forms of illegal conduct, such as conspiracy to defraud, signing of false certificates, the use of the mail to submit rigged bids or the destruction of evidence.¹⁸⁴ Due to the broad application of these non-

¹⁷⁷ These factors refer to domestic institutional structures, capacities and legacies. See more in Gregory Shaffer, ‘Transnational Legal Process and State Change’ (2012) 37 *Law and Social Inquiry* 229 and Terence Halliday and Gregory Shaffer, ‘Transnational Legal Orders’ in Terence Halliday and Gregory Shaffer (eds), *Transnational Legal Orders* (Cambridge University Press, 2015).

¹⁷⁸ The countries belonging to this group include the US and Japan.

¹⁷⁹ This group includes Vietnam, Austria, Slovakia, Germany and Hungary.

¹⁸⁰ See this compiled list in Shaffer, Nesbitt and Waller, above n 169.

¹⁸¹ Christopher Harding, ‘Business Collusion as a Criminological Phenomenon: Exploring the Global Criminalisation of Business Cartels’ (2006) 14 *Critical Criminology* 182, 191.

¹⁸² The US and Germany are among the countries following this dual sanction system.

¹⁸³ Army regulation (AR) 27-40, Legal Services, Section II, Terms.

¹⁸⁴ The list of the fraud offences in relation to bid rigging include: conspiracy to commit offense or to defraud United States – *Federal Conspiracy Law* 18 USC 371; false, fictitious or fraudulent claims – *Criminal False*

antitrust statutes, a bid rigging offence is often sanctioned simultaneously between antitrust and fraud counts to significantly increase the penalties for bid rigging.¹⁸⁵ This is one of the peculiarities of the US legislation which make it different from other jurisdictions.

While criminal sanctions for fraud in the context of bid rigging do not exist at the EU level, this regulation does exist in several EU member countries such as the UK and Germany. Under the German *Criminal Code*, bid rigging is treated as a fraud offence:

Section 263 Fraud

Whosoever with the intent of obtaining for himself or a third person an unlawful material benefit damages the property of another by causing or maintaining an error by pretending false facts or by distorting or suppressing true facts shall be liable to imprisonment not exceeding five years or a fine.

(2)-(7)...

Under this regulation, the three following elements need to be proven to constitute fraud: (1) false fact or the distortion or suppression of true facts (deceit); (2) mistake (error); and (3) damage of the assets of another person (damage).¹⁸⁶

In the UK, besides being criminalised under section 188 of the *Enterprise Act 2002*, bid rigging behaviour may also be indicted as a fraud conspiracy as has been judicially confirmed: ‘It is difficult to see why any such (price-fixing) agreement involving dishonesty or other fraud

Claims Act – 18 USC 287; false statement – *Criminal False Statement Act* 18 USC 1001; mail fraud and wire fraud – *Federal Laws Criminalising Mail and Wire Fraud Laws* 18 USC 1341 and 1343; major fraud against the United States – *Major Fraud Act* 18 USC 1031.

¹⁸⁵ In the *United States v Columbus Steel Co*, where defendants in the steel container industry entered into a collusive agreement, some individual defendants were charged with a single antitrust count while others faced antitrust counts and two mail fraud charges. As a result, the former were sentenced to four to ten months and the latter to at least 15 to 21 months’ imprisonment. See more at *United States v Columbus Steel Co*, Crim No 91 CR 0159, indictment (NDI11 8 March 1991). For a comparison concerning criminal sanctions between the *Sherman Act* count and the *Sherman Act* plus two mail fraud counts, see David Overlock Stewart, ‘Raising the Stakes: Raising the Upward Transformation of Antitrust And Fraud Charges’ (1993) 20(2) *American Journal of Criminal Law* 207, 215.

¹⁸⁶ In addition to Section 263 of the *German Criminal Code*, bid rigging also falls into the ambit of Section 298. Unlike Section 298, this new provision does not require deceit or damage. Instead, it requires two other requirements: including (1) an illicit agreement as the basis for an offer and (2) that such agreement was put into practice to the extent that at least one offer was delivered. It is noted that liability under Section 298 does not replace liability under Section 263.

‘Where the requirements for both provisions are met, there is concurrent liability under both sections; and in particular, section 298 cases will frequently fulfil the criteria of aggravated fraud’. See more at Florian Wagner-Von Papp, ‘What If All Bid Riggers Went to Prison and Nobody Noticed? Criminal Antitrust Law Enforcement in Germany’ in Caron Beaton-Wells and Ariel Ezrachi (eds), *Criminalising Cartels Critical Studies of An International Regulatory Movement* (Hart Publishing, 2011).

should not amount to a common law conspiracy to defraud'.¹⁸⁷ However, unlike the US where bid rigging can be indicted as a fraud offence and an antitrust offence in tandem, serious and complex bid rigging/fraud cases will be investigated and prosecuted by the Serious Fraud Office (SFO) while other anticompetitive agreements are vested in the Competition and Market Authorities (CMA).¹⁸⁸

2. *Bid rigging as a public procurement offence*

A typical example of criminalising bid rigging as a public procurement offence is the case of Vietnam. Vietnamese legislators classify bid rigging as a public procurement offence rather than a competition law offence under the newly revised *Penal Code 2014*. The rationale for this swap as well as scrutiny of the operation of new criminal provisions will be examined in Chapter 3 of this thesis.

Japan has also criminalised bid rigging as a public procurement offence.¹⁸⁹ Article 96-3 of the Japanese *Penal Code* reads as follows:

Article 96-3. (Obstruction of Auctions)

(1) A person who by the use of fraudulent means or force commits an act which impairs the fairness of a public auction or bid, shall be punished by imprisonment with work for not more than 2 years or a fine of not more than 2,500,000 yen.

(2) The same shall apply to a person who colludes for the purpose of preventing a fair determination of price or acquiring a wrongful gain.

This wide range of approaches confirm the views expressed by commentators such as Harding, who has observed that 'much of this criminal law provision is, from a comparative perspective, unsystematic, uncoordinated, and local rather than international in its origin.'¹⁹⁰

¹⁸⁷ *Norris v Government of the United States of America and others* [2007] EWHC 71 (Admin), CO/8286/2005, para 56.

¹⁸⁸ CMA and SFO, 'Memorandum of Understanding between the Competition and Markets Authority and the Serious Fraud Office' 3
<https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/307038/MoU_CMAandSFO.PDF>.

¹⁸⁹ In addition to Article 96 of the *Penal Code*, bid rigging, together with other anti-competitive agreements, is criminalised under Article 89(1) and Article 95(1) of the *Japanese Antimonopoly Act* (AMA).

¹⁹⁰ Harding, above n 181, 191.

Conclusion

This chapter has explored bid rigging from the three different landscapes of competition, public procurement and criminal law. From a competition law perspective, this chapter has clearly identified the specific traits of bid rigging that distinguish it from other types of cartel behaviour. While originally considered a subset of price-fixing and/or market allocation, bid rigging has been gradually recognised as a separate antitrust offence receiving high attention from competition authorities.

From a public procurement law perspective, this chapter argues that although bid rigging is an irregularity of public tender processes and consequently prohibited by public procurement rules, this practice is unintentionally facilitated by some of these rules as well as some of the administrative practices of procuring officials. Specifically, in some cases, public procurement rules and administrative practices lead to the reduction of potential bidders, the increased interaction among bidders and between bidders and public procurers, which can operate as the main factors facilitating bid rigging. Interestingly, and *prima facie* counter-intuitively, while transparency is essential to ensure the efficiency of tender process and avoid corrupt practices, over-transparency may also lead to collusive practices.

From the perspective of criminal law, this chapter shows that criminalisation of bid rigging behaviours does not have a uniform pattern. Besides being criminalised as a competition law offence, bid rigging conduct is in various jurisdictions and contexts condemned as a fraud offence or a public procurement offence or both. Notwithstanding that criminalising bid rigging as a hard-core cartel is the reflection of local factors, there is still scope and merit in exploring approaches to criminalisation of bid rigging from the single country perspective. This may help to explain the impetuses behind a country's decision on the appropriate degree and effectiveness of cartel enforcement. This is one of the matters which will be addressed in the following chapter in the Vietnamese context.

CHAPTER 3: LEGAL FRAMEWORK APPLICABLE TO BID RIGGING IN VIETNAM

This chapter sets out the legal framework for the assessment of bid rigging practices in the Vietnamese context. The *Competition Law*, the *Public Procurement Law* and the *Penal Code* will be examined in turn. As part of this assessment, consideration in this chapter extends to a comparison with various elements of the US, the EU and Japanese approaches to regulating bid rigging behaviour in order to highlight the shortcomings of the Vietnamese anti-bid rigging laws.

The first part begins by giving a brief overview of the history and structure of the *Vietnamese Competition Law*. It then goes on to identify bid rigging as an agreement in restraint of competition under Article 8 of that law. Specifically, it also assesses the extent to which the forms of bid rigging agreements stipulated in the *Competition Law* accord with well-recognised categorisations set out in Chapter 1.

The second part of this chapter sets out the legal regime applicable to bid rigging in the *Public Procurement Law*. It first starts with the overview of the history and structure of the Vietnamese *Public Procurement Law* and further assesses elements constituting bid rigging as an administrative offence.

As elaborated in Chapter 2, criminalisation of bid rigging behaviours around the globe does not have a uniform pattern. Accordingly, the final part of this chapter reaffirms that criminalisation of bid rigging in Vietnam reflects local factors aiming at ensuring the efficiency of state management in public procurement sector rather than protecting competition in the market. It further scrutinises elements constituting a bid rigging offence under the newly revised *Penal Code*.

I. The Competition Law and Bid rigging

A. Overview of the Vietnamese Competition Law

1. History and development of the Vietnamese Competition Law

Before Vietnam's Doi moi (Reform) policy¹⁹¹ was introduced, the concepts of 'protecting a competitive marketplace' and 'fighting cartels' seemed to be antithetical to the regulatory and

¹⁹¹ It refers to the Vietnamese government policy towards reforming the economy, adopted at the Sixth Party Congress in 1986.

business culture of Vietnam.¹⁹² From the perspective of business culture, Vietnamese enterprises tend to cooperate rather than compete, which can be explicable due to the everlasting influence of Confucian values.¹⁹³ This tendency is also illustrated in the old Vietnamese proverb, ‘buon co ban, ban co phuong’, which means ‘you must start up a business with friends and do business with a guild’.¹⁹⁴ From the perspective of regulatory culture, this mindset is also absorbed by government agencies, who have run a centrally-planned economic system for such a long time. During this period, competition, understood as ‘emulation’¹⁹⁵ (‘thi dua’ in Vietnamese) existed among state companies - the only economic entities legally recognised over the time. This led to the non-existence of a market-oriented economy because competition and business competitors did not exist and economic entities had to follow the State’s plan to do business.¹⁹⁶ As a result, there was no need for a competition law in this sort of economy.

However, since Doi moi policy was adopted in 1986, Vietnam has transformed a centrally planned economy into a socialist-oriented market economy. This process, including trade and price liberalisation, deregulation, privatisation and attraction of foreign direct investment has brought significant changes into economic law framework.¹⁹⁷ In addition to the reform process,

¹⁹² Nguyen Anh Tuan, ‘A Review of Ten Years of Enforcement’, above n 16.

¹⁹³ See Pham Duy Nghia, ‘Confucianism and the Conception of the Law in Vietnam’ in John Gillespie and Pip Nicholson (eds), *Asian Socialism and Legal Change: the Dynamics of Vietnamese and Chinese Reform* (ANU E Press and Asia Pacific Press, 2005). Like Vietnam, the business culture in other countries in East Asia such as Japan has been profoundly affected by Confucian values, which emphasise the cooperation and harmonisation towards a peaceful society. See more at Jingyuan Ma and Mel Marquis, ‘Business Culture in East Asia and Implications for Competition Law’ (2016) 51(1) *Texas International Law Journal* 9.

¹⁹⁴ Nguyen Anh Tuan, ‘A Review of Ten Years of Enforcement’, above n 16.

¹⁹⁵ It is noted that the term ‘emulation’ puts an emphasis on production enthusiasm. See more at Nguyen Thanh Tu, ‘Competition Law in Vietnam’, above n 11, 416. Also, these terms reflect different meanings. Specifically, while the principle of ‘competition’ is ‘defeat and death for some and victory and domination for others’, the principle of ‘emulation’ is to ‘comradely assistance by the foremost to the laggards, so as to achieve an advance of all’. See JV Stalin, *Works* 114-17 <<http://www.marx2mao.com/Stalin/ELEM29.html>>.

¹⁹⁶ Nguyen Nhu Phat and Bui Nguyen Khanh, *Tien toi Xay dung Phap luat Ve Canh tranh va Chong Doc quyen Trong Dieu kien Chuyen sang Nen Kinh te Thi truong* [Heading to Building Laws on Competition in the Condition of Transitioning into the Market Economy in Vietnam] (People’s Public Security Publisher, 2001); John Gillespie, ‘Changing Concepts of Socialist Law in Vietnam’ in John Gillespie and Pip Nicholson (eds), *Asian socialism & legal change the dynamics of Vietnamese and Chinese reform* (Asia Pacific Press, 2005) 56-57; Nguyen Nhu Phat, ‘Bao cao Tong hop de tai “Xay dung The che Canh tranh Thi truong o Viet Nam”’ [Overall Report of the Project ‘Building up a Market Competition Institution in Vietnam’] (2005) 1; Dang Vu Huan, *Phap luat Ve Kiem soat Doc quyen va Chong Canh tranh Khong Lanh manh o Vietnam* [Law Concerning Monopoly Control and Anti-Unfair Competition in Vietnam] (PhD in Law Thesis, Hanoi Law University, 2002) 116-117; Hoang Tho Xuan, ‘Report on the Situation of Competition and Competition Legislation in Vietnam’ (Paper presented at East Asia Competition Policy Forum, ASEAN Competition Project Series, 2001) <http://www.jftc.go.jp/eacpf/02/vietnam_r.pdf>.

¹⁹⁷ Nguyen Thanh Tu, ‘Competition Law in Vietnam’, above n 11, 416. In the very first years of the reform process, several competition practices were regulated by various laws and sub-laws including the *Commercial Law* 1997, Ordinance No 40 of the Standing Committee of the National Assembly dated 26 June on Price, and Ordinance No 43 of The Standing Committee of the National Assembly dated 25 May 2002 on Telecommunications. However, it is noted that these laws only governed unfair competition practices while other

the increasing economic integration¹⁹⁸ during this period has also had the effect of improving the development of Vietnamese legislation, especially relating to the economic management field including competition law. As a result, the VCL was promulgated on 3 December 2004 in an effort to establish a legal framework for a more effective competitive economy as one of the mandatory requirements for Vietnam's accession to the World Trade Organization (WTO).¹⁹⁹ Under this new legislation, cartels including bid rigging were regulated for the first time in spite of the fact that many Vietnamese government officials believed that cartels were not detrimental to the economy and should be encouraged to protect companies from cutthroat competition.²⁰⁰

2. Structure of the Vietnamese Competition Law

The VCL embodies 123 articles positioned in six chapters: (1) general provisions; (2) antitrust provisions including agreements in restraint of competition, abuse of dominant and monopoly position, economic concentration (mergers and acquisitions) and exemption procedures; (3) unfair competition acts; (4) competition authorities; (5) procedure and (6) implementation.

In addition to the Law, a number of decrees have been adopted by the Government to provide detailed guidance under the VCL, which must be read in conjunction with the VCL: Decree No 116/2005/ND-CP dated 15 September 2005 on Detailed Provisions for Implementation of the Law on Competition; Decree No 71/2014/ND-CP dated 21 July 2014 on Dealing with Breaches in the Competition Sector (DDB); Decree No 06/2006/ND-CP dated 9 January 2006 on Functions, Duties, Powers and Organisational Structure of Competition Administration Department and Decree No 07/2015/ND-CP of the Government dated 16 January 2015 on Functions, Duties, Powers and Organisational Structure of Competition Council.

components of competition policy such as cartels, monopolies or mergers fell outside the ambit of these such laws.

¹⁹⁸ Vietnam became the member of the Association of Southeast Asia Nations (ASEAN) in 1995, joined the Asia Pacific Economic Cooperation Forum in 1997 and also formally applied for WTO membership in 1995. All these factors were seen as chief landmarks contributing to the evolution of competition law in Vietnam. See more at William E Kovacic and William AW Neilson, 'Advisory Report on Approaches to Competition Policy in Vietnam' (July 1997) [prepared for the World Bank and the Central Institute for Economic Management].

¹⁹⁹ Vietnam officially joined the WTO on 11 January 2007.

²⁰⁰ Nguyen Anh Tuan, 'A Review of Ten Years of Enforcement', above n 16.

B. Bid rigging as an agreement in restraint of competition

1. General

Provisions on agreements in restraint of competition are stipulated in Chapter III of the *Vietnamese Competition Law*.²⁰¹ Article 8 of the law enumerates eight different categories of anticompetitive agreements.²⁰² These categories are divided into two main distinct groups: (1) prohibited and (2) conditionally prohibited, where the principles of the rule of reason²⁰³ and per-se rule²⁰⁴ are applied, respectively. Agreements falling in the first group²⁰⁵ are only prohibited if the parties to such agreements have a combined market share of at least thirty per cent in the relevant market.²⁰⁶ Also, such agreements may be exempted under Article 10(1) of the law. Meanwhile, the agreements under the second group are illegal per se, which means that such agreements will be utterly prohibited regardless of the market power of the cartel members. Bid rigging collusions are condemned under this group.²⁰⁷ As scrutinised in section I.B of chapter 2, best practice in effectively regulating bid rigging behaviour is to deal with bid rigging as a separate category of cartel conduct rather than a form of price fixing and/or marketsharing. In this regard, *Vietnamese Competition Law* has the same approach when classifying bid rigging as an illegal per se anticompetitive agreement separated from price fixing and market allocation cartels.²⁰⁸ This is because their negative impact on the public procurement market attracts adverse public attention and foreign donors. A strict prohibition is, therefore, an attempt to reassure the public and concerned foreign donors.²⁰⁹

²⁰¹ Vietnamese law is silent on the definition of an ‘agreement in restraint of competition’. Pursuant to Article 3.3 of the VCL, this practice is seen as a form of competition restriction, acts which are defined as ‘acts performed by enterprises to reduce, distort and prevent competition on the market’. See more at VCA and JICA, above n 17, 19.

²⁰² This exclusive list spurs much criticism. It is argued that this narrow, form-based definition may restrict the scope of cartel regulation and therefore may not cover other illegal collusive agreements. This approach is different from that of the EU, which is clearly non-exhaustive under Article 101(1) of the TFEU. See more at Nguyen Anh Tuan, ‘A Review of Ten Years of Enforcement’, above n 16, 215; VCA and JICA, above n 17, 28.

²⁰³ As mentioned earlier, the rule of reason together with the per-se rule are fundamental principles determining the legality of anti-competitive agreements. The rule of reason holds that a competitive agreement may have both pro-competitive and anti-competitive effects. Therefore, an assessment of the balance between these two effects will decide whether an anti-competitive agreement is prohibited. For an analysis of this rule, see Jacobson, above n 11, 56-59.

²⁰⁴ See above Chapter 1 n 12.

²⁰⁵ The first group includes price-fixing, market allocation, output restrictions, restrictions on technological development or investment and tying agreements.

²⁰⁶ This approach is similar to the rule of reason which exists in US antitrust law.

²⁰⁷ In addition to bid rigging, market foreclosure and boycotts also fall into this group.

²⁰⁸ Interestingly, unlike bid rigging, price fixing and market allocation cartels are not classified as per se cartels, which is different from the approach of the US, EU and Japan. The discussion on this issue

²⁰⁹ It is noted that a number of significant donations from developed nations and international institutions have been made to the Vietnamese government under the Official Development Assistance (ODA) program. The statistics of the ODA disbursements to Vietnam during the period from 2005 to 2014 show that the Vietnamese government received more than ten billion USD from major donors, most of which are used for infrastructure

It is noted that bid rigging practices will fall under the *Vietnamese Competition Law* if they satisfy several legal elements stipulated under the Law. These legal elements are discussed below to provide a contextualised assessment of the legal requirements for proving bid rigging collusion. The key elements are: (1) the involvement of ‘enterprises’; (2) the existence of ‘bid rigging agreements’ and (3) proof of bid rigging agreements.

2. The concept of enterprise

Article 8 of the *Vietnamese Competition Law* prohibits agreements between enterprises. While the definition of an enterprise is not provided by the VCL, the *Law on Enterprises*²¹⁰ defines it as an organisation having its own name, assets, office, and as being registered in accordance with the law for the purpose of conducting business. They include domestic private companies, State-owned companies, foreign invested companies and overseas companies operating in Vietnam.

Although the *Vietnamese Competition Law* is silent on the exact definition of an enterprise, Article 2 of this law lists ‘enterprises operating in the State-monopolised sectors and domains’ as an addressee of the law. In fact, the issue as to whether enterprises engaged in production or supply of public utility products or services or enterprises conducting business in State monopoly industries could be subject to the law has been raised many times. According to the Drafting Committee, these enterprises are assigned specific tasks by the state to manufacture products and to provide public utility services or operate in a State-monopolised arena.²¹¹ However, they are also permitted to conduct other business to make profits outside their specific tasks. Therefore, the law should apply to them to ensure the principle of equality among enterprises of all economic sectors. Also, the inclusion of such enterprises in the law shows the compliance with the definition of enterprise in the *Law on Enterprises*.

From a comparative perspective, the term ‘enterprise’ as stated in the law is similar to the term ‘undertaking’ in the EU competition rules; it is focused on economic activities performed by

development and public procurement. See more at OECD, *Geographical Distribution of Financial Flows to Developing Countries Disbursements, Commitments, Country Indicators* (2016) <<http://www.oecd-ilibrary.org/docserver/download/4316013e.pdf?expires=1463402416&id=id&accname=ocid177603&checksum=3DBDEADCC0A076E59A324EF92F66D023>>.

²¹⁰ The *Law on Enterprises* is the specialised law governing all activities of all kinds of enterprises in Vietnam. Therefore, if other laws are silent on the definition of ‘enterprise’, the definition under this law can be applied. See more at Article 4.7 of the 2014 *Law on Enterprises*.

²¹¹ Tran Thang Long, above n 26, 137.

entities rather than their legal status.²¹² In Japan, any officer, employee, agent or other person who acts for the benefit of any enterprise is deemed to be an enterprise in certain circumstances.²¹³

Similar to the term ‘enterprise’, the VCL is silent on the definition of trade association although such entities are governed by the law.²¹⁴ However, the *Law on Commerce*²¹⁵ provides some guidance, stating that trade associations are established to protect the lawful rights and interests of business entities and to encourage business entities to participate in the development of commerce. However, in practice, many trade associations play an active role in encouraging bid rigging agreements. Many bid rigging cases from the EU and Japan demonstrate that trade associations not only provide the platform for bidding companies to exchange information²¹⁶ but also directly promote and enforce bid rigging.²¹⁷ Therefore, trade association decisions including their recommendations, rules and unilateral acts that serve to support the members’ collusive agreements are regulated under the EU and Japanese competition rules.²¹⁸

²¹² See more at Case C-41/90, *Hofner and Elser v Macroton GmbH*, 1991 ECR I-1979, 21; Joined cases C-159/91 and C-160/91 *Poucet and Pistre*, 1993 ECR I-637, 17; Case C-244/94 *Federation Francaise des Societes d’ Assurance and Others v Ministere de l’ Agriculture et de la Pêche* (1995) ECR I-4013, 14.

²¹³ See Article 2.1 of the *Japanese Antimonopoly Law*.

²¹⁴ Article 47 of the VCL states:

Industry associations shall be prohibited from acting as follows:

1. Refusing admission to or refusing withdrawal from the association by any organisation or individual satisfying the conditions for admission or withdrawal, if such refusal constitutes discriminatory treatment and places such organisation or individual at a competitive disadvantage;
2. Unreasonably restricting the business activities or other activities involving a business objective of member enterprises.

²¹⁵ The *Law on Commerce* governs commercial activities conducted within the territory of the Socialist Republic of Vietnam. As an entity much involved in commercial acts, ‘trade association’ is defined and governed under this law. See the full text of this law at

<http://vipatco.vn/uploads/file/Luat%20tieng%20anh/9_%20Commercial%20Law%202005.pdf>.

²¹⁶ In the EU *Pre-Insulated Pipe* case, the meetings of cartel members were ‘for the most part held in secret under the cover of, or on the same occasion as, meetings of ostensibly legitimate trade associations’. See Commission Decision (1999/60/EC) *Pre-Insulated Pipe Cartel* OJ (1999) L24/1, para 162.

²¹⁷ Ulrike Schaeede, *Cooperative Capitalism: Self-Regulation, Trade Associations, and the Anti-Monopoly Law in Japan* (Oxford University Press, 2000).

²¹⁸ Article 101 of the TFEU says: ‘All agreements between undertakings, **decisions by associations of undertakings** and concerted practices which may affect trade between Member States and which have as their object or effect the prevention, restriction or distortion of competition within the internal market **are prohibited**’ [emphasis added]. See more at Alison Jones and Brenda Sufrin, *EU Competition Law: Text, Cases, and Materials* (Oxford University Press, 2014) 148.

Article 8.1 of the *Japanese Antimonopoly Law*:

A trade association must not engage in any act which falls under any of the following items:

- (i) Substantially restraining competition in any particular field of trade
- (ii) Entering into an international agreement or an international contract as provided in Article 6
- (iii) Limiting the present or future number of enterprises in any particular field of business
- (iv) Unjustly restricting the functions or activities of the constituent enterprises (meaning an enterprise who is a member of the trade association; the same applies hereinafter)
- (v) Inducing enterprises to employ such act as falls under unfair trade practices

Although no bid rigging cases have been investigated by the VCA, other investigated cartel cases in Vietnam reveal that trade associations orchestrated such collusive agreements.²¹⁹ In some cases, they issued official documents named ‘Quyết Định’ (Decision) and ‘Nghị Quyết’ (Resolution) and required their members to abide by and implement them.²²⁰ More interestingly, such trade associations were conscious that these actions constituted violations of the VCL.²²¹ To date, such practices have been outside the ambit of the VCL, even though trade associations are within the governing scope of such law. Given this inadequacy under the VCL, decisions issued by trade associations facilitating collusive agreements including bid rigging should be prohibited.

3. Bid rigging agreements

i) Agreements among enterprises

The exact definition of the term ‘agreements’ is not stipulated in the law. The construction of this term is limited in the competition cases, given that there have been only two official cartel cases adopted by the VCC, neither of which involved bid rigging conspiracies.

In principle, agreements are the results of negotiating among cartel members about several aspects of competing in the relevant market. In the bid rigging context, these agreements

²¹⁹ In *VCA v 19 Insurance Companies*, the Vietnam Insurance Association hosted a conference in Mui Ne and encouraged fifteen insurance companies to sign price-fixing agreements that would increase insurance premium rates for physical damage to vehicles by a minimum of 1.56 per cent of the insured value per year. See VCA, *Annual Report 2010* (2011) 24-27 <<http://earlywarning.vn/portal/sites/default/files/vca/Final%2027052011-LC.pdf>>.

Similarly, in *VCA v Vietnamese Commercial Banks*, commercial banks under the support of the Vietnam Banks Association (VNBA) agreed to fix the interest rates of VND-denominated deposits. See Nguyen Thanh Tu, ‘Thỏa Thuận Lai Suat Giua Cac Ngan Hang va Phap Luat Canh Tranh’ [Agreements on Fixing Interest Rates among Commercial Banks and Competition Law] (2005) 2(59) *Tap Chi Nghien Cuu Lap Phap* [Journal of Legislative Studies] 56.

Another similar case took place in 2008 when the Vietnam Steel Association held a meeting for its members to agree to fix a minimum price of steel billets and not to increase the production. See VCA, *Bao Cao Danh Gia canh tranh trong 10 Linh Vuc* [Report on Competition Assessment in 10 Sectors] (2010) 129-130; Hong Van, ‘Khi Doanh Nghiep Quên Luật Canh Tranh’ [When Enterprises Forgot the Competition Law], *Thoi Bao Kinh Te Sai Gon* [Saigon Times] (online) 9 October 2008; Vneconomy, ‘Khong Tiep Tuc Ha Gia Thép’ [Not Continue to Reduce Steel Prices], *Vietnamnet* (online) 10 October 2008.

²²⁰ VCA, *Review Report on the Vietnam Competition Law* (2012) 35.

²²¹ In *VCA v Vietnamese Steel Producers*, the Chairman of the Vietnam Steel Association said: ‘We know well that if collaboration hurts consumers, that would be in contradiction of the Competition Law as well as the Ordinance on Price and is not permitted. But in this case [the State] cannot apply [laws] in a rigid way.’ See more at TBKTSG, ‘Dieu Tra Viêc Hiep Hoi Thép Thoa Thuận Không Ha Gia’ [Investigating the Case that the Vietnam Steel Association Agreed not to Decrease Prices], *Vietnamnet* (Online) 17 October 2008.

In *VCA v Vietnamese Commercial Banks*, the general Secretary of the VNBA said that VNBA and its members apprehended the regulation of the *Competition Law* but argued that cartel regulation should not be applied for this case, as its application might have a negative impact on Vietnam’s economic development. See more at Le Thanh Vinh, *Competition Law Transfers in Vietnam from an Interpretive Perspective* (Phd Thesis, Monash University, 2012).

typically involve appointing the winning tender bidder, comparing bids and fixing the submitted bid prices. Such agreements can be explicit agreements or tacit agreements.

As regards the form of bid rigging agreements, Article 21 of Decree No 116/2005²²² lists commonly recognised types as follows:

1. One or more parties to an agreement withdraw from participating in the bidding or retract their bids already submitted so that one or more parties to the agreement win the bid.
2. One or more parties to an agreement cause difficulties to non-parties to the agreement which participate in a bidding, by refusing to supply raw materials or to sign subcontracts or otherwise.
3. All parties to an agreement agree to offer non-competitive bids or competitive bids accompanied with conditions unacceptable to the bid inviter so as to pre-determine one or more parties that will win the bid.
4. All parties to an agreement pre-determine the number of times each party will win the bid for a given period of time.
5. Other acts prohibited by law.

As can be seen from the above, this classification embodies the popular forms of bid rigging,²²³ such as bid suspension (reflected in sub-para (1)), cover bidding (reflected in sub-para (3)) and bid rotation (reflected in sub-para (4)). It is submitted that the Vietnamese legislators add the practice of causing difficulties to parties who are not the members of the bidding cartels as a form of bid rigging. This practice is not considered a form of bid rigging in other jurisdictions like the US, Japan or the EU. This may be because this practice does not directly form bid rigging. Instead, it promotes the stability of bid rigging. Adding this practice as a form of bid rigging is essential because it may reduce the stability of existing bid rigging agreements.

It should be noted that this is by no means a closed list. By adding the term ‘other acts prohibited by law’, the list is clearly capable of covering other forms of bid rigging agreements which are not clearly stated in this law. Further, it should also be noted that bid rigging collusion is governed not only by the VCL but also by the PPL. In such a situation where a practice is recognised as bid rigging collusion in the PPL but does not fall in one of the categories listed in sub-para (1) to sub-para (4) of this Article of the VCL, this act can fall into the ambit of the VCL pursuant to Article 21.5 of this Law.

However, compared with popular forms of bid rigging elaborated in Chapter 1, the Vietnamese legislators have not classified ‘subcontracting’ and ‘market allocation’ as forms of bid rigging.

²²² Decree No 116/2005 provides detailed regulations for implementing several articles of the VCL.

²²³ OECD, *Recommendation of the Council on Fighting Bid Rigging*, above n 95.

The absence of these forms may pose a challenge for competent authorities seeking to detect bid rigging practices, given that these practices are diversified and sophisticated.

Similarly, while anticompetitive joint bidding is closely connected with bid rigging, this practice is also outside the purview of the current *Competition Law*. Article 8 of the law fails to provide any comprehensive definition of anticompetitive agreements. Rather, Article 8 of the Law just lists eight particular forms of anticompetitive agreement, which constitutes an exhaustive list of prohibited practices. Although the list embodies the most common cases of restrictive practices, it cannot include all possibilities including anticompetitive joint bidding. For example, in a situation where two or more leading companies, each of which could perform the contract independently, submit a joint bid in an effort to avoid competing among each other or to allocate the market share, it seems that such an agreement is entirely legal as the law is silent on this issue.

From a comparative perspective, competition legislation in the US, the EU and Japan do clearly define competition restriction agreements which may include anticompetitive joint bidding

arrangements.²²⁴ US and EU laws in particular provide specific principles to assess whether joint bidding violates antitrust laws.²²⁵

According to the EU Guidelines on Horizontal Cooperation Agreements:

A commercialisation agreement is normally not likely to give rise to competition concerns if it is objectively necessary to allow one party to enter a market it could not have entered individually or with a more limited number of parties than are effectively taking part in the co-operation, for example, because of the costs involved. A specific application of this principle would be consortia arrangements that allow the companies involved to participate in projects that they would not be able to undertake individually. As the parties to the consortia arrangement are therefore not potential competitors for implementing the project, there is no restriction of competition within the meaning of Article 101(1).

This extract implies that parties to joint bidding agreements should be able to demonstrate that they can only submit a compliant tender if they participate together.²²⁶ To date, there have been

²²⁴ *Sherman Act 15 USC*:

Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal. Every person who shall make any contract or engage in any combination or conspiracy hereby declared to be illegal shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding \$100,000,000 if a corporation, or, if any other person, \$1,000,000, or by imprisonment not exceeding 10 years, or by both said punishments, in the discretion of the court.

Article 101 (1) of the TFEU:

The following shall be prohibited as incompatible with the internal market: all agreements between undertakings, decisions by associations of undertakings and concerted practices which may affect trade between Member States and which have as their object or effect the prevention, restriction or distortion of competition within the internal market, and in particular those which:

- (a) directly or indirectly fix purchase or selling prices or any other trading conditions;
- (b) limit or control production, markets, technical development, or investment;
- (c) share markets or sources of supply;
- (d) apply dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage;
- (e) make the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts.

Article 2.6 of the *Japanese Antimonopoly Act*:

The term 'unreasonable restraint of trade' as used in this Act means such business activities, by which any enterprise, by contract, agreement or any other means irrespective of its name, in concert with other enterprises, mutually restrict or conduct their business activities in such a manner as to fix, maintain or increase prices, or to limit production, technology, products, facilities or counterparties, thereby causing, contrary to the public interest, a substantial restraint of competition in any particular field of trade.

²²⁵ See the 2000 US Department of Justice and Federal Trade Commission 'Antitrust Guidelines for Collaborations Among Competitors' and the EU 'Guidelines on the applicability of Article 101 of the Treaty on the Functioning of the European Union to horizontal co-operation agreements'.

²²⁶ Several countries in the EU such as Italy, Austria and Romania apply this criterion of solo participation. Accordingly, a firm is normally able to participate in joint bids only when it fails to participate alone. See Gian L Albano, Giancarlo Spagnolo and Matteo Zanza, 'Regulating Joint Bidding in Public Procurement' (2008) 5(2) *Journal of Competition Law & Economics* 348.

no joint bidding cases in the EU to test out assessment of joint bidding agreements under the EU competition rules. However, case law under the domestic jurisdiction of EU members may be supplemented in this context. In a recent case upheld by the Warsaw Court of Appeal on 8 June 2016, it was submitted that tendering as part of a joint bid when its members can compete independently and win a contract breaches competition law and is harmful to the public procurer.²²⁷ The court claimed that the parties failed to combine their technical capacities to perform the public tender and that the reason behind the joint bid was to share market and demolish the competition among them. This joint bid agreement, hence, constituted an anticompetitive object and fell outside the individual exemptions under the competition rules.

In another case at the Higher Regional Court of Dusseldorf of Germany, the Court held that although parties to a joint bid are able to submit the bid independently, the joint bidding among them is admissible if individual participation is ‘economically inexpedient and commercially unreasonable’.²²⁸ This interpretation of the German court is much broader than that of the EU Commission presented in the Guidelines on Horizontal Cooperation Agreements.²²⁹

Like the EU, joint bidding agreements in the US (known as contractor team arrangements) are not immune from antitrust scrutiny.²³⁰ The standards employed to assess whether a joint bid breaches the antitrust laws are set out in the 2000 Department of Justice and Federal Trade Commission ‘Antitrust Guidelines for Collaborations Among Competitors’. The fundamental principle to assess the legality of joint bidding arrangements is whether cognisable efficiencies created by a joint bidding arrangement are sufficient to offset any anticompetitive harms.²³¹

Given experiences from the US and the EU, anticompetitive joint bidding agreements should be governed under the *Vietnamese Competition Law* to protect the competition of the Vietnamese public procurement market. Specific recommendations on this issue will be addressed in the Chapter 7 of this thesis.

ii) Agreements between enterprise and public procurers

²²⁷ See above n 102.

²²⁸ Higher Regional Court of Dusseldorf, Decision of 3 June 2004, W(Kart) 14/04.

²²⁹ Taking the similar approach, an economic report prepared by the UK OFT posits that: ‘Even where bidders could have potentially bid against one another, a joint bid is not necessarily anticompetitive if the joint bidders would have been in a weak situation had they bid separately’. See OFT, ‘Markets with Bidding Processes’ (Economic Discussion Paper, May 2007) 90 <<https://www.dotecon.com/assets/images/biddingmarkets.pdf>>.

²³⁰ It is stated under the 48 CFR 9.604 that ‘nothing in this subpart authorizes contractor team arrangements in violation of antitrust statutes’.

²³¹ See Section 3.37 of the 2000 US Department of Justice and Federal Trade Commission ‘Antitrust Guidelines for Collaborations among Competitors’.

As noted in Chapter 1, there are two broad types of bid rigging collusion - horizontal collusion covering collusive agreements among bidders and vertical collusion including collusive agreements between bidders and public purchasers who are the local and central public procurers. While the former fall under the scope of the *Vietnamese Competition Law*, the latter is regulated by the *Public Procurement Law*²³² and the *Vietnamese Penal Code*. The exclusion of vertical bid rigging from the VCL can be inferred from the scope of the VCL set out in Article 2 which restricts the application of the law to enterprises and trade associations. Also, as stipulated in Article 3.3 of the Law, the agreements in restraint of competition are the practices of enterprises which reduce, distort or hinder competition in the market. This exclusion can be explained based on the function of the VCL, which is described as controlling and adjusting of bidder behaviours and the relationship among them to ensure that such bidders compete competitively.²³³

From a comparative perspective, the approach of Vietnamese legislators is similar to that of the EU²³⁴ and Japan²³⁵ but differs from that of the US. While competition rules under the EU legislation are not applied to ‘to the purchasing of goods or services for ... free state schools, or when purchasing the goods and services needed for the government ministries that run ... education services’,²³⁶ the US competition rules are also applied to public procurers. Unlike the EU, the US courts do not provide a limitation in the antitrust liability of the government as a public purchaser. According to them, the government as a public procurer ‘intends to respond to the signals of a competitive market on the same terms as any other consumer, an intent which is entirely consistent with the aims of the Sherman Act’.²³⁷ The US courts appear to believe that purchasing might have a distortive effect on market-like selling, and therefore it should fall under the ambit of the competition law.

Although the fact that purchasing by public procurers may be controlled by competition rules is persuasive, the Vietnam approach, which separate vertical agreements from competition

²³² Nguyen Ngoc Son, [Competition Mechanisms and Acts of Bid Rigging], above n 25.

²³³ Phung Van Thanh, above n 37.

²³⁴ Competition rules in the EU are not applicable to organisations that fulfil a purely social nature and are entirely non-profit making. See more at Case C-41/90, *Hofner and Elser v Macroton GmbH*, 1991 ECR I-1979, 21; Case T-319/99 *FENIN v Commission* (2003) ECR II-357, 37; Joined cases C-264/01, C-306/01, C-354/01 and C-355/01 *AOK Bundesverband v Ichthyol-Gesellschaft Cordes, Hermani & Co*, 51 and 57. See also Arrowsmith, above n 69, 67-70.

²³⁵ Vertical bid rigging conspiracies fall under the ambit of the *Japanese Act on Elimination and Prevention of Involvement in Bid Rigging, etc. and Punishments for Acts by Employees that Harm Fairness of Bidding, etc.*, adopted in 2002. However, unlike the Vietnamese Competition Authorities and the EU Commission, the Japanese Fair Trade Commission has the competence to deal with this violation. See more at Wakui, above n 44, 43.

²³⁶ Arrowsmith, above n 69, 65.

²³⁷ *George R Whitten, Jr Inc v Paddock Pool Builders, Inc*, 424 F2d 25 (1970) 31.

rules (like the EU and Japan), is appropriate under the Vietnamese context. This is because this exclusion may not reduce the burden on competition authorities, which are fairly established agencies in Vietnam. However, this approach also requires a close cooperation between competition and public procurement agencies to deal with cases involving a mixture of horizontal and vertical collusion.²³⁸

iii) Proof of bid rigging agreements

One of the legal impediments to dealing with bid rigging investigating and collecting the evidence of a bid rigging agreement. Such evidence is typically classified into direct and indirect evidence. While direct evidence ‘identifies a meeting or communication between the subjects and describes the substance of their agreement’,²³⁹ indirect evidence includes ‘evidence of communications among suspected cartel operators and economic evidence concerning the market and the conduct of those participating in it that suggests concerted action’²⁴⁰ which does not delineate the terms of an agreement or the parties to it.

It is unclear, in the absence of direct evidence, whether the Vietnamese competition authorities can use circumstantial evidence to impute proof the existence of a bid rigging agreement. Using circumstantial evidence to impute the existence of a bid rigging agreement is unprecedented in Vietnam, as even in the two investigated official cartel cases, the competition authorities used direct evidence to prove the existence of cartels. The proof in these cases was clear and not difficult to demonstrate given that cartel members signed and publicised price-fixing agreements. However, most cartels including bid rigging cartels tend to reach tacit agreements and not to leave any clear evidence of express agreement that may sustain a charge that the law has been broken.

From the comparative perspective, the European Commission has not attempted to extend its reach to seek to pursue any bid rigging case without direct proof of communication among tenderers.²⁴¹ The Commission uses only direct evidence such as mutually confirmed statements

²³⁸ The cooperation between these agencies will be scrutinised in Chapter 5 of this thesis.

²³⁹ OECD, *Prosecuting Cartels without Direct Evidence of Agreement* (Policy Brief, June 2007) 1 <<https://www.oecd.org/daf/competition/prosecutionandlawenforcement/37391162.pdf>>.

²⁴⁰ Ibid. For a classification of indirect evidence employed in cartel detection all around the globe, see Jenny, Frédéric, ‘Direct Evidence, Economic Evidence, Presumptions and Standards of Proof in Competition Law Cases’ (Paper presented at APEC Workshop on Economics of Competition Policy, Vietnam, 22-23 February 2017).

²⁴¹ Kai-Uwe Kuhn, ‘Fighting Collusion, “Regulation of Communication between Firms”’ (2001) 16(32) *Economic Policy* 167, 175.

of enterprises to set up an infringement²⁴² rather than imputing the existence of bid rigging behaviour merely from suspicious behaviour patterns like identical bidding.

By contrast, in Japan, circumstantial evidence has been often used to detect cartels in the absence of direct evidence.²⁴³ In an effort to prove tacit bid rigging agreements, the JFTC has officially recognised several facts proving bid rigging communications among bidders. They include: prior contact or negotiations between the parties involved; the existence of the content of prior contact or negotiations; the uniformity of the effect of the action involved and the market environment concerning the uniform actions.²⁴⁴ The JFTC have maintained that the proof of the time and avenue regarding the communication among bidders is not necessarily required as its presence can be proven through the common understandings of the bidders, including bidders' recognition, bidders' ranking and order entry of individual products.

In a decision of the High Court in Japan on 19 December 2008, it was held that:

based on the fact that only the company which received information from the official in charge of procurement of the Ministry participated in bidding while the company which did not unofficially receive information did not participate in bidding, it was fully recognized that at least there was tacit communication of intent that only the company which unofficially received information from the official in charge of procurement at the Ministry would receive the order.²⁴⁵

This excerpt implies that the High Court acknowledges the existence of a collusive agreement through the common understandings of these bidders and their actions, despite the absence of direct proof.

Another example where the JFTC have employed indirect evidence to prove the existence of bid rigging is the case of Kyowa Exeo.²⁴⁶ In this case, Kyowa Exeo, together with other nine Japanese companies, rigged bids offered by the US Air Force Pacific Contracting Office during the period from 1981 to 1988. The JFTC claimed that these companies established the Kabuto

²⁴² Joined Cases T-236/01, T-239/01, T-244/01 to T-246-01, T-251/01 and T-252/02 *Graphite Electrodes* case, nyr, Judgement of 29 April 2004, para 431.

²⁴³ Mel Marquis, 'Firebird Suite: Cartel Suppression Reborn in Japan' (2016) 4(1) *Journal of Antitrust Enforcement* 84, 98.

²⁴⁴ Seryo, above n 124, 8.

²⁴⁵ This case was discussed in OECD, *Hearing On Oligopoly Market – Noted by Japan*

(DAF/COMP/WD(2015)36, 16-18 June 2015) 8

<<http://www.oecd.org/officialdocuments/publicdisplaydocumentpdf/?cote=DAF/COMP/WD%282015%2936&docLanguage=En>>.

²⁴⁶ This case was appealed in 1994 but then upheld by the Tokyo High Court in 1996. See the summary of this case at OECD, above n 239, 130-131.

Club, whose objective was to facilitate communication among bidders. The JFTC also detected contents of individual meetings among these bidders aiming to share price information. In light of the aim of establishment of the club as well as the contents of individual meetings, the JFTC and then the Tokyo High Court held that these practices provided compelling reasons for the alleged long-term bid rigging agreement.²⁴⁷

Given difficulties in seeking direct evidence, the Vietnamese competition authorities would be well advised to follow these experiences from Japan to deal with bid rigging efficiently. However, it is noted that while circumstantial evidence is accepted by the Vietnamese competition authorities, it is difficult to convince courts to accept such evidence. Article 115.1 of the *Competition Law* provides that if parties disagree with the VCC's decision, they may initiate proceedings before a competent provincial people's court. Under the judicial review, there is a possibility that the courts, in future cases, may disagree with the way the circumstantial evidence is employed by the Vietnamese competition authorities.

II. The *Public Procurement Law* and Bid rigging

A. Overview of the Public Procurement Law

1. History and development

Although public procurement policies and regulations are considered important indicators of public resource management,²⁴⁸ the establishment of a modern public procurement legal framework in Vietnam came late in 1996 with the adoption of the Decree No 43/1996/ND-CP on the issue of regulation on bidding. Since then, the public procurement legal framework has been revised and amended over time.

The latest version is the *Public Procurement Law* adopted in 2013, an amendment of the first version promulgated in 2005. The current regulatory framework also references the US *Federal Acquisition Regulation* and the model laws as well as guidelines promoted by international organisations such as UNCITRAL, the World Bank, the ADB and the OECD.

²⁴⁷ It is claimed by Mel Marquis that bid rigging agreements in Japan normally involve repeated interactions rather than a one-shot event and they often include a basic agreement followed by more specific arrangements. See Marquis, above n 243.

²⁴⁸ World Bank, Vietnam – Country Procurement Assessment Report - Transforming Public Procurement (Report No 25144-VN, 2002) 1
<<http://documents.worldbank.org/curated/en/422021468315007849/pdf/251440white0co1r0official0use0only1.pdf>> .

The current law provides the legal framework for public procurement activities with regard to goods,²⁴⁹ works,²⁵⁰ services (non-consulting services²⁵¹ and consulting services²⁵²) and the mixed package.²⁵³

The Public Procurement Agency (PPA) within Ministry of Planning and Investment is the lead government agency in charge of public procurement in Vietnam. The PPA is responsible for promulgating, disseminating, providing guidance for and arranging implementation of procurement legislation and policies; reviewing, assessing and reporting on public procurement implementation; administering the information system and databases on public procurement nationwide; monitoring, supervising, examining, and inspecting public procurement operations, handling procurement complaints, petitions and denunciations and sanctioning violations of procurement legislation in accordance with the Public Procurement law.²⁵⁴ Other ministries and ministerial-level agencies also have the authority to regulate and oversee government procurement matters in their relevant field.²⁵⁵

In addition to these national authorities, local People's Committees have the authority to supervise and administrate the local government procurement activities.²⁵⁶

2. Structure of the Public Procurement Law

The PPL consists of 96 Articles divided into 12 chapters: (1) general provisions; (2) forms and methods of selection of contractors, investors and professional bidding organisations; (3) the plan and process of tenderer selection; (4) methods to assess bid dossiers, dossiers of proposals

²⁴⁹ Goods includes machinery, equipment, fuel, materials, components, spare parts and consumer products, medicines and medical supplies for healthcare facilities.

²⁵⁰ Works include the works related to the process of construction and installation for a project or components of a project.

²⁵¹ Non-Consulting Services is one or several activities including: logistics, insurance, advertising, installation other than those prescribed in Item 45 of this Article, commissioning, training, maintenance, mapping and services other than consulting services prescribed in Item 8 of this Article.

²⁵² Consulting Services is one or several activities including: preparing and appraising planning reports, development master plans and architectural designs; surveying and preparing pre-feasibility studies and feasibility studies and environmental impact assessment reports; surveying, designing and developing cost estimates; preparing requests for express of interest, requests for prequalification, bidding documents or requests for proposals; evaluating expressions of interest, prequalification applications, bids or proposals; appraising and reviewing; supervising; conducting project management; financial arrangement; auditing, training and technology transfer; and other consulting services.

²⁵³ Mixed Package includes engineering and procurement of equipment (EP); engineering and construction (EC); procurement of equipment and construction (PC); engineering, procurement of equipment and construction (EPC); or project development, engineering, procurement of equipment and construction (turn-key contract).

²⁵⁴ See Article 83 of the PPL.

²⁵⁵ See Article 84 of the PPL.

²⁵⁶ Ibid.

and award of the contract; (5) concentrated procurement, regular procurement, purchase of drugs, medical supplies and provision of public products and services; (6) investors selection; (7) selection of tenderers and investors in online bidding; (8) contracts; (9) responsibilities of parties in selection of tenderers and investors; (10) state management on public procurement; (11) prohibited acts and penalties and (12) resolution of protests and disputes in bidding.

In addition to the Law, a number of Decrees and Circulars which must be read in conjunction with the *Public Procurement Law* have been adopted by the Government and Ministry of Planning and Investment to provide the detailed guidance on the *Public Procurement Law*: Decree No 63/2014/ND-CP dated 9 January 2014 on Detailed Provisions for Implementation of the public procurement Law in terms of choosing tenderers; Decree No 155/2013/ND-CP dated 11 November 2013 on administrative penalties on applicable to breaches of regulations in respect of planning and investment; Circular No 03/2015/TT-BKHDT dated 6 May 2015 on detailing the preparation of bidding documents for civil works and Circular No 17/2010/TT-BKH dated 22 July 2010 on providing in detail pilot online bidding.

*B. Bid rigging agreements and proof of bid rigging agreements – the sole element
constituting an administrative offence*

1. Bid rigging agreement

Bid rigging conspiracy is expressly prohibited by Article 89.3 of the PPL. The PPL does not provide an all-inclusive definition of bid rigging but instead prohibits typical forms of bid rigging practices:

Collusion with each other in bidding, including the following acts:

- a) Agreeing on bidding withdrawal or withdrawal of bidding application has already been submitted previously so that one party or parties in agreement win the bid;*
- b) Agreeing to let one or many parties prepare the bid dossier for the parties of bidding so that one party may win the bid;*
- c) Agreeing on refusal for goods provision, refusal for signing contract of sub-contractor, or forms which cause other difficulties to parties that refuse to participate in the agreement.*

The three main forms of bid rigging formulate a closed list, and thus exclude any forms of bid rigging which are not stipulated under this Article. It is submitted that the form of bid rigging

reflected in sub-paragraph a) is bid suppression. However, it seems that the other forms of bid rigging such as complementary bidding or bid rotation are not caught by this Article although sub-paragraph b) is arguably relevant to complementary bidding. It appears to capture a subset of the complementary bidding. Intrinsically, complementary bidding occurs when parties to the collusion submit a higher bid than the designated winner or submit bids with unacceptable specifications. To aim at this, the parties may consent to let one or more bidders prepare bid dossiers for the remaining bidders. In other words, sub-paragraph b) represents a method to indirectly address complementary bidding.

Instead of adopting the definition of bid rigging under the VCL, the PPL clearly takes a different approach to defining bid rigging. Specifically, while the VCL's definition is much broader and in line with the understanding of the OECD and other competition authorities, the PPL's definition does not cover all forms of bid rigging. As outlined above, the definition appears not to capture complementary and bid rotation as forms of bid rigging. This inadequacy may be an obstacle for public procurement agencies in proving the existence of bid rigging agreements.

2. Proof of bid rigging agreement

Under the PPL, proving the existence of bid rigging agreement regardless of damages or effect on competition is sufficient for administrative liability. Accordingly, this part examines what is required under the PPL to prove bid rigging agreement for administrative liability purposes.

A useful starting point is a decision regarding bid rigging collusion handed down in 2014 by the President of An Giang province's people's committee. In this case, the suppliers of school equipment submitted their bids with identical spelling mistakes and the same formats. Interestingly, the public purchaser, following the bid consultant's report, argued that these similarities were noticed in the technical specification session examining the bid documents and that the similarities were understandable as these bidders bought equipment from one supplier and therefore were provided with the same technical specifications. The public purchaser then claimed that these similarities were not counted as conclusive evidence of bid rigging behaviour.

However, this argument was rejected by the evaluation authority, which took the view that identical spelling mistakes coupled with the same format of bidders' documents were sufficient evidence to prove bid rigging infringement under the PPL. More specifically, when submitting bid documents, bidders had to submit both technical specifications and explanations of those

technical specifications. The evaluation authority pointed out that while similarities in technical specifications may be acceptable as they are provided by one supplier, similarities detected in the explanation of those technical specifications are clear proof of bid rigging behaviour as these documents have to be prepared by bidders themselves.

The evaluation authority in this case also ascertained that similarities in technical proposals and particulars of tendering volumes (which are out of the formal scope of bid requirements) can be considered in determining whether there is proof of bid rigging behaviour. From the aforementioned reasons, the conclusion was that there was bid rigging collusion among the tenderers in this case to arrange the bid winner. It can be implied from this case that there was no direct evidence of a bid rigging agreement proved. Rather, the identical patterns in bidding documents, which are considered circumstantial evidence, were employed in this case and considered sufficient. Accordingly, this determination suggests that the standard of proof required to sustain an administrative offence for bid rigging under the PPL are significantly less stringent than required for competition law and criminal law offences.

Given difficulties in proving the direct evidence of bid rigging, this less stringent approach should be encouraged. This approach is also consistent with practices using indirect evidence of the EU and Japan analysed in section B.3 (iii) of this chapter.

III. The *Penal Code* and Bid rigging

A. Criminalisation of cartels including bid rigging in Vietnam: A reflection of domestic factors

The *Vietnamese Penal Code* was first promulgated in 1985 and then revised and amended during the last three decades.²⁵⁷ Before its new version was adopted in 2015, cartels (including bid rigging cartels) were not governed by the VPC, notwithstanding that the need to criminalise such offences had been raised many times, given increasing recognition of its harmful social impact.²⁵⁸

²⁵⁷ It was revised and amended in 1989, 1991, 1992, 1997, 1999, 2009 and 2015, respectively.

²⁵⁸ VCA and JICA, above n 17, 39.

One of the greatest obstacles to the imposition of criminal sanctions for cartel offences is sympathetic social norms towards these offences.²⁵⁹ This is particularly true in Vietnam where the business and regulatory culture is still broadly supportive of cartels. As mentioned earlier, Vietnamese companies tend to cooperate rather than to compete with each other. Meantime, from the regulatory perspective, due to the legacy of a centrally planned economy, many Vietnamese government officials have historically underestimated the harm of cartels on society and even believed that such cartels should be remained to protect businesses from cutthroat competition.²⁶⁰ This old-fashioned mindset may explain why the VCL has not treated price-fixing and market allocation cartels as illegal per se offences as other jurisdictions have.

In addition to the wave of criminalising cartels and bid rigging around the globe, there are several domestic factors contributing to the imposition of criminal sanctions in the Vietnamese context. First, criminalising cartels is to be in line with strategies of Resolution No 49-NQ/TW of the Politburo of the Central Committee of the Communist Party on the Judicial Reform Strategy to 2020, which includes the aim of ‘criminalising new serious offences emerging in the process of socio-economic, scientific, technological development and global integration’.²⁶¹ Moreover, this objective recognises the need to protect competition and equality in business and manufacture, to ensure the stable development of the economy in accordance with the newly revised Vietnamese *Constitution 2013*.²⁶² Second, it is now being recognised that penal sanctions for cartel conduct will provide more deterrence rather than sanctions provided by the VCL and thus complement and enhance the enforcement of competition law and improve economic competitiveness.²⁶³ Accordingly, while there is a strong case for introduction of

²⁵⁹ Andreas Stephan, ‘Cartel Laws Undermined: Corruption, Social Norms, and Collectivist Business Cultures’ (2010) 37(2) *Journal of Law and Society* 345, 354.

²⁶⁰ During the process of building the Competition Bill, many National Assembly law-makers claimed that price-fixing agreements among enterprises are ordinary business practices and should not be treated as illegal ones. See more at the Standing Committee of the National Assembly, *Bao cao Giai Trinh Tiep Thu, Chinh Ly Du Thao Luat Canh Tranh Trinh Quoc Hoi Thong Qua* [Report on Explanation, Reception and Revision of the Draft Competition Bill Submitted to the National Assembly for Approval] (Report No 265/UBTVQH11, 13 October 2004) (unpublished document, on file with the author).

²⁶¹ Vietnamese Government, *To Trinh Ve Du An Bo Luat Hinh Su Sua Doi* [Report on the revised Penal Code Proposal] (No 186/TTr/CP, 27 April 2015) <http://duthaoonline.quochoi.vn/DuThao/Lists/DT_DUTHAO_LUAT/View_Detail.aspx?ItemID=526&TabIndex=2&TaiLieuID=1948>.

²⁶² Hoi Dong Tu Van Tham Dinh Cac Du An Luat, Phap Lenh Trien Khai Thi Hanh Hien Phap [Advisory Committee on evaluation of Proposals of Laws and Ordinances implementing the Constitution], *Bao Cao Ve Nhung Noi Dung Co Ban Cua Du An Bo Luat Hinh Su Sua Doi Truc Tiep Trien Khai Thi Hanh Hien Phap Nam 2013* [Report on fundamental issues of the revised *Penal Code* proposal in accordance with the implementation of the *Constitution 2013*] (No 54/BC-HDTVTD, 10 March 2015) <http://duthaoonline.quochoi.vn/DuThao/Lists/DT_DUTHAO_LUAT/View_Detail.aspx?ItemID=526&TabIndex=2&TaiLieuID=1952>.

²⁶³ Official Letter No 648/BCT-PC of Ministry of Trade and Industry dated 21 November 2015 on opinions on the revised *Penal Code* proposal.

criminal sanctions, whether these sanctions enhance anti-bid rigging enforcement depends on how they are devised under the VPC.

1. Classification of bid rigging as a public procurement law infringement rather than a competition law infringement

Before the VPC was adopted, it underwent eight official drafts as the result of input from various state authorities, interest groups and agents. In the first seven drafts, bid rigging offences were stipulated as a competition infringement together with other forms of cartels such as price-fixing or market-allocation. Interestingly, until the public procurement law infringement was first introduced (in the sixth draft of the VPC), bid rigging had been simultaneously governed by both the article dealing with competition infringements and the article of public procurement infringements. However, by the time the final draft of the VPC was settled upon and officially adopted, bid rigging crime was no longer recognised as a competition law infringement. Vietnamese legislators choose to classify bid rigging as a public procurement law offence rather than a competition law offence. This choice implies that criminalisation of bid rigging is seen as necessary to ensure the efficiency of state management in the field of public procurement rather than to protect competition in the economy. This viewpoint of Vietnamese legislators reaffirms the low-profile role of competition law in the economy; as one of the public officials interviewed by the author claims:

Competition has not been considered the constitution of markets. The role of competition law is not set properly in the position it should have in the economy.²⁶⁴

The possible rationales for this shift can be explained as follows. First, bid rigging is under the ambit of a public procurement law infringement alone in order to avoid the overlap between the *Penal Code* articles dealing with competition law infringement and public procurement law infringement.

Second, this change seems to secure more efficient deterrence considering that the sanctions for public procurement law infringement are more severe than the penalties for competition law infringements.

However, the shifting of bid rigging from a cartel offence to a public procurement offence does create a difference in the approach to dealing with bid rigging as a public procurement offence and dealing with cartel offences more generally, given that bid rigging is simply one typical

²⁶⁴ Interviewee 2 (Hanoi, 26 August 2016).

form of cartel behaviour. Once such difference is in terms of the subject of offences - while both individuals and corporations are criminally liable under the cartel offence, only individuals are sanctioned under the public procurement offence provisions, even though companies are typically involved in bid rigging behaviour. A second difference concerns the proof of harmful consequences: while cartel offences under the VPC require evidence of either damage or illegal income, the bid rigging offence requires proof of damage, which is much more difficult to prove in practice. These differences can be summarised in the below table.

	Competition law infringement	Public procurement law infringement
	Article 217 – the VPC	Article 222 – the VPC
The subject of offence	Individuals and corporations	Individuals only
Proof of harmful consequences	Illegal income and/or damage	Damage
Sanction	up to 2 years’ community sentence or 3 - 24 months’ imprisonment	3 years’ community sentence or 1 - 5 years’ imprisonment.

These differences, on the one hand, imply that Vietnamese legislators prefer to treat bid rigging as an irregularity in public tendering rather than as a hard-core cartel behaviour distorting competition in public markets. On the other hand, these differences may pose a challenge regarding the cooperation mechanism between competition authorities and criminal law enforcement authorities in dealing with bid rigging. This challenge will be identified and elaborated upon in Chapter 5 of this thesis.

2. Corpus delicti – Elements constituting a bid rigging offence

As noted above, the newly revised *Penal Code* introduced the criminalisation of bid rigging offences under article 222.²⁶⁵ Under the law, in order to establish the commission of a bid

²⁶⁵ Article 222: Offences against regulations of law on bidding that lead to serious consequences

1. A person who commits any of the following acts and causes damage of from VND 100,000,000 to under VND 300,000,000, or causes damage of under VND 100,000,000 but was disciplined for the same offence, shall face a penalty of up to 3 years’ community sentence or 1 - 5 years’ imprisonment:

- a) Illegally interfering bidding activities;
- b) Colluding with other bidders in bidding;
- c) Commit frauds in bidding;
- d) Obstructing bidding activities;
- dd) Committing regulations of law on assurance of fairness and transparency of bidding;

rigging offence, four elements of *Corpus delicti* (a legal doctrine widely accepted in socialist countries to determine elements constituting the criminal responsibility²⁶⁶) must be established. These four elements are: (1) the object; (2) the objective element; (3) the subject and (4) the subjective element.²⁶⁷

The ‘object’ of a crime refers to social relations and interests that have been influenced by a crime.²⁶⁸ The ‘objective element’ of a crime consists of the offender’s criminal conduct, harmful consequences, the causal link between these two aspects and other aspects such as place, time, setting, manner and means to commit a crime.²⁶⁹ The ‘subject’ of a crime refers to individuals or legal persons who have committed a crime and thus are subject to criminal liability.²⁷⁰ The ‘subjective element’ refers to the psychological attitude of the violator towards their harmful conduct. It is also known as ‘guilt’ including intention and negligence. If all four elements are met, the behaviour of a person constitutes a crime and the person is criminally liable. If any of these elements are missing or deficient, there is no crime. Accordingly, each of these elements warrant closer examination.

a. The object of a bid rigging offence

Like other socialist countries such as Russia or China,²⁷¹ the objects of offences under the Vietnamese criminal theory are not the individual victims or their assets. The objects of crimes

e) Holding contractor selection before capital sources are determined that result in inability to pay contractors;

g) Illegally transferring the contract.

2. This offence committed in any of the following cases shall carry a penalty of 3 - 12 years’ imprisonment:

a) The offence is committed for self-seeking purposes;

b) The offence is committed by an organised group;

c) The offence involves the abuse of the offender’s position or power;

d) The offence involves the use of deceitful methods;

dd) The offence results in damage from VND 300,000,000 to under VND 1,000,000,000.

3. If offence results in damage of VND 1,000,000,000 to over, the offender shall face a penalty of 10 - 20 years’ imprisonment.

4. The offender might also be prohibited from holding certain positions or doing certain works for 1 - 5 years, or have all or part of his/her property confiscated.

²⁶⁶ ‘Corpus delicti’ has been recognised in Russian and Chinese criminal laws. See more at Mohamed Elewa Badar and Iryna Marchuk, ‘A Comparative Study of the Principles Governing Criminal Responsibility in the Major Legal Systems of the World (England, United States, Germany, France, Denmark, Russia, China, and Islamic Legal Tradition)’ (2013) 24 *Criminal Law Forum* 1; Wei Luo, ‘China’ in Kevin Heller and Markus Dubber (eds), *The Handbook of Comparative Criminal Law* (Stanford University Press, 2011) 146.

²⁶⁷ Mohamed Elewa Badar and Iryna Marchuk, above n 266, 25; Wei Luo, above n 266, 147.

²⁶⁸ Mohamed Elewa Badar and Iryna Marchuk, above n 266, 26.

²⁶⁹ Natalya Mosunova, ‘An Examination Of Criminalization Of Russia’s Anti-Bid Rigging Policy’ (2015) 3(4) *Russian Law Journal* 32, 45.

²⁷⁰ The subject of a crime also embodies corporate legal entities in the revised VPC 2015.

²⁷¹ See Article 2.1 of the Criminal Code of the Russian Federation and Article 2 of the Criminal Law of the People’s Republic of China.

are generally described by Article 1 and Article 8 of the VPC. They include the protection of the sovereignty and territorial integrity of Vietnam, the political regime, economic regime, culture, national defence and security, social order and safety, the lawful rights and interests of organisations, human rights, the lawful rights and interests of citizens, and other aspects of socialist law. In the case of the bid rigging offence, the objects are the interests of the State and organisations and citizens which are protected under regulations in the public procurement field.

b. The objective element of a bid rigging offence

The bid rigging offence's objective elements consist of the offender's conduct of rigging bids, the harmful consequences of that conduct and the causal link between the rigging bid conduct and the harmful consequences. All three aspects must be proven under the VPC.

(i) *The offender's conduct of rigging bids*

Given that the bid rigging offence has just been criminalised under the newly revised *Penal Code*, there have been no bid rigging cases prosecuted to examine the proof of this crime. However, it seems that proving such crime under Article 222 of the VPC is as difficult in practice as under the VCL. Criminal laws are closely connected with severe sanctions and social stigma, they tend to be applied with caution and, therefore, the standards of proof are more stringent than those under the *Competition Law* and *Public Procurement Law*. More specifically, only direct evidence of the commission of a crime is admissible to establish proof of time, place and other circumstances. Considering the secrecy surrounding bid rigging and the fact that typically an administrative offence under the *Public Procurement Law* are pursued on the basis of indirect circumstantial evidence, establishing a criminal offence through direct evidence is likely to prove difficult in bid rigging cases.

(ii) *Harmful consequences*

According to Article 222, damage is the compulsory element which must be proved for a conviction. Specifically, the level of damage required is from 100 million VND to under 300 million VND. In the case where the damage is lower than the threshold of 100 million VND, bid-riggers will be sanctioned only when they were disciplined for the same offence. While the

quantification of damage aims for more clarity,²⁷² such regulation may have several shortcomings and ambiguities.

First, it seems artificial to limit the punishable harmful consequences of bid rigging offences only to damage stipulated in Article 222. This is incompatible with the harmful consequences of cartel offences stipulated in Article 217, which refers not only to damage but also illegal income. To some extent, proving receipt of illegal income is likely to be much easier than providing proof of damage. For instance, in the aforementioned 2014 decision regarding bid rigging collusion adopted by the President of An Giang province's people's committee, although the existence of the bid rigging behaviour was evident, no damage was mentioned in this decision. In that case, the bid ceiling price offered by the public procurer was 1.104 billion VND. The bid prices of all three bid riggers were 1.099; 1.103 and 1.156 billion VND, respectively. The winner of this tender was the bidder with the lowest price offer of 1.099 billion VND. As the winning bid price was still lower than the bid ceiling price and even higher than other bidders, it would be very difficult to verify whether the damage existed in this case or not.

One may argue that the damage in such a case is the cost of organising the public tender as public procurers have to cancel the tender where bid rigging occurred and initiate a new procedure. This is certainly the case in circumstances where bid rigging is detected before and during the tender process. However, if the detection of bid rigging occurs several years later, potentially even after the winning bidders have completed the contract with the public procurers, this cost cannot be considered damage. In such cases, however, illegal income can be tracked if the money transfer transaction is conducted among cartel members.

From the comparative law perspective, although criminal sanctions for bid rigging are not applied at the EU level, bid rigging is identified in several EU member jurisdictions, and in these jurisdictions, the issue of damage in bid rigging cases has been considered. For example, the Supreme Court of Germany in 1987 ruled that damage proof can be identified if another tenderer had the opportunity of being awarded the contract and that this opportunity was

²⁷² In previous law, many articles did not quantify the damage. Rather, several terms such as 'causing serious damage', 'causing very serious damage' or 'causing extremely serious damage' were employed. See more at The Standing Committee of The National Assembly, Bao Cao Giai Trinh Tiep Thu, Chinh Ly Du Thao Bo Luat Hinh Su Sua Doi [Report on Explanation, Reception and Revision of the Criminal Bill] (Report No 979/BC-UBTVQH13, 28 October 2015) 9 <http://duthaoonline.quochoi.vn/DuThao/Lists/DT_DUTHAO_LUAT/View_Detail.aspx?ItemID=526&TabIndex=2&TaiLieuID=2181>.

obstructed.²⁷³ In 1992, the Supreme Court's determined that compensation or bribes paid to other bid rigging cartel members was evidence of damage incurred.²⁷⁴ It is highlighted that compensation or bribes are 'illegal income' constituting harmful consequences of cartel offences stipulated in *Vietnamese Penal Code* Article 217. However, 'illegal income', as outlined earlier, is not stipulated under Article 222 as a harmful consequence of bid rigging offences. Experience from Germany reaffirms the view that damage caused by bid rigging could be measured through bribes or compensation among bid rigging members. Hence, this provision in the VPC should be revised to capture these forms of illegal income as evidence of the harmful consequences of bid rigging.

In addition to proof of bid rigging conduct and harmful consequence, a causal link between the conduct of rigging bids and damage must be clearly demonstrated. For example, in the case of damage incurred, it should be proven that these damages were caused only by bid rigging practices rather than by any other conduct.

c. The subject of a bid rigging offence

The 'subject' of bid rigging offences refers to the individual who has committed bid rigging. According to the law, they must be at least 16 years-old²⁷⁵ and have the mental capacity to control their conduct.²⁷⁶ The *Penal Code* presumes that criminal sanctions on individuals are the most cost effective deterrent.²⁷⁷ However, some concerns remain about the ambiguity and application of the subject of bid rigging.

First, there is a significant misunderstanding in identifying the subject of a bid rigging offence. In the case where the bid rigging damage caused is under the threshold of 100 million VND, individuals would be liable for criminal responsibility only when they were disciplined for the same offence before. This regulation implies that individuals will escape criminal sanction if the damage caused is below the threshold and they were not disciplined for bid rigging in the past. Under the Vietnamese legislation, there exist three forms of sanctions: disciplinary sanctions, administrative sanctions and criminal sanctions. While the two latter forms are applied to any individual, the former is just for public officials. While the subject of the bid

²⁷³ Bundesgerichtshof – BGH St 34, 379 ff cited in Christof Vollmer, 'Experience with Criminal Law Sanctions for Competition Law Infringements in Germany' in Katalin J Cseres, Maarten Pieter Schinkel and Floris OW Vogelaar (eds) *Criminalization of Competition Law Enforcement – Economic and Legal Implications for the EU Member States* (Edward Elgar, 2006) 262.

²⁷⁴ Ibid.

²⁷⁵ Article 16 *Penal Code*.

²⁷⁶ Article 21 *Penal Code*.

²⁷⁷ Vietnamese Government, above n 261, 4.

rigging offence in the *Penal Code* is an individual responsible for the bidding companies' bid rigging behaviour (not the public officials), the law excludes such individuals if the damage caused is under the threshold as they are not public officials and will, thus, never be subject to disciplinary sanctions.

It is worth noting that Article 222 not only deals with bid rigging offences but also other public procurement law infringements such as fraud and behaviours of interfering with or obstructing bidding activities. As opposed to bid rigging, the subject of the rest of the offences is broader as these also apply to public officials. On balance, bid rigging offences appear to be stipulated both in terms that in some respects are too narrow and in other respects too broad. For instance, the exclusion of offenders hailing from bidding companies in cases where the damage caused is under 100 million VND is an unnecessary narrowing of the scope of the offences. Conversely, the inclusion of public officials who are not the subject of horizontal bid rigging in the scope of the offences is, arguably, unnecessarily broad.

Second, the term 'individual' has a broad meaning in the context of bid rigging offences. It seems unclear whether the subject of bid rigging is any individual, including any employees in companies engaging in bid rigging or whether it is just limited to executives and management members of bidding companies. In that sense, the experiences of the US reveal that individual sanctions should be imposed on the managerial level, whether these managers rigged bids either under orders or on their own initiative.²⁷⁸ While the latter involvement undoubtedly deserves criminal sanction, the imposition of such sanctions on the former type is also reasonable, given that punishing such behaviour will encourage managers to resist pressures to rig bids and thus make bid rigging more costly for companies.

d. The subjective element of the bid rigging offence

Under the VPC, an offender will be criminally liable only if his intentional or negligent act leads to harmful consequences for society. In other words, even if a person causes a harmful consequence, he or she will not be criminally liable if he or she did not intend to cause such consequence or was not negligent in causing it.

Intention and negligence are classified into two different forms respectively. Intention, is divided into two categories: (1) direct intention and (2) indirect intention. The former can be defined as intentionally committing a crime, where the person is well aware that his or her act

²⁷⁸ OECD, *Cartel Sanctions against Individuals*, above n 174, 100.

will produce harmful consequences and foresees consequences of such act and desires that such consequences will occur. The latter is understood as intentionally committing a crime, where the person is well aware that his act will produce harmful consequences and foresees consequences of such act but does not desire that such consequences will occur yet still deliberately lets them occur.²⁷⁹ Negligence is defined as either: (1) negligently committing a crime, where the person foresaw the harmful consequences but believed that such consequences could not be occurred or be prevented or (2) negligently committing a crime, where the person should have foreseen that his or her act might cause harmful consequences.²⁸⁰

In terms of the bid rigging offence under the VPC, it can be inferred that the act of committing a bid rigging offence is intentional, either directly or indirectly. The bid riggers clearly know that their behaviour will do harm to society. They also foresee the consequences of such behaviour, whether or not they desire that such consequences will occur. This approach is reasonable, given that bid rigging offenders are normally well-educated people working in bidding companies.

Conclusion

This chapter has focused on the assessment of the legal framework applicable to bid rigging in Vietnam from the perspective of three different laws: the *Competition Law*, the *Public Procurement Law* and the *Penal Code*. The analysis has identified a number of shortcomings in current laws which may contribute to the failure of bid rigging enforcement.

As regards the *Competition Law*, the current law does not cover all forms of bid rigging including subcontracting and market allocation. Given that such forms are typically regulated in other jurisdictions like the US and the EU, this inadequacy may prevent Vietnamese competition authorities from detecting and investigating this sophisticated practice. More

²⁷⁹ Article 10: Deliberate crimes

Cases of deliberate crimes:

1. The offender is aware of the danger to society of his/her act, foresees consequences of such act and wants such consequences to occur;
2. The offender is aware of the danger to society of his/her act, foresees consequences of such act and does not want such consequences to occur but still deliberately lets them occur.

²⁸⁰ Article 11: Involuntary crimes

Cases of involuntary crimes:

1. The offender is aware of the danger to society of his/her act but believes that consequences would not occur or could be prevented;
2. The offender is not aware of the danger to society of his/her act though the consequences have to be foreseen and could be foreseen.

seriously, the current law fails to govern anticompetitive joint bidding which potentially disguise or facilitate bid rigging practices.

In terms of the *Public Procurement Law*, there is an inconsistency in the definition of bid rigging in this law compared with the *Competition Law*. The definition of bid rigging in the law on public procurement does not cover all forms of bid rigging that make competent public procurement agencies have difficulties identifying and detecting bid rigging.

With regard to the *Penal Code*, criminalisation of bid rigging in Vietnam reflects local factors in the Vietnamese context. Specifically, bid rigging has been classified as a public procurement offence rather than a competition offence. This legislative choice implies that criminalisation of bid rigging aims to ensure the efficiency of state management in the field of public procurement rather than to protect competition in the economy more broadly. This choice also results in inconsistencies in criminalising bid rigging in Article 222 when compared to criminalising other cartels in Article 217. The assessment of four factors constituting a bid rigging offence in the *Penal Code* also has revealed a number of shortcomings of this newly revised Code.

First, while the damage threshold of VND 100 million is a compulsory condition in order to establish the commission of a criminal offence, it is a real challenge for competent authorities to quantify this damage. Without any further guidance from the Supreme Court in this issue, criminalisation of bid rigging may prove to be a ‘paper tiger’ failing to bring about prosecutions of any bid riggers under this criminal provision.

Second, there seems to have been a misunderstanding among Vietnamese legislators on the subject of the bid rigging offence. While the subject of the bid rigging offence, as drafted, is individuals in bidding companies in accordance with the definition of bid rigging provided by the *Public Procurement Law*, criminal law puts an emphasis on public officials who are involved in bid rigging practices.

Vietnamese legislators also appear to keep the words of Article 165 of the previous version – ‘deliberately acting against the State’s regulations on economic management, causing serious consequences’— without noticing that bid rigging, in accordance with the *Public Procurement Law* and the *Competition Law* is just limited to horizontal bid rigging. Bid rigging refers to collusions among bidding companies rather than between public procurers and bidding companies stipulated in the 2005 *Public Procurement Law*. Therefore, public officials who become involved in bid rigging may be subject to the provisions in relation to corruption.

Third, there are inconsistencies between the cartel offence stipulated in Article 217 and bid rigging offence in Article 222. While the subject of the bid rigging offence is just limited to individuals, the subject of the cartel offence is both individuals and companies. Also, the element determining the harmful consequence of the cartel offence extends to both the illicit profit and the damage caused by the offending behaviour, whereas in the case of the bid rigging offence it is limited only to damage. These inconsistencies may negatively affect the enforcement of the criminal laws prohibiting bid rigging in practical terms.

CHAPTER 4: BID RIGGING IN THE VIETNAMESE PROCUREMENT MARKET

This chapter looks at the prevalence and form of bid rigging collusion in the Vietnamese context and the effectiveness of the Vietnamese *Procurement Law* in practice in tackling these bid rigging behaviours. The first part explores the picture of bid rigging practices in Vietnam through detected cases by competent authorities. Given the difficulties in collecting data and constraints of enforcement mechanisms, it is argued that detected bid rigging cases are just the tip of the iceberg. Based on in-depth interviews conducted with stakeholders, this part also identifies the traits of bid rigging collusion in the Vietnamese context.

The final part of the chapter addresses the question of to what extent the Vietnamese *Public Procurement Law* in concert with the administrative practices of public procurers (at both central and local levels) serve to facilitate bid rigging practices. In order to answer this question, the theoretical framework set out in Chapter 2 is applied focusing on three main factors: (1) the restriction of potential bidders' participation and entry; (2) subcontracting and joint bidding and (3) public procurement goals and policies.

I. Bid rigging in the Vietnamese public procurement market

Much anecdotal evidence shows that bid rigging is prevalent in almost all economic sectors where public procurement takes place,²⁸¹ and the Vietnamese public market is not exempt from these practices. As noted from the outset, the fact that bid rigging is deeply entrenched in the Vietnamese public procurement market has been corroborated through not only government reports²⁸² and international academic studies²⁸³ but also adjudicated cases and inspection reports. Although both government reports and academic studies claim that bid rigging is pervasive in the Vietnamese public market, no study to date has calculated how vast this problem is; to do so is beyond the province of this thesis. However, this part aims to paint the

²⁸¹ Sanchez Graells, 'Prevention and Deterrence of Bid Rigging', above n 7, 171-98; Mino and Fernandez, above n 7; Hüschelrath, above n 7, 185-91.

²⁸² Vietnam's Ministry of Planning and Investment, [Report on Assessment of Implementing the Public Procurement Law], above n 8, 7.

²⁸³ Gainsborough, above n 9, 25; Jones, 'Curbing Corruption', above n 9, 154; Jones, 'Public Procurement in Southeast Asia', above n 9, 17.

Vietnamese bid rigging picture based on the best available sources - adjudicated cases and inspection reports.

A. Detected bid rigging cases in Vietnam: The tip of the iceberg

1. Adjudicated cases

The responsibility for investigating and adjudicating bid rigging cases is shared between three different organisations: the competition authority, the public procurement authority and the criminal enforcement authority. While there have been no bid rigging cases investigated by the competition and criminal enforcement authorities, there have been only five official bid rigging cases adjudicated by the public procurement authority, all of which took place in An Giang province – a southern province among the 63 provinces in Vietnam. More specifically, on 26 November 2014, the President of An Giang province’s people’s committee established the existence of bid rigging conspiracies in the public tenders organised by An Giang province’s Department of Education and Training for the purchase of school equipment.²⁸⁴ This public procurement bid included three separate bid packages, all of which were suspected of bid rigging. In this particular case, the suppliers of school equipment submitted their bids with identical spelling mistakes and the same formats.

In a similar case, on 2 February 2015, a prohibition decision was issued regarding bid rigging agreements between two bidders in the bid project of supplying and installing equipment for Chau Doc hospital.²⁸⁵ Prior to that, on 7 March 2012, three bidders were debarred from participating in future bids for the next three years, as they were found to have colluded in the project of supplying and installing central air conditionings for Tan Chau hospital.²⁸⁶ Also in the same year, on 18 and 19 December 2012, two decisions were issued to cancel the bid results due to signs of bid rigging.²⁸⁷

Although all kinds of infringements under the PPL in general, and bid rigging laws specifically, must be publicised on the national bidding network system and in the *Bidding Newspaper*, as at the time of writing, there has been only one bid rigging case of five cases in An Giang

²⁸⁴ Decision No 2107/QĐ-UBND on handling violations in bidding project of supplying school equipment for Thoi Ngoc Hau high school for the gifted.

²⁸⁵ Decision No 202/QĐ-UBND dated 02/02/2015 promulgated by An Giang province’s President of People’s Committee.

²⁸⁶ Decision No 350/QĐ-UBND on cancellation of bid package’s result of supply and installation of air conditioners under the bidding project of Tan Chau hospital.

²⁸⁷ Decision No 2370/QĐ-UBND dated 19/12/2012 promulgated by An Giang province’s President of People’s Committee.

province published on the national bidding system.²⁸⁸ This inadequate information may raise the question of actual bid rigging cases adjudicated by public procurement authorities in the remaining provinces in Vietnam.²⁸⁹ Also, it seems irrational when bid rigging conspiracies have not been detected anywhere in Vietnam except for An Giang province, given that bid rigging practices have been proved pervasive under the Government's reports.

The fact that bid rigging is pervasive in the Vietnamese public market has been corroborated by interviews conducted with public officials working at central and local public procurement agencies.²⁹⁰

Of 17 interviewees spanning a cross section of government officials and scholars in the field of competition law and public procurement, the below comments are typical of the views expressed:

If public procurers organise ten public tenders, there are around eight ones connected with bid rigging. These practices take place in many forms and most of them are too sophisticated to detect.²⁹¹

Or:

The number of bid rigging cases adjudicated in An Giang province is minimal. In reality, it is much higher. It could be 50 cases or 500 cases rather than simply five cases.

In view of interviews provided by public officials, the indication is that the abovementioned adjudicated bid rigging cases are just the tip of the iceberg.

²⁸⁸ An interview with a public official who is in charge of managing the national e-procurement website reveals that, although decisions of sanctioning violation shall be sent to the Ministry of Planning and Investment in accordance with Article 90.4 of the Law, not many local public procurers have complied with this rule. To date, there have been only 40 decisions of any kind of violations sent to the Ministry. The public official explains that this is because the law does not provide any sanctions to anyone failing to send such decisions to the Ministry. He also suggests that the picture of bid rigging cases would be clearly depicted if the survey were sent to the 63 provinces as well as other public procurement units such as state companies and state corporations.

²⁸⁹ One of the possible reasons for suspected underreporting or non-compliance with publication requirements of bid rigging cases, according to one interviewee, is the arrangements made by local public officials and bid riggers not to publicise cases on the national bidding network system. This is because bid riggers may suffer a loss of prestige if their violation is publicised on the nation-wide website.

²⁹⁰ Interviewee 5 (Hanoi, 23 August 2016); Interviewee 6 (Hanoi, 27 August 2016); Interviewee 7 (Hanoi, 25 August 2016); Interviewee 8 (Hanoi, 27 August 2016); Interviewee 15 (Hanoi, 26 August 2016); Interviewee 16 (An Giang, 31 August 2016); Interviewee 17 (Hochiminh City, 16 August 2016).

²⁹¹ Interviewee 15 (Hanoi, 26 August 2016).

2. Inspection reports

In addition to bid rigging cases adjudicated by public procurement authorities, recognition of bid rigging may be reinforced based on inspection reports²⁹² conducted by state inspection agencies.²⁹³

One of the bid rigging cases detected by the state inspection authority took place in 2002,²⁹⁴ long before the VCL and the PPL were first promulgated. In this case, four State-owned companies participated in the tendering process of the Van Son-Lam Hai II Road Construction project in Ninh Thuan province – a province located in the middle of Vietnam. No.98 Construction Company then won the bid. However, it was later found out that the other three companies were ‘ghost’ companies set up by No.98 Construction Company to create fake competition. In fact, the bids submitted by these bidders were much higher than the one submitted by No.98 Construction Company. As a result, No.98 Construction Company won the bid at the price of VND 1.5609 billion which was only 141 VND less than the price of 1.560900141 billion suggested by public procurers. While such a practice is known as ‘cover bidding’—the most common form of all bid rigging cases prosecuted by competition authorities in the world²⁹⁵—it is also recognised as the coalition of the ‘green army [quan xanh]’ and ‘the red army [quan do]’ under the Vietnamese public procurement market.²⁹⁶

In Quang Ngai province, five bidding projects suspected of having signs of bid rigging collusion, including bidding packages No 12, No 14, No 13, No 7 and No 9 were not detected and investigated.²⁹⁷ In these projects, bidders agreed to choose the designated bidders. In Gia Lai province, it was ascertained that there were signs of bid rigging collusion in bidding

²⁹² The purpose of inspection activities, in accordance with the *Law on Inspection*, are to detect loopholes in management mechanisms, policies and laws, then to recommend remedies to competent state agencies; prevent, detect and handle law violations; and assist agencies, organisations and individuals in properly observing the law.

²⁹³ State inspection agencies are established at central and local levels, including the Government Inspectorate, ministerial inspectorates, provincial inspectorates, inspectorates of provincial-level departments and district inspectorates. Inspection activities in public procurement setting are entrusted to specialised inspectorates at central and local levels, such as inspectors under the purview of the Ministry of Planning and Investment and of Departments of Planning and Investment throughout the 63 provinces in Vietnam.

²⁹⁴ ‘Tendering in Construction: Real Competition or not?’ *Ninh Thuan Newspaper* (17 December 2002) cited in Alice Pham, *Competition Law in Vietnam: A Toolkit* (CUTS International, 2007) 25.

²⁹⁵ See above n 89.

²⁹⁶ Gillespie, ‘Managing Competition in Socialist-transforming Asia’, above n 27, 164, 178. The terms ‘Green Army’ and ‘Red Army’ will be later analysed at section I.B.1 of this chapter.

²⁹⁷ *Thông báo kết luận thanh tra số 2585/TB-TTCT của Thanh Tra Chính Phủ ngày 8 tháng 9 năm 2015 về việc chấp hành pháp luật trong quản lý, sử dụng đất đai và quản lý đầu tư xây dựng trên địa bàn tỉnh Quảng Ngãi* [Notice of Inspection Result No 2585/TB-TTCT of Government Inspector dated 8 September 2015 on the law compliance in the management and usage of land and in the management of construction investment in Quang Ngai Province] 11

<http://thanhtra.gov.vn/ct/news/Lists/KetLuanThanhTra/View_Detail.aspx?ItemID=54>.

projects sponsored by state funds, although the province failed to specify the names of these bidding projects.²⁹⁸

In the bidding package for construction of a surrounding fence, pile and basement at Hochiminh city Open University, an educational institution under the control of the Ministry of Education and Training, COTEC Joint-stock company won the bid package. However, government inspectors detected that identical bidding documents were submitted by COTEC and Tan Ky Real Estate Business Joint-stock Company.²⁹⁹ More specifically, some sections from the handbook of occupational safety of both companies were the same. It was later confirmed by COTEC that its staff copied the content from the Tan Ky handbook. This sign was seen as evidence of collusion between the two bidders in this bidding package.

It can be inferred from these cases that bid rigging is more pervasive in the Vietnamese construction industry than other sectors. This is similar to bid rigging practices in construction markets all around the world.³⁰⁰

Although inspection authorities have no competence to handle bid rigging infringements, they will support public procurement enforcement authorities and criminal law enforcement authorities to detect and prosecute this kind of violation. In accordance with the current legislation, such inspection reports must be publicised via at least one of three channels: mass media; state inspection agencies' websites or working offices of agencies/organisations subject to inspection. Having said that, there have been only 67 inspection reports publicised on the website of the Government Inspectorate, and only three of those dealt with bid rigging practices in the public market.³⁰¹ Because inspection reports are publicised in a very sporadic and

²⁹⁸ *Thông báo kết luận thanh tra số 2834/TB-TTCT của Thanh Tra Chính Phủ ngày 19 tháng 11 năm 2014 về việc quản lý, sử dụng đất đai và quản lý đầu tư xây dựng một số dự án trên địa bàn tỉnh Gia Lai* [Notice of Inspection Result No 2834/TB-TTCT of Government Inspector dated 19 November 2014 on the management and usage of land and on the management of construction investment towards some projects in Gia Lai Province] 6 <http://thanhtra.gov.vn/ct/news/Lists/KetLuanThanhTra/View_Detail.aspx?ItemID=28>.

²⁹⁹ *Thông báo kết luận thanh tra số 408/TB-TTCT của Thanh Tra Chính Phủ ngày 4 tháng 3 năm 2015 về việc thực hiện Nghị định số 43/2006/NĐ-CP ngày 25/4/2006 của Chính phủ tại trường Đại học Mở Thành phố Hồ Chí Minh thuộc Bộ Giáo Dục và Đào Tạo (giai đoạn 2010-2012)* [Notice of Inspection Result No 408/TB-TTCT of Government Inspector dated 4 March 2015 on the implementation of the Decree No 43/2006/ND-CP of the Government dated 25th April 2006 at Hochiminh city Open University under the purview of the Ministry of Education and Training in 2010-2012 period] 9 <http://thanhtra.gov.vn/ct/news/Lists/KetLuanThanhTra/View_Detail.aspx?ItemID=38>.

³⁰⁰ See more at OECD, *Policy Roundtable on the Construction Industry* <<http://www.oecd.org/regreform/sectors/41765075.pdf>>; OFT, 'Evaluation of the impact', above n 152, 72.

³⁰¹ See more at <http://thanhtra.gov.vn/ct/news/Lists/KetLuanThanhTra/View_Detail.aspx?Page=1>.

unreliable manner, the number of actual inspection reports dealing with bid rigging is difficult to confidently quantify.

Notwithstanding, in view of the anecdotal evidence provided through adjudicated cases and inspection reports, as well as interviews conducted with stakeholders in the Vietnamese public market, no doubt can be harboured as to the ubiquity of bid rigging practices in the Vietnamese public procurement market. The difficulties in collecting data regarding administrative Decisions and inspection reports imply that more effort should be made to define the size of the bid rigging issue in Vietnam and to empirically confirm that such limited decisions are just the tip of the iceberg.

B. Peculiarities of bid rigging practices in Vietnam

This part identifies two traits of bid rigging practices in the Vietnamese public procurement market. It first argues that the existence of horizontal bid rigging practices sometimes results from vertical bid rigging. It then explores the possibility of State-owned companies rigging bids compared to other private companies. As a matter of law enforcement, these traits are imposing constraints to competent authorities on investigations against bid rigging.

1. The mixture between horizontal and vertical bid rigging practices

The fact that bid rigging is closely connected with bid corruption has been not only identified in theory³⁰² but also evidenced in practice around the globe.³⁰³ Such a connection, however, has not received high-level attention from the perspective of Vietnamese policy makers and scholars. As noted in Chapter 1, Son's 2008 study is the single research on bid rigging touching on this relationship. He posits that bid rigging practices detected in public procurement are systematic and mixed among different forms of collusion, even between horizontal and vertical ones.³⁰⁴ He also emphasises that bid rigging cases detected in construction or sector development projects are always connected with a corrupt public official playing a role as the investor or broker for public project. However, his research fails to identify or scrutinise any detected bid rigging cases involving bid corruption. This is unsurprising, given that decisions

³⁰² David Lewis, 'Bid Rigging and Its Interface with Corruption' in Michal S Gal et al (eds) *The Economic Characteristics of Developing Jurisdictions Their Implications for Competition Law* (Edward Elgar, 2015) 197, 207.

³⁰³ A description of a number of detected bid rigging cases involving corruption can be found at OECD, *Collusion and Corruption*, above n 58, 6, 25.

³⁰⁴ Nguyen Ngoc Son, [Competition Mechanisms and Acts of Bid Rigging], above n 25.

in relation to horizontal bid rigging cases that may involve vertical collusion are only published in a very limited manner by the Vietnamese courts.³⁰⁵

One form of evidence to support Son's assumption is a number of cases detected by the Vietnamese media showing signs of bid rigging practice closely linked with corruption. These media allegations fall short of allegations that have been tested and proven in a court, but they are instructive nonetheless for what they potentially reveal about common collusive practices in public procurement markets in Vietnam, as well as the connection between vertical and horizontal bid rigging agreements.³⁰⁶

A recent notable case gained much attention from the Vietnamese media when the Xinxing Corporation – a China-based pipe supplier— won the contract for a Ha Noi water project of more than 26 million USD led by Viwasupco – a subsidiary of Vinaconex – one of Vietnam's leading state corporations. There were four bidders joining the bid including: Xinxing; another China-based HydroChina Corporation; France-based Saint-Gobain PAM and Jsaw-Newtaco as a joint bid between a Vietnamese and Indian company. Surprisingly, two of them, HydroChina and Saint-Gobain were disqualified as they failed to meet the requirement of submitting a bid security amount. Later on, Jsaw-Newtaco was also eliminated as it is claimed that this company failed to meet one of the technical requirements of the tender, and Xinxing was the declared winner with its low bid price.

³⁰⁵ For a review on the constraints of publicising the Court's decisions in Vietnam, see more at Pip Nicholson, 'Access to Justice in Vietnam: State Supply — Private Distrust' in J Gillespie and A Chen (eds), *Legal Reforms in China and Vietnam: A Comparison of Asian Communist Regimes* (Routledge, 2010) 188, 199.

³⁰⁶ There are at least 4 bid rigging cases reported by the Vietnamese media. Except for Xinxing case discussed in detail, the remaining cases will be also identified in the section II.A of this chapter. All of the cases are generally connected with corrupted practice where public procurers manage to impose the criteria so that only their 'intimate contractors' ('nhà thầu ruột') can meet the requirements and subsequently become the winners of the public tender. It is also noted that there are a number of other media allegations showing the signs of collusion. However, the provided information is not adequate enough to be discussed. See more at Tran Quyet, 'Dau Thau Va Nhung Kich Ban Khiem Nha Thau... "Chet Dung"[Situations in bidding troubled bidders], *Doi Song va Phap Luat* (online) (14 May 2014) <<http://www.doisongphapluat.com/xa-hoi/dau-thau-va-nhung-kich-ban-khiem-nha-thau-chet-dung-a32844.html>>; Tran Quyet, 'Vach Tran Nhung 'Van Co Hiem' Trong The Gioi Ngam Dau Thau' [Exposing Dangerous Tricks in the Bidding Underworld] (23 May 2014) <<http://www.doisongphapluat.com/kinh-doanh/doanh-nghiep/bai-3-vach-tran-nhung-van-co-hiem-trong-the-gioi-ngam-dau-thau-a33618.html>>; Anh The, 'Nghĩ An Thông Thau Tại Bắc Giang: Kien Nghi Ky Cheo Ho So Thau Bi Tu Choi' [The Signs of Bid rigging in Bac Giang Province: Recommendation on cross signing on Bidding Documents is rejected], *Dan Tri* (online) (4 July 2014) <<http://dantri.com.vn/ban-doc/nghi-an-thong-thau-tai-bac-giang-kien-nghi-ky-cheo-ho-so-thau-bi-tu-choi-1404996838.htm>>.

Given their high prestige as well as their financial capacities, failure to meet the pre-qualification requirement of submitting a bid security has raised suspicions of collusive agreement among these companies. As the representative of Jsaw-Newtaco claimed:³⁰⁷

I am utterly surprised by these big companies. Submitting a bid security of around 1 million USD is just a piece of cake to them. What are the reasons leading to their self-elimination's decisions?

In discussing the case in author interviews with senior public officials at the Department of Public Procurers (elaborated below), they claim that submitting bids without bid security is quite common in public market.³⁰⁸ This is done so as to eliminate themselves but still retain the appearance of competition of the bid so that the designated winner will be considered the objective and untainted actual winner of the bid.

In addition to the suspicion of horizontal bid rigging, the Xinxing successful bid also raises the question of whether or not there was any pre-arranged outcome led by Viwasupco—put differently, whether there was any collusion between Viwasupco and Xinxing. One holds the view that it is likely that Viwasupco imposed the technical requirements which only fitted Xinxing.³⁰⁹ This is because it is unclear why Viwasupco required bidders to evidence their capacity to produce the pipe of 1800mm rather than 1600mm, while the former is considered the manufacturing strength of Xinxing. Another also point outs that Viwasupco has recently transferred its share of 43.6 per cent to Singapore-based Acuatico Corporation, which is claimed to possess a share of Xinxing.³¹⁰ If this is the case, it is highly likely that this high-profile project involves corruption and collusion as the media reveals. As noted above, when it comes to the connection between bid rigging and bid collusion, interviews conducted by the author with public officials at both competition and public procurement authorities reveal that bid rigging in the Vietnamese public market is often led by bid corruption.

³⁰⁷ Viet Hoai, 'Duong Ong Nuoc Song Da 2: Lo dien 'thong thau'?' [Song Da pipeline Project – 2nd stage: Bid rigging detected?] *Giao duc Viet Nam* (online) (1 April 2016) <<http://giaoduc.net.vn/Kinh-te/Duong-ong-nuoc-song-Da-2-Lo-dien-thong-thau-post166879.gd>>.

³⁰⁸ Interviewee 8 (Hanoi, 27 August 2016); Interviewee 16 (An Giang, 31 August 2016) and Interviewee 17 (Hochiminh City, 16 August 2016).

³⁰⁹ Vinh Hai, 'Co Hay Khong Viec 'Cai Thau' Du An Duong Ong Nuoc Song Da?' [Whether or not there is the arranged outcome in the project of Song Da Pipeline?], *Dan Tri* (online) (5 April 2016) <<http://dantri.com.vn/kinh-doanh/co-hay-khong-viec-cai-thau-du-an-duong-ong-nuoc-song-da-20160405151210002.htm>>.

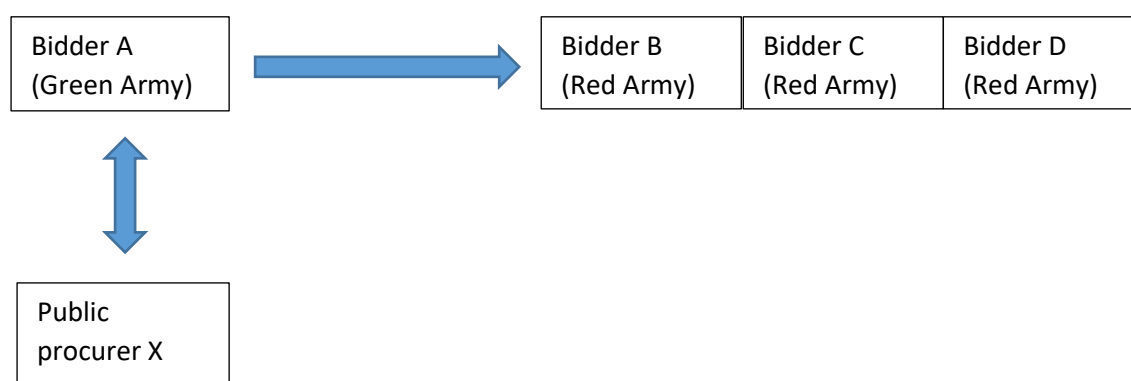
³¹⁰ Lam Hoai, 'Chi Nha Thau Trung Quoc Co Ho So Hop le' [Only One Chinese Bidder is qualified], *Tuoi tre* (online) (2 April 2016) <<http://tuoi tre.vn/tin/kinh-te/20160402/chi-nha-thau-trung-quoc-co-ho-so-hop-le/1077697.html>>.

According to one interviewee:³¹¹

One of the peculiarities in the Vietnamese public market is that collusion arises at the period of setting up a project/purchase budget. A public tender's life cycle starts when a project/purchase budget is drafted and then adopted by competent authorities. A contractor selection plan is subsequently drafted and approved. After that, other steps are followed, including preparing bidding documents, hiring consultants and organising bids. A bidder who lobbied corrupted public officials from the very outset of public tender will easily control other remaining steps.

These comments imply that vertical bid rigging agreements between public procurers and bidders is reached first, and then a horizontal agreement will be reached with fellow bidders to give the appearance of authentic competitive bidding. In other words, the designated winner is chosen by the public procurer. The winner, together with the public procurer, may ask other bidders to submit a cover bid or a bid suppression to ensure that the contract is awarded to the designated winner. This kind of collusion, which is known as 'Quan Xanh, Quan do' ('Green Army, Red Army') can be illustrated by the diagram below. In these situations, the 'Green Army' as the designated winner often prepares bidding documents for other 'Red Armies'. These 'Red Armies' are sometimes private enterprises run by family members of public officials who are involved in public tenders.³¹²

Diagram 1: 'Green Armies' and 'Red Armies' in Vietnam



While the horizontal bid rigging falls within the ambit of the *Competition Law* and the *Public Procurement Law*, the vertical arrangement is governed by the *Public Procurement Law*. This would challenge the newly established Vietnamese Competition Authority, as they have to

³¹¹ Interviewee 17 (Hochiminh City, 16 August 2016).

³¹² Gillespie, 'Managing Competition in Socialist-transforming Asia', above n 27, 164, 178.

investigate and scrutinise the horizontal element in such sophisticated cases. As mentioned earlier in Chapter 3, a close connection and cooperation between competition authorities and public procurement authorities may address these cases.

2. *The involvement of State-owned companies in bid rigging cases*

The bid rigging cases detected by public procurement authorities and state inspection agencies reveal that bid rigging practices may occur not only among private but also State-owned enterprises (SOEs).³¹³

While detected bid rigging cases seem to be popular among private enterprises, arguably the most serious and biggest cases tend to take place among State-owned enterprises.³¹⁴ This is because State-owned enterprises get exclusive enjoyment from their substantial capital and collaborative relationships with other state firms to get involved in large public purchasing projects. Specifically, SOEs under the guarantee from the Government are easily financed by State-owned commercial banks regardless of the risk of the proposed project, while other private enterprises normally get the loan from the commercial banks on strict requirements imposed by such banks.³¹⁵ This financial preference may enable SOEs to out-bid private sector competitors with low bids.³¹⁶

It is also noted that bid rigging tends to be prevalent in the market where bidding companies know each other through social connections, trade associations or business contacts.³¹⁷ Compared with private enterprises, SOEs are more likely to be closely connected with trade associations and belong to stronger informal business networks, which also facilitates easy involvement in bid rigging collusion.

In addition, they tend to have recourse to close personal connections with competent public procurers (which are also provincial and government officials) and access to confidential

³¹³ According to Article 4.8 of the 2014 *Law on Enterprises*, State-owned enterprises are ones in which the State holds one hundred per cent of the charter capital.

³¹⁴ Nguyen Ngoc Son, [Competition Mechanisms and Acts of Bid Rigging], above n 25.

³¹⁵ Markus D Taussig, Nguyen Chi Hieu and Nguyen Thuy Linh, *From Control to Market: Time for Real SOE Reform in Vietnam* (CIGIO and CIMA, 2015) 28 <<https://bschool.nus.edu.sg/Portals/0/docs/From-Control-To-Market.pdf>>; Stoyan Tenev et al, *Informality and the Playing Field in Vietnam's Business Sector* (IFC, World Bank, and MPDF, 2003) 61 <<http://www.ifc.org/wps/wcm/connect/9aae680047adb52f9311f7752622ff02/VN-informality-playing-field-VN.pdf?MOD=AJPERES>>.

³¹⁶ See Charles K Coe, 'Government Purchasing: The State of the Practice' in Thomas D Lynch and Lawrence L Martin (eds), *Handbook of Comparative Public Budgeting and Financial Management* (Marcel Dekker, 1993) 207-24; Jones, 'Public Procurement in Southeast Asia', above n 9, 9-10.

³¹⁷ OECD, *Collusion and Corruption*, above n 58, 317.

information about the relevant bidding packages.³¹⁸ Gillespie explains this close relationship by citing the statement of one of the managers in a Vietnamese State-owned company as follows:³¹⁹

Even after có phần hoa [privatisation] the government is still involved in making high-level appointments in the firm and the construction department is still the firm's controlling body. But in reality we have known each other for such a long time we are like brothers and I don't have a cấp trên (higher level) that I report to. The firm consults (xin ý kiến) about large construction tenders but when we meet we mix talk about business with talk about our families and other things that have nothing to do with business.

The involvement of SOEs in collusive arrangements may be a big challenge for the newly-established VCA and the VCC to detect and enforce. It is even more problematic, given that SOEs still play a leading role in the economy. Article 52 of the 2013 *Constitution* states:

The Vietnamese economy is a socialist-oriented market economy with multi-forms of ownership and multi-sectors of economic structure; **the state economic sector plays the leading role.** [emphasis added]

Despite its incline in quantity under the Equalisation Program,³²⁰ SOEs account for nearly 30 per cent of Vietnam's GDP growth in the period of 2005 to 2013.

II. Factors facilitating bid rigging in the Vietnamese public procurement market

A. The restriction of potential bidder's participation and entry

As identified in section II of Chapter 2, while pursuing industrial policies favouring protecting domestic enterprises, the Vietnamese government put some restrictions on foreign bidders' participation that may decrease the number of potential bidders and therefore indirectly facilitate bid rigging. This can be clearly seen through the current regulations on international bidding and preferential treatment in choosing tenderers. More specifically, foreign bidders are not allowed to participate in tenders, except in certain circumstances listed under Article 15 of

³¹⁸ As noted above, the close relationship between senior managers of State-owned companies and provincial and government procurers has been established during the command economy and reinforced through regular social meetings. See more at Gillespie, 'Managing Competition in Socialist-transforming Asia', above n 27, 164, 178.

³¹⁹ Gillespie, 'Localizing Global Competition Law in Vietnam', above n 28, 935, 948.

³²⁰ Equalisation programs can be defined as 'the transformation of SOEs into joint-stock companies and selling part of the shares in the company to private investors in order to improve the performance of the firms'. In fact, it is well-known as a Vietnamese version of SOEs' privatisation, which is different from the Western approach as it does not necessarily mean that the government loses its ultimate control over the firm. See Karen Ellis and Rohit Singh, 'Assessing the Economic Impact of Competition' (Report, Overseas Development Institute, July 2010) 8 <<https://www.odi.org/sites/odi.org.uk/files/odi-assets/publications-opinion-files/6056.pdf>>.

the *Public Procurement Law*.³²¹ In addition, preferential treatment in choosing tenderers seems to favour domestic bidders by requiring bidders to ensure that, when submitting a bid, domestic production costs occupy 25 per cent or more of the total costs of supplying goods under the contract.³²² The effect of this requirement is that, while domestic tenderers who bid either independently or jointly enjoy preferential treatment by not being affected by the rule, foreign tenderers will need to bid in partnership with local domestic tenderers where the domestic tenderers supply 25 per cent or more of work value of the bidding package.³²³ These requirements aim at facilitating a campaign named ‘Vietnamese prioritise Vietnamese goods’ and prioritising the development of domestic resources, creating jobs for local workers and enhancing domestic bidders’ capacity and competitiveness.³²⁴ These are worthy pursuits, but as presently framed, their achievement comes at the cost of unwittingly fostering potential bid rigging behaviour.

Under the Vietnamese public procurement rules, criteria for selecting bidders in a tender include the bidder’s capacity and experience, technical requirements and price requirements.³²⁵ Although these criteria are clarified under the law, there is still room for public procurers to make them more specific depending on different types of tender packages.³²⁶ As a result, specifications imposed by Vietnamese public procurers to allow them to choose qualified bidders may restrict the pool of potential bidders and also indirectly facilitate bid rigging. This potential problem appears to be anticipated under the Vietnamese public procurement rules, which clearly state that requirements under bidding documents shall not aim at reducing the

³²¹ Article 15: International bidding

1. International bidding shall be held to select tenderer only when it meets one of the following conditions:

- a) The donor of bidding package requests for holding international bidding;
- b) Tender packages for procurement of goods where the goods are not yet able to be manufactured domestically or able to be manufactured but fail to meet technical, quality or price requirements. Cases of common goods, already been imported and offered for sale in Vietnam, do not organise international bidding;
- c) Bidding packages of providing advisory service, non-advisory service, construction and installation, mixture provision which domestic tenderers are not able to satisfy requirements of bidding package performance.

³²² Article 14.1 *Public Procurement Law*.

³²³ Article 14.2 *Public Procurement Law*.

³²⁴ Vietnam’s Ministry of Planning and Investment, *To Trinh Ve Du An Luat Dau Thau Sua Doi* [Report on the Draft of Revised Public Procurement Law] (2012) 8 <http://duthaoonline.quochoi.vn/DuThao/Lists/DT_DUTHAO_LUAT/View_Detail.aspx?ItemID=653&TabIndex=2&TaiLieuID=676>.

³²⁵ Article 12.2 of Decree No 63/2014/ND-CP

³²⁶ Article 12.3 and 12.4 of Decree No 63/2014/ND-CP.

number of bidders or giving priority to certain bidders, which causes unfair competition among bidders.³²⁷

Notwithstanding, unnecessary and excessive selection criteria are commonly reported in the Vietnamese media. A recent case related to a construction project in the middle of Vietnam, Phu Yen Province, in 2015.³²⁸ Accordingly, the local public procurer – Vietnam Television Center (VTC, Phu Yen branch) — was in charge of organising the tender package.³²⁹ One of the criteria imposed by the VTC was a requirement that bidders must have conducted at least three similar contracts of which the value and building size was more than 30 billion VND and six floors, respectively. In addition, this involvement must have included involvement in a contract constructing radio and television towers since 2010. In response to these requirements, one bidder claimed that there have been just a few construction projects in the field of radio and television tower in the middle of Vietnam, most of which had been erected a long time ago (certainly well before 2010). Another complained that these criteria effectively ruled out all local bidders as there has been no television tower constructed for the last ten years.

A similar case concerned a hospital construction project in Ha Nam – a northern province of Vietnam— where public procurers also imposed several strict requirements.³³⁰ The tenderers in this case were required to evidence five recent years’ experience of building hospitals, five tender packages and six contracts of constructing hospitals, and three projects valued over 15 billion VND each. Also, the tenderers were required to meet the requirement of supplying their financial reports for three years from 2007 to 2009 to show that the total value of their projects shown on VAT invoices during three years from 2007 to 2009 was over 30 billion VND.

In several cases, many public procurers used the social insurance book³³¹ as a compulsory requirement to choose potential bidders. Specifically, they required that bidders must submit the social insurance books of key executives who would be mainly in charge of the tender if they were successful, or any alternative documents issued by social insurance state agencies to

³²⁷ Article 12.2 of Decree No 63/2014.

³²⁸ Dong Hai, ‘Nhieu Tieu Chi Han Che Nha Thau Tham Gia Dau Thau’ [Criteria towards Restricting Potential Tenderers’ Participation], *Xay dung* (Vietnam) (31 March 2015) <<http://www.baovaydung.com.vn/news/vn/kinh-te/nhieu-tieu-chi-han-che-nha-thau-tham-gia-dau-thau.html>>.

³²⁹ The tender package, entitled 5A, was invested to erect the Vietnam Television Tower in Phu Yen.

³³⁰ Nhat Minh, ‘Chu Dau Tu Vi Pham Luat Dau Thau’ [Investors Violate the Public Procurement Law], *Phap Luat va Xa hoi* (Vietnam) (1 July 2010) <<http://phapluatxahoi.vn/giao-thong-do-thi/chu-dau-tu-vi-pham-luat-dau-thau-70260>>.

³³¹ The social insurance book is a document granted to Vietnamese employees and workers by social insurance organisations. This is mostly used for the purpose of managing the payment of social insurance. It is also the basis for employees and workers to receive benefits such as pension and social allowances from the State.

certify that bidders had paid annual social insurance fees for these key staff. This requirement aimed to eliminate bidders managing to submit required qualifications and documents but not having enough key staff to perform the tender. Again, this is a worthy pursuit. However, public procurers should impose requirements aimed primarily at assessing the capacity and experience of key staff of tenderers to complete the project rather than asking for the social insurance book, which may lead to the restriction of otherwise qualified potential bidder participation.³³²

In addition to reports from Vietnamese media, interviews with officials working at central and local governments also corroborate the fact that unnecessary and excessive selection criteria are prevalent in the Vietnamese public market.³³³ One such official interviewed by the author claimed that the Public Procurement Agency has received a massive number of enquiry letters from bidders as to the issue of whether criteria imposed by public procurers in certain public tenders to choose the bidders are appropriate or not; in most of these cases, these criteria led to less competition.³³⁴

Other interviewees stated that they witnessed these practices more often when examining public procurement activities at local public procurement bodies.³³⁵ There appears to be some evidence to corroborate this assertion. For example, a public tender was organised to buy meeting-hall chairs with the amount of 1000 pieces in Ha Noi with the tender value of 6 billion. However, one of the criteria imposed by the public procurer in this case was that the bidder's annual revenue was VND 1000 billion.³³⁶ This is far higher than the usual financial requirements that are typically expected to be approximately 1.5 times to twice the contract price.³³⁷

The explanation for this practice is complex but can be attributed in part to the competence of public procurers and consultants. It has been said that the knowledge and the ability to understand the law of many public officials in the public procurement field, especially at local

³³² Ban Bien Tap [Editorial Board], 'Quy Dinh Nhan Su Chu Chot Duoc Nha Thau Dong Bao Hiem Co Dung' [Tenderers Are Required To Pay Social Insurance To Key Personnel: Legitimate Or Not?] *Dau Thau* (Vietnam) (1 August 2016) See <<http://baodauthau.vn/phap-luat/quy-dinh-nhan-su-chu-chot-duoc-nha-thau-dong-bao-hiem-co-dung-25332.html>>.

³³³ Interviewee 5 (Hanoi, 23 August 2016); Interviewee 6 (Hanoi, 27 August 2016); Interviewee 7 (Hanoi, 25 August 2016); Interviewee 8 (Hanoi, 27 August 2016); Interviewee 15 (Hanoi, 26 August 2016); Interviewee 17 (Hochiminh City, 16 August 2016).

³³⁴ Interviewee 8 (Hanoi, 27 August 2016).

³³⁵ Interviewee 5 (Hanoi, 23 August 2016); Interviewee 7 (Hanoi, 25 August 2016); Interviewee 8 (Hanoi, 27 August 2016).

³³⁶ Interviewee 5 (Hanoi, 23 August 2016).

³³⁷ Interviewee 6 (Hanoi, 27 August 2016).

level, is still low and problematic.³³⁸ However, the fundamental reason behind this problem, according to some interviewees, is corrupt practices between public procurers and bidders.³³⁹ In fact, some public procurers have close relationships with several bidders.³⁴⁰ Public procurers manage to impose the criteria so that only their ‘intimate contractors’ (‘nhà thầu ruột’) can meet the requirements and subsequently become the winners of the public tender.³⁴¹ This explains why, in some cases, public procurers copy technical requirements provided by their intimate contractor or impose several requirements which are only obtainable by their ‘intimate contractors’.³⁴²

B. Subcontracting and Joint bidding

Given that subcontracting can be employed as a compensation mechanism within a collusive bid rigging agreement, it is suggested that subcontracting should be free from the bidding process if possible.³⁴³ However, this suggestion is a difficult one for policy makers as, by the same token, subcontracting is an effective tool for public procurers to encourage minor bidders’ participation in tenders. The middle ground may be to ensure that subcontracting is closely monitored so that winning bidders can be prevented from using subcontracting arrangements to compensate losing bidders with whom they have colluded to secure the contract.

The current law appears to seek out this middle ground. Under the current law, a list of sub-contractors must be identified when the contractors submit their bidding documents.³⁴⁴ Also, the prime contractor is not allowed to request subcontractors to carry out tasks other than the tasks of the subcontractors mentioned in the submitted bid-envelope, and the sub-contractors

³³⁸ Interviewee 6 (Hanoi, 27 August 2016).

³³⁹ Interviewee 5 (Hanoi, 23 August 2016); Interviewee 6 (Hanoi, 27 August 2016); Interviewee 7 (Hanoi, 25 August 2016); Interviewee 8 (Hanoi, 27 August 2016); Interviewee 15 (Hanoi, 26 August 2016); Interviewee 17 (Hochiminh City, 16 August 2016).

³⁴⁰ The close relationship between public procurers and certain bidders has been revealed via a number of media allegations. See Tran Quyet, ‘Dau Thau Va Nhung Kich Ban Khien Nha Thau... "Chet Dung"’ [Situations in bidding troubled bidders], *Doi Song va Phap Luat* (online) (14 May 2014) <<http://www.doisongphapluat.com/xa-hoi/dau-thau-va-nhung-kich-ban-khien-nha-thau-chet-dung-a32844.html>>; Tran Quyet, ‘Vach Tran Nhung ‘Van Co Hiem’ Trong The Gioi Ngam Dau Thau’ [Exposing Dangerous Tricks in the Bidding Underworld] (23 May 2014) <<http://www.doisongphapluat.com/kinh-doanh/doanh-nghiep/bai-3-vach-tran-nhung-van-co-hiem-trong-the-gioi-ngam-dau-thau-a33618.html>>; Anh The, ‘Nghĩ An Thong Thau Tai Bac Giang: Kien Nghi Ky Cheo Ho So Thau Bi Tu Choi’ [The Signs of Bid rigging in Bac Giang Province: Recommendation on cross signing on Bidding Documents is rejected], *Dan Tri* (online) (4 July 2014) <<http://dantri.com.vn/ban-doc/nghi-an-thong-thau-tai-bac-giang-kien-nghi-ky-cheo-ho-so-thau-bi-tu-choi-1404996838.htm>>.

³⁴¹ For more instances regarding these criteria, see more at Tran Quyet, ‘Bat Tay Dat Tieu Chi Cho Mot Nha Thau ‘An Chac’? [Collusion to impose criteria to make the designated bidder win the bid], *Doi Song va Phap Luat* (online) (16 May 2014) <<http://www.doisongphapluat.com/kinh-doanh/doanh-nghiep/the-gioi-ngam-dau-thau-dat-tieu-chi-cho-mot-nha-thau-an-chac-a33214.html>>.

³⁴² Interviewee 5 (Hanoi, 23 August 2016); Interviewee 15 (Hanoi, 26 August 2016); Interviewee 17 (Hochiminh City, 16 August 2016).

³⁴³ OECD, *Public Procurement – The Role of Competition Authority in Promoting Competition*, above n 135, 9.

³⁴⁴ Article 128.2a of Decree No 63/2014/ND-CP.

can be only replaced or modified upon the prior consent of the public procurers.³⁴⁵ Therefore, if the public procurers are vigilant about risks of bid rigging, the law as presently drafted does assist in ensuring subcontracting cannot be used to distribute cartel proceeds among bid riggers.

The current law also provides prohibitions in terms of transferring contracts, which is closely linked to subcontracting. As such, the contractor is not allowed to transfer to another contractor a portion of the package amounting to 10 per cent or higher, or below 10 per cent of the signed contract price but amounting to over VND 50 billion (after deducting the portion of works under the responsibility of the subcontractors). This implies that without registration of using sub-contractors, the awarded bidder is permitted to sub-contract to other bidders a portion of the package less than 10 per cent and less than VND 50 billion. Even so, it is hard for bid riggers to take advantage of this regulation to distribute the cartel profits, given that the distribution of the contract price is trivial. It seems that regulations governing subcontracting under the current law deal with division of cartel proceeds effectively. This finding is also corroborated by public officials interviewed by the author.³⁴⁶

Like subcontracting, joint bidding also has both negative and positive impacts on the competitiveness of the bidding process. While joint bidding can be a useful tool for SMEs whose capacities do not meet the entire bid to join together and to make a competitive bid, it may also be a product of a collusive scheme to reduce competition in public procurement.

The Vietnamese public procurement rules allow two or more bidders to submit a joint bid provided that there is a written joint bid agreement among themselves, in which the responsibilities of the head of joint bid and general responsibilities as well as separate responsibilities of each member in the joint bid are clearly stated.³⁴⁷ However, the law requires that the competence and experience of each member must meet the requirements of work that it is in charge of by itself under the contract.³⁴⁸

It is notable that the law provides no prohibition for bidding companies that independently meet the requirements to enter a joint bid except for bidders in the short list.³⁴⁹ It is highly

³⁴⁵ Article 128.2b of Decree No 63/2014/ND-CP.

³⁴⁶ Some interviewees claim that it is very hard for bid riggers take advantage of subcontracting mechanisms to divide cartel profits under the current law if public procurers keep their eyes open for this mechanism: Interviewee 6 (Hanoi, 27 August 2016) and Interviewee 8 (Hanoi, 27 August 2016).

³⁴⁷ Article 5.3 of the *Public Procurement Law*.

³⁴⁸ Section 2—Chapter 3 of Circular No 03/2015/TT-BKHDT and Section 2—Chapter 3 of Circular No 03/05/2015/TT-BKHDT.

³⁴⁹ The Short List is the list of qualified bidders or investors in case competitive bidding with prequalification; the list of contractors invited to bid in case of limited bidding; or the list of consultants whose expressions of interest

likely that many bidding companies who are among the market leaders in certain sectors will take advantage of this regulation to enter a consortium so that they can maintain their current market shares and share the profit among each other. Interviews with public officials in Vietnam reveal that the practices where bidding companies choose to bid jointly while they are able to bid alone are not rare.³⁵⁰ However, such practices seem to gain less attention from the public procurers as they are permitted and considered legitimate under the law on public procurement.³⁵¹

The current law fails to request that joint bidders clarify the purpose and merits of submitting a joint bid, hence public procurers find it hard to assess whether the joint bid is genuinely competitive or not. Accordingly, the current law facilitates bid rigging schemes in cases where bid riggers try to submit a joint bid although each single bidder meets all the requirements to bid independently.

C. Public procurement goals and policies

Although the PPL's objectives are not clearly stipulated in the law itself, these can be found in governmental materials produced during the process of developing the draft legislation. From these materials, the objectives of the law are stated as including unification of spending State funds, enhancing the competition in public procurement, transparency, equity, anti-corruption and efficiency.³⁵² Among these, objectives aimed at enhancing transparency and anti-corruption may inadvertently facilitate bid rigging conspiracies. This can be demonstrated through the content and operation of provisions of information disclosure.

Under the PPL, a procuring entity must comply with three publication rules. First, it is required to publish a plan on selection of tenderers.³⁵³ Second, a tender notice must be released when procuring entities plan to start a bidding process.³⁵⁴ Third, a notice regarding the result of

are evaluated as responsive to requirements specified in the request for expressions of interest. If bidders are on the short list, they are not allowed to enter a joint bid together. See more at Article 22.3 of Decree 63/2014/ND-CP.

³⁵⁰ Interviewee 6 (Hanoi, 27 August 2016); Interviewee 8 (Hanoi, 27 August 2016); Interviewee 17 (Hochiminh City, 16 August 2016).

³⁵¹ According to the interviews, public procurers normally focus on the consortium agreement as well as responsibilities of each party in such consortium. This is because in many cases bidders failed to do their assigned tasks in the consortium agreement. Rather, all of the tasks would be completed by one bidder in this consortium, which negatively affected the quality and time of the project.

³⁵² Vietnam's Ministry of Planning and Investment, above n 324, 6; Vietnam's Ministry of Planning and Investment, *Bao Cao Danh Gia Tac Dong Cua Luat Dau Thau Sua Doi* [Report on Assessing the Impact of the Revised Public Procurement Law] (2012) 3 <http://duthaoonline.quochoi.vn/DuThao/Lists/DT_DUTHAO_LUAT/View_Detail.aspx?ItemID=653&TabIndex=2&TaiLieuID=674>.

³⁵³ Article 8.1.a *Public Procurement Law*.

³⁵⁴ Article 8.1.b and 8.1.c of the *Public Procurement Law* and Article 8.1.b of Decree No 63.2014/ND-CP.

selection of tenderers must be published.³⁵⁵ All bidders also need to be informed of the success or failure of their participation in a tender. In detail, information regarding the name of the winning tenderer, price of the winning bid, type of contract, contract duration, list of unselected bidders and a summary of reasons for elimination, and a plan for completing and signing the contract with selected bidders must also be produced.³⁵⁶ All notices must be published on the national bidding network system and the newspaper of Ministry of Planning and Investment called the *Bidding Newspaper*.³⁵⁷

While the goal of transparency is understandable, it can be inferred that this requirement to produce a greater than necessary amount of information under the PPL may increase the possibility of detecting the deviations that are considered the contributing factors to cartel stability.³⁵⁸ Cartelists can use the information to more easily detect cheating cartel members based on information divulged under the law and may impose sanctions to deviators to discourage future such behaviours, thus strengthening the stability of their cartel.

Information disclosure is also required when procuring entities open the bids in the presence of all bidders. While the names of bidders will be announced when opening the technical bids,³⁵⁹ the submitted prices will be publicised when the financial bids are opened.³⁶⁰ Unfortunately, such practices will not only help bidders know each other but also allow them to know the competitors' submitted prices and may facilitate the conclusion of future bid rigging conspiracies.

In addition to information disclosure, principles of transparency and anti-corruption can be demonstrated through the communication between public procurers and bidders. Such practices may facilitate communication among bidders before or during the tender process and, again, are ripe for abuse by potential bid riggers. Under the Vietnamese public procurement rules, tenderers' information is kept confidential until the result of contractor selection is made known to the public, and under no circumstance is the information contained in the bid packages revealed to any other bidders, except for the information that needs to be disclosed during the bid opening.³⁶¹ However, identities of bidders may be still revealed through pre-bid

³⁵⁵ *Public Procurement Law*, art 8.1.dd.

³⁵⁶ Article 20.4 and Article 20.6 of Decree No 63/2014/ND-CP.

³⁵⁷ These notices are also encouraged to be published on the websites of Ministries, sectors and localities or on other means of mass media.

³⁵⁸ Stigler, above n 32, 44, 48.

³⁵⁹ Article 26.4b of Decree No 63/2014/ND-CP.

³⁶⁰ Article 29.2.c of Decree No 63/2014/ND-CP.

³⁶¹ Article 14.3.b of Decree No 63/2014.

clarification meetings hosted by Vietnamese public procurers. Under the current law, there are two channels to clarify bid solicitations: in-writing communication and face-to-face meetings.³⁶² Although clarification meetings are only legally required to be held when necessary,³⁶³ practice shows that this kind of meeting is held more often, especially in cases involving bid packages which are of high value and sophistication.³⁶⁴ Even worse, on-site visits also are offered by public procurers following the clarification meetings.³⁶⁵ These meetings provide a natural meeting where bidders can exchange sensitive information and reach collusive agreements.³⁶⁶ As is shown in most bid rigging cases, seeking out other bidders and making contact with them are full-time jobs for many staff in bidding companies.³⁶⁷

Public procurers who were interviewed by the author also confirm that clarification meetings in some cases may facilitate bid riggers to meet each other and to enter a collusive agreement.³⁶⁸ However, interestingly, they all agree that such meetings are not a big deal in the Vietnamese context.

One emphasises that:

[i]n terms of clarification meeting, the World Bank, one of major donors for Vietnam, at the outset insisted that bidding competitors are not allowed to meet each other. However, they later on agreed that such issues are allowed in the Vietnamese context. This is due to the fact that direct meetings are not the only means for tenderers to rig bids. In fact, bid rigging can take place from their houses, it can be rigged via making a phone call, drinking beers or coffee. It can be rigged not only among directors of bidding companies but also among senior executives of these companies.³⁶⁹

Another adds:

Bidders do not need the clarification meeting to rig bids. As stated in the old Vietnamese proverb, ‘buon co ban, ban co phuong’ [which means ‘you must start up a business with friends

³⁶² Article 14.3.c of Decree No 63/2014.

³⁶³ Article 14.3.c of Decree No 63/2014.

³⁶⁴ Interviewee 8 (Hanoi, 27 August 2016); Interviewee 15 (Hanoi, 26 August 2016).

³⁶⁵ DHD, ‘Hoi Nghi Tien Dau Thau Hai Goi Thau Chinh Thuoc Du An Mo Rong Nha May Thuy Dien Da Nhim’ [Pre-bid Clarification Meeting For Two Main Bidding Packages Under the Project of Expanding Da Nhim Hydropower Plant] (15 April 2015)

<<http://dhd.com.vn/d4/news/Hoi-nghi-tien-dau-thau-hai-goi-thau-chinh-thuoc-Du-an-mo-rong-nha-may-thuy-dien-Da-Nhim-1-249.aspx>>.

³⁶⁶ OECD, *Fighting Bid Rigging in Public Procurement in Mexico* (2011) 59 <<http://www.oecd.org/competition/abuse/49390114.pdf>>.

³⁶⁷ *US v Maryland and Virginia Milk Producers Cooperative Association*, 974 F2d 1333, (Unpublished Disposition) 2 and *US v Ashland-Warren, Inc*, 537 FSupp 433, 435 (1982).

³⁶⁸ Interviewee 8 (Hanoi, 27 August 2016).

³⁶⁹ Interviewee 15 (Hanoi, 26 August 2016).

and do business with a guild’], bidders should clearly know who their competitors are in the public tender project.

In addition to main goals, there exist secondary policies that may similarly limit competition in public procurement and promote bid rigging collusion. They include the policy of prioritising the development of domestic resources, opening up more opportunities for local bidders to win the bid and creating jobs for local workers and the policy of boosting the ‘Vietnamese prioritise Vietnamese goods’ campaign. As outlined earlier, these policies lead to restrictions on foreign bidder participation that facilitate bid rigging collusion.

Conclusion

This chapter has examined the extent of the prevalence of bid rigging practices in the Vietnamese public market and the extent to which the Vietnamese public procurement legislation as well as the administrative practices of public procurement authorities facilitate bid rigging.

The significantly limited number of bid rigging cases adjudicated makes empirical conclusions difficult, but clearly should not be taken to mean that the Vietnamese public market is exempt from this practice. In fact, such practice proves prevalent, especially in construction industry, according to government inspection reports and Vietnamese media. This fact is also corroborated by interviews conducted by the author with public officials of public procurement agencies, at central and local levels.

The chapter has also identified two key characteristics of bid rigging practices in the Vietnamese public procurement market. First, bid rigging and bid collusion often take place in tandem. More interesting, bid rigging sometimes is led by a bid corruption scheme between public procurers and one or more bidders. Put differently, bid rigging could be seen as an effective tool to support corruption scheme. Second, while bid rigging cases occur among all forms of enterprises, the most serious ones often take place among State-owned companies. This is because they take advantage of preferential treatment afforded by their financial and social networks when compared to private enterprises.

By scrutinising factors prone to bid rigging collusion in the Vietnamese public market, it is also revealed that the Vietnamese public procurement legislation as well as administrative

practices of public procurers do facilitate the formation and stability of bid rigging. The factors giving rise to the strongest concern include the practice of imposing unnecessary and excessive selection criteria, which leads to the limited participation of bidders, regulation of joint bidding, information disclosure and frequent communication between bidders backed by public procurers on the basis of transparency and anti-corruption policy. While transparency and anti-corruption are seen as worthy goals of the PPL, excessive transparency can greatly facilitate bid rigging collusion.

CHAPTER 5: PUBLIC ENFORCEMENT OF BID RIGGING IN VIETNAM

The fight against bid rigging depends not only on effective anti-bid rigging laws but also on effective enforcement mechanisms. While Chapters 3 and 4 dealt with the legal framework governing bid rigging practices in the Vietnamese public market, this chapter is concerned with the enforcement mechanisms surrounding those laws, with the focus on public enforcement. The focus is not only on how anti-bid rigging laws are being enforced but also on formulating measurements to strengthen public enforcement against bid rigging.

This chapter begins by identifying a modern pre-emptive method against bid rigging that is widely used in the US. It then argues whether such a method should be introduced in the Vietnamese context. The second part dwells on the Vietnamese leniency program by discussing challenges that Vietnamese competition authorities may face in the bid rigging context if the leniency program is adopted in the future. In the third part of this chapter, attention is given to the examination of sanctions imposed on bid riggers. The final part of the chapter examines enforcement authorities and puts an emphasis on the cooperation among these authorities as an essential factor contributing to strong enforcement mechanisms. Where appropriate, the experiences of the US, the EU and Japan are introduced to offer solutions to make enforcement mechanisms more effective.

I. Certificate of Independent Bid Determination as a pre-emptive method

The Certificate of Independent Bid Determination is also known as a ‘Certificate of Independent Price Determination’ (‘CIPD’) in the US or ‘self-declaration’ in the EU. This certificate is designed to require bidders to certify that they bid independently without any consultation or communication with other competitors for the purpose of restricting competition.³⁷⁰

This certificate was first introduced in the United States in 1985. Under the US *Federal Acquisition Regulation*, a CIPD must be inserted in solicitations with regard to fixed priced

³⁷⁰ FAR 52.203-6.

contracts.³⁷¹ The main part of this certificate concentrates on the commitments of bidders. Accordingly, the offeror is required to certify that:

- (1) The prices in this offer have been arrived at independently, without, for the purpose of restricting competition, any consultation, communication, or agreement with any other offeror or competitor relating to (i) those prices, (ii) the intention to submit an offer, or (iii) the methods or factors used to calculate the prices offered;
- (2) The prices in this offer have not been and will not be knowingly disclosed by the offeror, directly or indirectly, to any other offeror or competitor before bid opening (in the case of a sealed bid solicitation) or contract award (in the case of a negotiated solicitation) unless otherwise required by law; and
- (3) No attempt has been made or will be made by the offeror to induce any other concern to submit or not to submit an offer for the purpose of restricting competition.

In a situation where offerors delete or modify certain sections of the certificate, the contracting officer is entitled to reject the offer.³⁷² Falsely certifying the CIPD forms a criminal violation under the US code.³⁷³ Specifically, bidding companies as well as the individual who signs the CIPD on behalf of the company may face a fine, and individuals may also be sentenced to up to 5 years of imprisonment.³⁷⁴ It should be noted that bid riggers are subject not only to the sanctions under Section 1 of the *Sherman Act*³⁷⁵ but also the remedies against fraud, including providing false certificates. This can result in substantially increased penalties for bid riggers. The primary purpose of introducing the certificate in the US was to protect the integrity of government procurement and to discourage fraud against government agencies.³⁷⁶

The requirement of submitting CIPDs in the US has had a deterrent impact on bid rigging conspiracies and has enhanced competition in public procurement in a few other ways. First, submission of CIPDs has the benefit of enhancing the awareness of bidding companies of the need to ensure competition in government tendering. In fact, by reminding tenderers about the risks of bid rigging, it has had the effect of discouraging tenderers from involving themselves

³⁷¹ FAR 3.103-1.

³⁷² FAR 3.103-2

³⁷³ 18 USC §1001

³⁷⁴ 18 USC §1001

³⁷⁵ The *Sherman Act* provides for a maximum fine of USD 100 million. See more at 15 USC § 1.

³⁷⁶ Haberbusch, above n 63, 107.

in this kind of collusion.³⁷⁷ Second, requiring CIPDs also raises the consciousness of protecting competition in public tendering among public procurers. Third, if there is insufficient evidence to convict bidders of bid rigging as an anticompetitive agreement under the antitrust law, the Department of Justice (DOJ) may pursue charges against individual bidders for falsifying CIPDs. In fact, it is clear that proving that bidders communicated with other competitors may be much easier than proving the existence of collusion.³⁷⁸ This tool has contributed to the success of prosecuting procurement fraud in the US over time.³⁷⁹

The benefits of using this kind of certificate have also been emphasised by the OECD.³⁸⁰ Accordingly, the Certificate of Independent Bid Determination is considered an effective tool ‘to discourage non-genuine, fraudulent or collusive bids, and thereby eliminate the inefficiency and extra cost to procurement’.³⁸¹ Therefore, it has been suggested by the OECD that all bidders should be required to ‘sign a Certificate of Independent Bid Determination or equivalent attestation that the bid submitted is genuine, non-collusive, and made with the intention to accept the contract if awarded.’³⁸² In addition, penalties in terms of colluding or falsifying the certificate should be emphasised on this form to remind participants to bid independently.

Although this kind of certificate has been used by many countries and also highly recommended by the OECD, it has not been applied in the Vietnamese public procurement market. There are a number of possible explanations for this. First, one may argue that this mechanism is inappropriate in Vietnam because Vietnam does not apply the US model of prosecuting bid rigging simultaneously under competition law and fraud. In fact, charges of bid rigging infringements are not linked to fraud provisions in Vietnam at all. Introducing a CIBD or equivalent would, thus, not lead to a significant increase in the penalties for bid riggers. In other words, this kind of certificate seems less effective if applied in the Vietnamese context. However, as mentioned earlier, CIBDs serve several other functions which could be of benefit in a Vietnamese context. For example, applying a CIBD also aims at enhancing the consciousness of the need for competitive processes not only of bidding participants but also public procurers.

³⁷⁷ Henry L Thaggert, ‘Antitrust and Procurement - the United States’ (2011) *Competition Law International* 82(7) 84-85.

³⁷⁸ Claeson, above n 48.

³⁷⁹ Kovacic, *The Antitrust Government Contracts Handbook*, above n 31.

³⁸⁰ OECD, *Guidelines for Fighting Bid Rigging*, above n 54, 8.

³⁸¹ Ibid.

³⁸² OECD, *Recommendation of the Council on Fighting Bid Rigging*, above n 95.

Second, it seems that the existence of a CIBD in Vietnam is unnecessary because provisions prohibiting bid rigging and other unlawful acts listed under the PPL³⁸³ are repeated in the tender offer itself. Also, tender application forms require bidders to make the commitment to not rig bids.³⁸⁴ Therefore, this also serves a similar role occupied by CIBDs in other countries as a reminder to the bidders to follow competitive public procurement rules. However, conversely, it could be argued that these alternatives do not have the same deterrent impact on bid riggers as a CIBD because they are part of hundreds of pages of tender offer documentation. A CIBD puts a much clearer and more succinct emphasis on the need to ensure independence of determining bid prices as well as including possible sanctions under the antitrust and public procurement rules, which are more likely to garner the attention of bidders.

On balance, it is strongly advisable for Vietnam to introduce Certificates of Independent Bid Determination as a separate bidding document in all forms of public tender. In addition to the preceding general reasons, this conclusion can be justified based on the following specific reasons.

Firstly, the value of the introduction of a CIBD in Vietnam in enhancing the awareness of tenderers about competition issues under public tendering is extremely high. This is because the consciousness of Vietnamese bidding firms, especially State-owned firms, about competition issues is still particularly low.³⁸⁵ There is evidence that these enterprises are the least likely to comply with the *Competition Law*, and many of them think that they are out of the governing scope of competition law.³⁸⁶ The US experience shows that such a certificate will give notice to tenderers of the cartel prohibition provided by the US antitrust rules.³⁸⁷ One may argue that if the informative function of CIBDs is still proving valuable in the US where antitrust laws are long established, they would be of particular benefit in Vietnam where regulation is far less established and accepted.

The more direct and succinct attention of the need for competitive approaches and the sanctions for non-competitive behaviour facilitated by CIBDs discussed above also has particular resonance in the Vietnamese context. This is because, although prohibitions on collusive

³⁸³ Circular No 03/2015/TT-BKHDT provides detailed regulation for preparing tender offer on construction works; Circular No 05/2015/TT-BKHDT provides detailed regulation for preparing tender offer on goods.

³⁸⁴ Circular No 03/2015/TT-BKHDT provides detailed regulation for preparing tender offer on construction works; Circular No 05/2015/TT-BKHDT provides detailed regulation for preparing tender offer on goods.

³⁸⁵ VCA, *Khao Sat Muc Do Nhan Thuc Cua Cong Dong Doi Voi Luat Canh Tranh* [Survey of the Community's Understanding about the Competition Law] (unpublished document, on file with the author) 18.

³⁸⁶ Gillespie, 'Localizing Global Competition Law in Vietnam', above n 28, 935, 945.

³⁸⁷ Haberbusch, above n 63, 101.

tendering as well as sanctions for such practices have been listed under the PPL, the VCL and also in tender offers themselves, it seems that they do not get many tenderers' attention. This is unsurprising, given that the PPL and the VCL contain 123 and 96 Articles, respectively, and the standard Vietnamese tender offer under the current law runs to more than one hundred pages and consists of six chapters. As a result, tenderers are not likely to read these whole documents and therefore may easily skip regulations on bid rigging.

Second, applying CIBDs in Vietnam's context would also provide an avenue for much needed improvement in the consciousness and diligence of public procurers about protecting competition in government tendering. Since public procurement may be conducted by State bodies at both central and local levels, State-owned companies and other organisations,³⁸⁸ it is remarkable that there are thousands of respective public procurement bodies throughout Vietnam. However, the procurement capacity and the consciousness of public procurement rules are uneven among these various organisations and particularly limited in remote provinces.³⁸⁹ Therefore, the awareness of public procurement infringements in general and bid rigging in particular may be limited. In addition, a number of writers have expressed scepticism towards public procurers' diligence in detecting competition irregularities in public procurement. For example, it has been said that public procurers are 'typically not very smart buyers'³⁹⁰ and 'not very vigorous advocates of antitrust policies'.³⁹¹ Therefore, the CIBD would serve to educate and remind public procurers of anticompetitive behaviours in public tenders.

Finally, introduction of a CIBD would be particularly useful in Vietnam to bridge the gap between the *Competition Law* and the *Public Procurement Law* in terms of bid rigging in the public procurement market. As already mentioned on a number of occasions, bid rigging in Vietnam is regulated under both the VCL and the PPL. Accordingly, bid riggers are not only sanctioned through administrative fines under the VCL but also considered for debarment regime under the PPL. However, there have been no provisions under either the PPL or the VCL to show the connection between them in terms of regulation of bid rigging. So far, there have been a limited number of bid rigging cases investigated, and all of these have been

³⁸⁸ See Article 1 of the PPL.

³⁸⁹ Vietnam's Ministry of Planning and Investment, [Report on Assessment of Implementing the Public Procurement Law], above n 8, 6.

³⁹⁰ MA Cohen and DT Scheffman, 'The Antitrust Sentencing Guideline: Is the Punishment Worth the Costs?' (1989-1990) 27 (2) *American Criminal Law Review* 331, 344.

³⁹¹ R Nash, 'Postscript: Antitrust Violations in Government Contracting' (1993) 7 *Nash & Cibinic Report* [4].

detected by public procurement officials. Therefore only the PPL has been applied to deal with these cases. This may lead to a misunderstanding that bid riggers will be only sanctioned under the debarment regulation of the PPL. A CIBD could assist in clearing up any such misapprehension. It is also noted that the 2015 revised VPC has introduced criminal penalties to bid riggers.³⁹² Therefore, a Vietnamese public market CIBD could also serve to remind tenderers of all of the kinds of criminal sanctions they might face if convicted of collusion.

II. E-Government procurement system (e-procurement)

The term ‘e-procurement’ refers to the use of digital technologies to replace or redesign paper-based tendering procedures³⁹³ in any or all phases of the public tender process, including ‘publication of tender notices, provision of tender documents, submission of tenders, evaluation, award, ordering, invoicing and payment’.³⁹⁴

The fact that an e-procurement system is an effective tool to reduce the possibility of bid rigging has been corroborated by many international organisations such as the OECD,³⁹⁵ the World Bank and ADB.³⁹⁶ This is because e-procurement helps to enhance competition in the public market and also decrease the interaction among bidders as well as between public procurers and bidders.

More specifically, online publication of tender notices in a centralised web portal may enable bidders to access tender opportunities more easily,³⁹⁷ as they can search and locate tender information; this may increase the number of bidders in a public tender. Importantly, bidders cannot get the potential list of bidders before the bid opening – making it harder to collude.

³⁹² See Article 222 of the *Penal Code of Vietnam*.

³⁹³ OECD, Recommendation on Public Procurement, above n 166, 5.

³⁹⁴ European Commission, *Green Paper on Expanding the Use of E-Procurement in the EU* (2010) 3.

³⁹⁵ OECD, *Fighting Bid Rigging in Public Procurement: Report on Implementing the OECD Recommendation* (2016) 9 <<http://www.oecd.org/daf/competition/Fighting-bid-rigging-in-public-procurement-2016-implementation-report.pdf>>; OECD, *Recommendation of the Council on Fighting Bid Rigging*, above n 95, 2; OECD, *Policy Roundtables: Collusion and Corruption in Public Procurement* (2010) 12 <<http://www.oecd.org/competition/cartels/46235399.pdf>>.

³⁹⁶ In addition to reducing the risks of bid rigging, e-procurement offers numerous benefits. For a review of objectives and benefits of e-procurement, see more at World Bank, *Electronic government procurement: roadmap* (2009) 6 <<http://documents.worldbank.org/curated/en/197321468152096939/Electronic-government-procurement-roadmap>>; ADB, *e-Government Procurement Handbook* (2013) 11-16 <<https://www.adb.org/sites/default/files/institutional-document/34064/files/e-government-procurement-handbook.pdf>>.

³⁹⁷ ADB, above n 396.

In addition, the possibility of submitting tenders online also helps to reduce market entry barriers. Bidders may submit an offer without being physically present, unlike the conventional tendering procedure which prevents bidders from accessing the tender documents. This is the case in Vietnam where, in many cases, bidders have difficulties accessing the tender document.³⁹⁸ Furthermore, e-procurement also contributes to the decreased level of interaction among bidders and between bidders and public procurers. This is because, by using e-procurement, confidential information regarding the identity of bidders will not be disclosed, and therefore it is difficult for bidders to collect information to rig bids.

E-procurement also makes it easier to collect public tender data to analyse and identify the signs of bid rigging in the public market. For example, based on online public procurement data, the Korean Fair Trade Commission (KFTC) developed a program named 'Bid Rigging Indicator Analysis System' (BRIAS), which reportedly flags more than 80 bid rigging cases per month for the KFTC to further investigate.³⁹⁹

Vietnam launched the pilot e-procurement system in 2009, which was partly based on the Korean online e-procurement system (KONEPS).⁴⁰⁰ In the pilot phase from 2009 to 2011, e-procurement was implemented in only three public organisations.⁴⁰¹ Since then, it has been developed nation-wide. However, unlike the Korean's end-to-end system, the current Vietnamese e-procurement system is limited to two main functions, including e-publication (publication of tender notices via a centralised web portal) and basic e-tendering (online submission of bid documents by bidders). The current system is only applied to the shopping

³⁹⁸ The Vietnamese media reports a number of cases where several bidders claimed that their applications have been stolen in the front of public procurer's office before they were submitted to the public procurers. See more at Bich Thao, 'Cuop HSDT Truoc Cong Ban QLDA Thuy Loi Binh Dinh: Chi Nha Thau Ban Dia Nop Duoc HSDT (Ky 1)' [Stealing Tender's Application in Front of Binh Dinh Province's Department of Managing Project regarding Water Resources: Only Local Bidders Are Allowed to Submit Application (episode 1)] *Bidding Newspaper* (Vietnam) (22 June 2016) <<http://baodauthau.vn/phap-luat/cuop-hsdt-truoc-cong-ban-qlda-thuy-loi-binh-dinh-chi-nha-thau-ban-dia-nop-duoc-hsdt-ky-1-23778.html>>; Thuy Diem, 'Hai Nha Thau Bi Cuop Ho So Ngay Tai Cong So NN&PTNT Tinh Dak Lak' [Two Bidders Had Their Applications Stolen in Front of Dak Lak Province's Department of Agriculture and Rural Development] *Dantri* (9 July 2016) <<http://dantri.com.vn/phap-luat/hai-nha-thau-bi-cuop-ho-so-ngay-tai-cong-so-nnptnt-tinh-dak-lak-2016070913533045.htm>>.

³⁹⁹ OECD, *Policy Roundtables: Ex Officio Cartel Investigations and the Use of Screens to Detect Cartels* (2013) <www.oecd.org/daf/competition/exofficio-cartel-investigation-2013.pdf>.

⁴⁰⁰ KONEPS is one of the most successful e-procurement models exported to a number of developing countries. Apart from Vietnam, other countries such as Algeria, Tunisia, Costa Rica, Jordan, Uzbekistan and Mongolia have adopted this system. See more in Ho In Kang, 'e-Procurement Experience in Korea: Implementation and Impact' (Speech, June 2012) <http://ec.europa.eu/internal_market/publicprocurement/docs/eprocurement/conferences/speeches/ho-in-kang_en.pdf>

⁴⁰¹ Three piloting agencies are the People's Committee of Hanoi, the Vietnam Post and Telecommunications Group and the Vietnam Electricity Group. See Article 2 of Circular No 17/2010/TT-BKHDT on pilot e-procurement.

method⁴⁰² in the purchase of goods and to open bidding⁴⁰³ or limited bidding⁴⁰⁴ in the purchase of low-value goods.⁴⁰⁵

A comprehensive road map for implementation of e-procurement has been recently adopted by the Vietnamese Government.⁴⁰⁶ As such, the e-procurement system, in the long run, is anticipated to become a comprehensive system consisting of many functions: e-bidding; e-shopping; e-contract; e-payment; e-catalogue; e-guarantee; supplier's performance management and other functions.⁴⁰⁷ The road map is divided into two main phases: Phase 1 spanning from 2016-2018, which will focus on developing the legal framework governing e-procurement and Phase 2 spanning from 2018-2025, which will emphasise boosting the development of e-procurement.⁴⁰⁸ A specific target has been set for every single year in Phase 1 and for the whole period in Phase 2. Specifically, at least 20 per cent of the purchase of goods via shopping and at least ten per cent of the purchase of small-value tender packages must be conducted via online systems in 2016.⁴⁰⁹ These figures must be incrementally increased up to 30 per cent and 15 per cent in 2017 and 40 per cent and 30 per cent in 2018, respectively.⁴¹⁰ The target for the end of Phase 2 is to have 100 per cent of tender notices publicised online and at least 70 per cent of public tender packages conducted via the online bidding system.⁴¹¹

Despite the comprehensive plan, the implementation of e-procurement lags far behind the expectations set out in the Government Plan on e-procurement. As of 2015, there were only 500 of 153,367 public tender packages implemented through the national online bidding

⁴⁰² Shopping is applied to the purchase of a low-value commodity of under 5 billion VND. This method requires public procurers to get a minimum of three quotations from three different suppliers. Normally, the bidder offering the lowest price will win the contract if their application meets the technical requirement of public tender. See Article 23 of the *Public Procurement Law* and Article 57 to Article 59 of Decree No 63/2014/ND-CP.

⁴⁰³ It is employed for the selection of tenderers from an unlimited number of tenderers. See Article 20 of the *Public Procurement Law*.

⁴⁰⁴ Unlike open tendering, limited bidding applies only to a limited number of tenderers. According to Article 21 of the *Public Procurement Law*, this method can be employed where a procurement package has highly technical requirements or technical peculiarities for which specific requirements can be met by several certain tenderers.

⁴⁰⁵ Small-value procurement packages are non-consulting services and goods packages having prices not exceeding VND 10 billion and civil works or mixed packages having prices not exceeding VND 20 billion. See more at Article 63 of Decree No 63/2014/ND-CP.

⁴⁰⁶ See Decision No 1402/QĐ-TTg of the Prime Minister on ratification of the overall plan and roadmap for application of e-bidding in the 2016-2025 period

⁴⁰⁷ Ibid.

⁴⁰⁸ Ibid.

⁴⁰⁹ Ibid.

⁴¹⁰ Ibid.

⁴¹¹ Ibid.

network, which accounts for only 0.32 per cent of total public tender packages.⁴¹² There are still many challenges that need to be addressed to reach the target as planned.

First, inertia on the part of public procurers needs to be addressed. It is claimed that public procurers are not willing and ready to conduct public tenders electronically.⁴¹³ One interviewee explains that the inertia of public procurers results from ‘group interests’.⁴¹⁴ These public procurers do not want to enhance the transparency and competition in public procurement because it may reduce the power of public procurers.⁴¹⁵ This problem appears to be more serious, given that there have been no sanctions imposed on those who have failed to conduct e-bidding as required.

Second, the level of technical infrastructure to accommodate e-procurement is still under-developed. One interviewee questioned on this issue by the author revealed that a maximum storage capacity for a file uploaded by bidders as of now is 20MB.⁴¹⁶ This is a big obstacle because a file of bidding document may contain hundreds of pages and be much larger than 20MB.⁴¹⁷ In addition, there is a wide gap in IT skills and technical infrastructure between public procurers and bidders at different provinces, especially in rural areas.

Accordingly, while e-bidding is considered an effective tool to prevent bid rigging, it is still under-developed in the Vietnamese public market. Challenges arise not only from the underdevelopment of technical infrastructure but also the awareness and diligence of public procurers. For a more effective e-bidding mechanism in Vietnam, more spending on technical infrastructure and strict sanctions on public procurers failing to conduct e-bidding are essential.

III. Leniency programs and bid rigging

Not all competition agencies find it easy to detect and investigate cartels effectively due to the fact that such agreements are often tacitly made. The experiences of several competition

⁴¹² Vietnam’s Ministry of Planning and Investment, *Bao Cao Tinh Hinh Thuc Hien Hoat Dong Dau Thau Nam 2015* [Report on Implementation of Public Procurement Activities 2015] (unpublished document, on file with the author) 19.

⁴¹³ Vietnam’s Ministry of Planning and Investment, above n 412,19; VCCI, ‘E-Procurement: Difficulty in Political Determination’ *VCCI News* (18 April 2002) <http://vccinews.com/news_detail.asp?news_id=25825>.

⁴¹⁴ Interviewee 6 (Hanoi, 27 August 2016).

⁴¹⁵ Interviewee 6 (Hanoi, 27 August 2016).

⁴¹⁶ Interviewee 17 (Hochiminh City, 16 August 2016).

⁴¹⁷ Interviewee 17 (Hochiminh City, 16 August 2016).

agencies worldwide reveal that strict sanctions of competition law may not prevent enterprises from colluding to distort competition. Instead, leniency policy⁴¹⁸ is utilised as an effective tool to enforce competition law against cartels.⁴¹⁹ Leniency policy can be defined as ‘the granting of immunity from penalties or the reduction of penalties for antitrust violations in exchange for cooperation with the antitrust enforcement authorities’.⁴²⁰

Despite the effectiveness of leniency programs in detecting and prosecuting cartels in general⁴²¹ (and bid rigging, specifically), to date they have not been introduced into the VCL. Rather, current legislation in Vietnam only considers extenuating circumstances for cartel members. This regulation may not provide the necessary impetus and benefits for the parties involved in collusion practices to cooperate with competition agencies, which could be achieved through introduction of a leniency program.

Hearteningly, it is worth highlighting that a leniency program is currently being designed by Vietnam’s Ministry of Industry and Trade⁴²² in response to the effectiveness of such programs being emphasised by Vietnamese scholars and the Vietnamese Competition Authorities.⁴²³ The balance of this part will, therefore, focus on challenges of implementing a leniency program in Vietnam, given the existing difficulties in detecting bid rigging in the Vietnamese public procurement market and the particular characteristics of Vietnamese public procurement bid rigging behaviour, rather than examining the effectiveness and the design of leniency programs per se – a matter which has already received significant attention from scholars.⁴²⁴

The first challenge is that the fear of detection is inconsiderable, given the weak enforcement against bid rigging. One of the essential factors contributing to the success of a leniency

⁴¹⁸ It is known as ‘immunity policy’ or ‘amnesty policy’. See Ann O’Brien, ‘Leadership of Leniency’ in Caron-Beaton-Wells and Christopher Tran (eds), *Anti-Cartel Enforcement in a Contemporary Age: Leniency Religion* (Hart Publishing, 2015) 17.

⁴¹⁹ Since the leniency program was first introduced in the United States in 1993, 59 countries have adopted such a program. See more in Joan-Ramon Borrell, Juan Luis Jiménez and Carmen García, ‘Evaluating Antitrust Leniency Programs’ (2013) 10 *Journal of Competition Law & Economics* 107, 108.

⁴²⁰ Wouter PJ Wils, ‘Leniency in Antitrust Enforcement: Theory and Practice’ (2007) 30 *World Competition: Law and Economics Review* 1 <<http://ssrn.com/abstract=939399>>.

⁴²¹ See above n 24.

⁴²² ‘Cartels targeted in Penal Code’, *Vietnam Investment Review* (Vietnam) (25 January 2016) 10.

⁴²³ Nguyen Anh Tuan, [‘Theoretical framework and practices for applying the leniency program’], above n 22; Phan Cong Thanh, above n 22; Nguyen Thi Nhung, above n 16, 211-213.

⁴²⁴ For a review of the effectiveness of leniency programs, see more at Marvao and Spagnolo, above n 24, 57, 80; Koh and Jeong, above n 24, 161; Hinloopen and Soeteven, above n 24, 607; Chen and Harrington, above n 24, 59; Aubert, Rey and Kovacic, above n 24, 1241; Motchenkova, above n 24; Feess and Walzl, above n 24; Spagnolo et al, above n 24; Massimo Motta and Michele Polo, ‘Leniency Programs and Cartel Prosecution’ (2003) 21 *International Journal of Industrial Organization* 347; Joe Harrington, ‘Collusion and Cartels: Successes and Challenges’ (Paper presented at APEC Workshop on Economics of Competition Policy, Vietnam, 22-23 February 2017).

program is that there must be a heightened fear of detection.⁴²⁵ It is implied that if infringers perceive little risk of being caught by competition authorities, not even the threat of large fines and possible jail time will deter cartel behaviour or encourage cartelists to apply for application of the leniency program.⁴²⁶ Hence the effectiveness of such a program in Vietnam is likely to be limited – as already discussed, there have been no bid rigging cases either investigated or adjudicated by Vietnamese competition authorities as at the time of writing, and the recorded history of bid rigging cases which have been detected by public procurement authorities can be counted on one hand. In summary, current weak enforcement against bid rigging is a big challenge to the introduction of a leniency program in Vietnam as bid riggers may not submit their application, given that the risk of being detected by competition authorities is extremely low.

The second obstacle is the high stability of bid rigging in the public market. The stability of bid rigging as an obstacle for leniency has been identified in both empirical and non-empirical studies.⁴²⁷ In general, the stability of a cartel including bid rigging depends on the likelihood that deviations may be detected by cartel members and on the severity of the punishment imposed on deviators.⁴²⁸ With regard to the former, the higher the possibility of detecting deviations from their collusion, the more stable the cartel. However, as already discussed in Chapter 4, under the current Vietnamese public procurement rules, winning bids must be publicly announced with full identification of the prices and specifications of the winners, which facilitates the immediate detection of cheating among cartel members.⁴²⁹ For example, if one bid rigger cheated other bid rigging cartel members by bidding with a lower price compared to the agreed price to win the bid, it would be soon detected when the public procurers announced the bid result. This implies that bid rigging is more stable in Vietnam because the cheaters are easily detected due to the requirement of transparency under the public procurement rules.

⁴²⁵ In addition to this factor, two other factors also contributing to the success of a leniency program are (1) a system of severe sanction imposed on infringers who fail to obtain immunity and (2) transparency and predictability in enforcement policies. See more at Scott D Hammond, 'Cornerstones of an Effective Cartel Leniency Programme' (2008) 4 *Competition Law International* 4, 4; International Competition Network, 'Drafting and Implementing an Effective Leniency Policy' in *Anti-Cartel Enforcement Manual* (2014) 5-6, <<http://www.internationalcompetitionnetwork.org/uploads/library/doc1005.pdf>>.

⁴²⁶ O'Brien, above n 418, 23.

⁴²⁷ Heimler, above n 61, 849; Giosa, above n 61; Zimmerman and Connor, above n 61, 22.

⁴²⁸ Danish Competition Authority, above n 58; Kovacic, 'Antitrust Policy and Horizontal Collusion', above n 62, 104.

⁴²⁹ Stigler, above n 32, 44-8; Haberbusch, above n 63, 101; Areeda and Hovenkamp, above n 63, 72.

In terms of the latter, severe punishments will prevent cheaters from deviating. Case laws show that once detected, the bid rigger will face the severe punishments imposed by the remaining cartel members.⁴³⁰ More specifically, the cartel members will bid with a lower price than the one the ousted bidder can afford so that the bidder cannot win the bid. They may also persuade subcontractors and suppliers to refuse to sign the subcontracting contracts and supply the goods or services needed to perform the bid.⁴³¹ These punishments, which may drive the deviators to financial loss and more seriously to bankruptcy, will contribute to the stability of bid rigging. All of this means that, on this score too, a leniency program is likely to be of limited effect in Vietnam when compared to other jurisdictions.

The third challenge is the vulnerability of leniency applicants to debarment mechanisms. Whether or not leniency applicants are exempted from debarment mechanisms under the public procurement rules also contributes to the success of any leniency program. From a comparative perspective, the US leniency program fails to insulate leniency applicants from debarment penalties.⁴³² This can be explained by the fact that the debarment mechanism is generally a matter of public procurement law rather than competition law,⁴³³ and public procurement authorities, therefore, have their own rules that are separate and distinct from the leniency program.⁴³⁴ The same situation also happens to the EU and Japanese leniency programs when they are silent on the immunity of debarment sanctions.

Despite this, it seems that a leniency program can be coupled with the mechanism of debarment under the competence of public procuring agencies in the US and Japan. According to the US *Federal Acquisition Regulation* (FAR),⁴³⁵ one of debarment's grounds is a criminal or civil antitrust verdict or any other cause of so serious or compelling a nature that it affects the present

⁴³⁰ For example, in the EU high-profile SPO case (which was mentioned in section 1.B of Chapter 2), the SPO took retaliatory measures by excluding cheaters from being the members of the SPO. See more at Case T-29/92 *Vereniging van Samenwerkende Prijsregelende Organisaties in de Bouwnijverheid and others v Commission (SPO)* (1995) ECR II-00289, [11]. Even in situations where retaliatory measures are not applied, the deviators also suffer serious damage. Specifically, in the EU *Elevators and Escalators* case, if one cartel member failed to comply the bid rigging arrangements, the cartel members would restore the balance by reallocating subsequent projects in the absence of any punishments for such cheater. However, it was claimed by the EU Commission that the readjustment of projects would have had an effect comparable to retaliatory measures against such cheater. See more at Case COMP/E-1/38.823 - *PO/Elevators and Escalators* [750] <http://ec.europa.eu/competition/antitrust/cases/dec_docs/38823/38823_1340_4.pdf>.

⁴³¹ Haberbusch, above n 63.

⁴³² OECD, *Public Procurement/ Bid Rigging Issues – United States* (DAF/COMP/WP3/WD(2010)61).

⁴³³ Business and Industry Advisory Committee (BIAC), 'Discussion on Public Procurement/Bid rigging Issues: Leniency and Bidder Disqualification' 1.

⁴³⁴ OECD, *Public Procurement/ Bid Rigging Issues – United States*, above n 432.

⁴³⁵ The *Federal Acquisition Regulation* is a regulation codified at Title 48 of the *Code of Federal Regulations*. As outlined in 48.CFR 1.101, the purpose of FAR is to provide 'the codification and publication of uniform policies and procedures for acquisition by all executive agencies'.

responsibility of the contractor or subcontractor.⁴³⁶ Accordingly, a bid rigger will escape debarment sanctions on the ground of a criminal verdict if it is not prosecuted by the DOJ under the immunity offered by the leniency program. However, a bid rigger may be still debarred if there is a civil judgement against it or there is a serious or compelling cause for debarment. But even so, the debarment mechanism may be eliminated if the contractor cooperated fully with Government agencies during the investigation and any court or administrative action.⁴³⁷ It can be inferred that joining the DOJ's leniency program may be considered a mitigating circumstance, depending on the decision of the debarment authority. It turns out to be a challenge for the DOJ to pursue transparency in the operation of leniency, since the result of the debarment's exemption will not be predicted.⁴³⁸

Meanwhile, in an effort to promote leniency applications, the Japanese Nationwide Liaison Council on Public Work Contracting publicised guidance that halved the debarment time for leniency applicants.⁴³⁹ Prior to that, it is reported that 90 per cent of Japanese local government stipulated a provision to reduce the debarment period.⁴⁴⁰ This regulation is considered a contributing factor to the success of the Japanese leniency program.⁴⁴¹ In comparison with the US leniency program, the Japanese leniency program seems more transparent when providing the specific reduction of debarment time. However, it seems that neither the US nor Japan makes any difference in treating first leniency applicants and other subsequent applicants.

Under the Vietnamese public procurement legislation, bidders involved in bid rigging conspiracies shall be debarred from participating the future bidding during a period from three to five years, depending on the decision of competent persons in view of the nature and seriousness of violation. Unlike the US where the administrative exclusion is discretionary depending on competent agencies, such an exclusion is compulsory under the ambit of the PPL. More importantly, a debarment sanction alone may still make some local bidders go bankrupt if their business is primarily centred on seeking opportunities to get government contracts. The relationship between the future leniency program and the debarment mechanism therefore needs to be considered.

⁴³⁶ 48 CFR 9.406-2

⁴³⁷ 48 CFR 9.406-1(a)(4)

⁴³⁸ BIAC, above n 433, 5.

⁴³⁹ Toshiyuki Nambu, 'A Successful Story: Leniency and (International) Cartel Enforcement in Japan' (2014) 5 *Journal of European Competition Law & Practice* 158.

⁴⁴⁰ OECD, *Public Procurement/ Bid Rigging Issues – Japan* (DAF/COMP/WP3/WD(2010)68).

⁴⁴¹ Nambu, above n 439.

Once the leniency program is adopted, the Vietnamese public procurement legislation needs to be revised to take leniency into account. More specifically, it should offer exclusions for debarment mechanisms instead of the current rigid regulation. The ground for exclusions should be separated for the first and the subsequent bidders applying for the leniency program. Accordingly, the first leniency applicant should be excluded from this sanction. As for the other subsequent bidders cooperating with competition authorities, they can be excluded from the debarment under the self-cleaning provision (discussed in greater detail below).⁴⁴² Another option, in the absence of the self-cleaning provision, is that the debarment period of the subsequent bidders can be halved.

The fourth challenge is the vulnerability of leniency applicants to criminal sanctions. The question arising is: to what extent can a leniency application under the proposed Vietnamese leniency program lead to immunity from criminal sanctions for individuals involved in bid rigging collusions? The ideal solution to ensure the effectiveness of the proposed leniency program is that individuals who acted on behalf of the company should be also exempted from criminal sanctions. This, however, does not seem feasible under the current Vietnamese criminal law. This is because criminal law enforcement is solely entrusted to the tripartite regime of the police's investigating authority, the people's procurary and the criminal court in accordance with the *Criminal Procedure Code*. Therefore, it seems that competition authorities are neither involved in this enforcement mechanism nor in decisions as to whether to confer immunity to infringers' criminal violations. The recently revised VPC offers a number of certain circumstances for considering criminal liability's exemption. Accordingly, if the offenders confess their offence, contribute to the crime discovery and investigation, minimise the damage inflicted by their offence and have made reparation or special contributions recognised by the State and society, they may be exempt from criminal responsibility. Even so, it is likely to be a challenge for leniency program applicants to get immunity under the VPC, given that not all of them are likely to have made reparation or special contributions recognised by the State and society. However, there remains some prospect that the application for leniency under the proposed leniency program may serve as a mitigating factor under the ambit of the VPC.⁴⁴³

⁴⁴² The introduction of the self-cleaning provision has been mentioned earlier in the section on debarment mechanisms.

⁴⁴³ Article 51: Mitigating factors

1. The following circumstances are considered mitigating factors:

On balance, while a leniency program may greatly contribute to the success of detecting and preventing cartels including bid rigging, the introduction of such a program in the Vietnamese context may not be as effective as in other jurisdictions if the challenges outlined above cannot be addressed.

IV. Punishing bid rigging

A. Competition law sanctions

According to Article 117 of the VCL there are two main forms of administrative sanctions applied to all offences: warnings and fines. In addition to this, the confiscation of illicit proceeds and the removal of illicit clauses from the agreement among perpetrators can be applied depending on the nature and gravity of the violations.

1. Fines

The fines for offences violating competition law in general and bid rigging conspiracies specifically are governed by Decree No 71/2014/ND-CP. This new Decree is promulgated to further develop and refine the fine policies that had been governed by its predecessor - Decree No 120/2005/ND-CP - for more than nine years.

Pursuant to Article 17 of Decree No 120/2005/ND-CP, the fine for bid rigging is up to five per cent of the total revenue of company in the financial year prior to the year in which the breach was committed.⁴⁴⁴ This fine will be increased from five to ten per cent either for bid rigging conspiracy leaders or for rigging of contracts for any of the goods and services listed under Article 10.2 of that Decree.⁴⁴⁵

It is noted that the new Decree, however, no longer divides the fine into two levels: up to five per cent and from five to ten percent. Rather, Article 15 of this Decree envisages administrative

...

s) The offender expresses cooperative attitude or contrition;

t) The offender arduously assisting the agencies concerned in discovery of crimes or investigation;

⁴⁴⁴ It was argued that this fine was too low to secure efficient deterrence. However, according to the Vietnam Competition Authority, five per cent of total revenue of a Vietnamese undertaking in one financial year may even make that undertaking go bankrupt. See MOIT, *Bao Cao Ve Giai Trinh, Tiep Thu Gop Y Doi Voi Du Thao Nghi Dinh Ve Xu Ly Vi Pham Phap Luat Trong Linh Vuc Canh Tranh – Cac Van De Chung* [Report on explanation, Reception of comments on the Decree Proposal on Dealing with Breaches in the Competition Sector – General Issues] (26 November 2013) 3.

⁴⁴⁵ The goods and services listed under the Article 10.2 of Decree No 120/2005/ND-CP are foodstuffs, food products, medical apparatus, preventive and treatment medicine for humans, veterinary drugs, fertiliser, animal feed, plant protection agents, seeds or domestic animals, medical services or healthcare services.

finances not exceeding ten per cent of the total revenue of the undertaking in the financial year prior to the year in which the breach was committed. Compared with other competition legislation, it is worth noting that the fine for bid rigging conspiracies in Vietnam is equivalent to that in the EU.⁴⁴⁶ Accordingly, and given that most of enterprises in Vietnam are SMEs, Vietnam's administrative fines are set at an appropriate level.⁴⁴⁷

Although turnover-based fine calculation is the choice of many competition legislation regimes, arguably according to commentators such as Weishaar, turnover-based fine calculation may lead to under-deterrence or over-deterrence of cartel behaviour.⁴⁴⁸ Specifically, under-deterrence can arise when a cartel only serves the cartelised market. In such situations, the basic fine level for this undertaking may exceed the fine cap of ten per cent of the undertaking's turnover.⁴⁴⁹ This argument is reinforced by empirical findings which show that undertakings fined with the higher ratio of their turnover are generally single-product companies, while companies fined with the lower ratio of their turnover tend to be larger companies with multi-billion dollar turnovers.⁴⁵⁰ A further problem with turnover-based fine calculations is that, in a situation where a member cartel has sales turnover but no profits or very small profits, this proxy may be inappropriate to determine the fines.⁴⁵¹

The new Vietnamese Decree establishes the two-step method for setting fines: the first step is setting the basic fine, and the second one is adjusting the basic fine based on the certain circumstances.⁴⁵² With regard to the first step, the basic fine will be determined by reference to the percentage of the turnover or value of the goods and services related to the violations within the time the undertaking commits violations.⁴⁵³ This percentage may depend on seven factors

⁴⁴⁶ See *Guidelines on the method of setting fines imposed pursuant to Article 23(2)(a) of Regulation No 1/2003* (2006/C 210/02).

⁴⁴⁷ It is reported that small and medium enterprises account for 97.5 per cent of enterprises in the Vietnamese economy. See more at ERIA Research Working Group, *Asean SME Policy Index 2014 towards Competitive and Innovative Asean SMEs* (2014) <<https://www.oecd.org/globalrelations/regionalapproaches/ASEAN%20SME%20Policy%20Index%202014.pdf>>.

⁴⁴⁸ Alan Riley, 'Modernising Cartel Sanctions: Effective Sanctions for Price Fixing in the European Union' (2011) *European Competition Law Review* 553.

⁴⁴⁹ Weishaar, above n 56.

⁴⁵⁰ Riley, above n 448, 555.

⁴⁵¹ Christian Ehmer and Francesco Rosati, 'Science, Myth and Fines: Do Cartels Typically Raise Price by 25%' (2009) *Concurrences* 4.

⁴⁵² This new regulation of Decree No 71/2014/ND-CP is principally based on the EU competition legislation, especially the *Guidelines on the Method of Setting Fines Imposed Pursuant to Article 23(2)(a) of Regulation No 1/2003* (2006/C 210/02).

⁴⁵³ It is noted that the method to determine the basic fine in EU competition is different from that in Vietnamese legislation. Specifically, the basic fine is set based on the proportion of the sale value of the goods and services in the relevant market during the last full business year of an undertaking's participation in the infringement. This basic fine then will be multiplied by the duration of infringement.

listed under Article 4.4 of this Decree: the anti-competitive degree of the violations; the extent of the damage caused by the violations; the anticompetitive potential of the bidders; the time when the violations are committed; the scope of the violations; the profits from the violations; and other essential factors related to each specific case.⁴⁵⁴ It is noticeable that this regulation stipulates only the principles to determine the proportion of sales value. Therefore, it allows the competition authority to enjoy a wide margin of discretion to define which percentage of sales value will be applied to specific cases. However, it remains unclear for the competition authority to determine which ratio of sales revenue may produce the deterrent effect for cartelists. In terms of this issue, the basic fine for bid rigging in the EU law may be up to 30 per cent of the sales value of the cartelised goods and services in the relevant market during the cartel year.⁴⁵⁵ Furthermore, this basic fine may include another 15 to 25 per cent of the determined sales value, known as the additional punishment for horizontal cartels.⁴⁵⁶ Therefore, it is clear that the basic fine of bid rigging infringement may be up to 55 per cent of the sales value of the cartelised goods and services in the relevant market.

In terms of the next step, the basic fine will be adjusted on the basis of aggravating and mitigating circumstances, which are stipulated in Article 4.5 of this Decree. Accordingly, the fine might be correspondingly reduced or raised by 15 per cent for each such circumstance. It is noticeable that the present Decree is an important improvement when compared to its previous Decree No 120/2005/ND-CP, which failed to set up the specific method for determining and adjusting the basic fines.

Article 85 of Decree 116/2005/ND-CP lists four aggravating circumstances and four mitigating circumstances. It can be inferred that the infringement fine will be reduced or increased up to 60 per cent of the basic fine. There is considerable uncertainty as to the basis on which 15 per cent of turnover threshold is applied to consider these circumstances; the competition authority, however, claims that this threshold is plausible enough not only to achieve the deterrence but to ensure the undertaking's ability to pay the fines.

⁴⁵⁴ Compared with the previous Decree, this Decree adds two new factors: scope of violations and other essential factors related to each specific case. Also, aggravating and mitigating circumstances which were seen as one of the factors for the competition authority to determine the fines in the previous Decree are not used to consider calculating the basic fine.

⁴⁵⁵ See Section 1.B of *Guidelines on the Method of Setting Fines Imposed Pursuant to Article 23(2)(a) of Regulation No 1/2003* (2006/C 210/02).

⁴⁵⁶ Ibid.

In addition to the fines, one or more of the additional forms of penalty and measures for remedying consequences may also be applied to undertakings. These are confiscation of all profits earned from the practice in breach and/or compulsory removal of illicit terms and conditions from the contract or business transaction.⁴⁵⁷

B. Public procurement law sanctions

1. The debarment mechanism and its exemptions

The debarment mechanism is seen an instrumental tool in deterring bid rigging under public procurement rules.⁴⁵⁸ This instrument is prescribed in Article 90.2 of the Vietnamese *Public Procurement Law* and Article 122 of Decree 63/2014/ND-CP.⁴⁵⁹

...depending on the nature and seriousness of violation, organisations and individuals breaching law on bidding shall be also banned participation in bidding activities and put into list of infringing contractors on the national bidding network system.

Accordingly, *prima facie*, bid rigging conspirators shall be debarred from the tender process by administrative decision of the competent persons.⁴⁶⁰ However, the introduction of the words ‘depending on the nature and seriousness of violation’ into this provision leaves some uncertainty. For that reason, one may argue that a debarment decision is discretionary, depending on the nature and gravity of the violation. Consequently, this sanction does not necessarily apply in all bid rigging cases. Contrasting with the US, it is interesting to note that the purpose of the US debarment decision is not for punishing violators.⁴⁶¹ Rather, it is only imposed to protect the public interest.⁴⁶² In this sense, this administrative exclusion is

⁴⁵⁷ See Article 8.2 of Decree No 71/2014/ND-CP.

⁴⁵⁸ Sanchez Graells, *Public Procurement*, above n 48, 296.

⁴⁵⁹ This Decree provides detailed regulations for implementing several articles of the Vietnamese *Public Procurement Law* regarding the selection of contractors.

⁴⁶⁰ Article 90: Dealing with violations

3. Competence of banning participation in bidding activities is prescribed as follows:

a) The competent persons shall issue decisions on banning participation in bidding activities for projects, estimate of procurement under their management; case of serious violation, they may suggest the Ministers, Heads of ministerial-level agencies, chairpersons of the provincial/municipal People’s Committees to issue decision on banning participation in bidding activities within management of Ministries, sectors and localities or suggest the Minister of Planning and Investment to issue decisions on banning participation in bidding activities nationwide;

b) The Ministers, Heads of ministerial-level agencies, chairpersons of provincial/municipal People’s Committees shall issue decisions on banning participation in bidding activities within management of their Ministries, sectors and localities for cases suggested by the competent persons as prescribed at point *a* this Clause;

c) The Minister of Planning and Investment shall issue decisions on banning participation in bidding activities nationwide for cases suggested by the competent persons as prescribed at point *a* this Clause.

⁴⁶¹ 48 CFR §9.402(b)

⁴⁶² Public interest may be relevant to national defense or fundamental damage to the programs of agencies that may prevent these agencies from accomplishing mission requirements. See more Rachel E Kramer, ‘Awarding

discretionary depending on competent agencies. These agencies, therefore, may suspend or debar a bidder because this is not a mandatory requirement.⁴⁶³

The length of debarment time may range from three to five years depending on the decision of competent persons. As stated in *An Giang province v 7 Bidders in project of high school's equipment*:⁴⁶⁴

The debarment of tenderers aims at deterring violators rather than giving a harsh punishment; however, if debarment time is too long, then it may have an adverse impact on businesses given that these companies infringed for the first time in An Giang province. In addition, it is noted that the cancellation and reopening of bid in An Giang province is fairly frequent due to the fact that there are a limited number of enterprises bidding for the high school's project of teaching equipment. This may lead to lengthening the project. To sum up, debarring bid riggers for a long time may restrict the number of potential bidders and lessen the competition in tendering procedure...

A minimum of 3-years' debarment is implemented by the competent authority for bid rigging conspirators after contemplating a number of relevant factors, including: first-time infringers, market structure at local area, economic cost of reducing the number of bidders and the goal of promoting competition in public tendering. In general, the debarment period in the Vietnamese legislation is longer than that in the US and the EU.⁴⁶⁵ The scope of debarment may be applied to bidding projects under the umbrella of either the competent persons giving such debarment or the Ministers or the President of each province in Vietnam depending on the gravity of the violation.⁴⁶⁶

From a comparative approach, unlike the US and the EU, there are no exemptions in the current PPL for the debarment of bid riggers. Under the EU public procurement rules, the mechanism on exemption of the debarment is known as a 'self-cleaning' measure.⁴⁶⁷ The concept of self-cleaning refers to the probability that bidders, irrespective of their past misconduct, may avoid

Contracts to Suspended and Debarred Firms: Are Stricter Rules Necessary?' (2005) 34 *Public Contract Law Journal* 539, 544.

⁴⁶³ 48 CFR §9.402(a).

⁴⁶⁴ See Official letter No 575/VPUBND-ĐTXD dated 6 June, 2014 of Department of Planning and Investment of An Giang province in terms of handling with bid rigging conspirators.

⁴⁶⁵ Pursuant to 48 CFR 9.406-4, the debarment period in the US generally does not exceed three years. Similarly, according to the Article 57.7 of Directive 2014/24/EU, the maximum period of exclusion is three years from the date of the relevant event.

⁴⁶⁶ See Article 122.1 of Decree 63/2014/ND-CP.

⁴⁶⁷ Steven Van Garsse and Sylvia De Mars, 'Exclusion and Self-Cleaning in the 2014 Public Sector Directive' in Yseult Marique and Kris Wauters (eds), *EU Directive 2014/24 on Public Procurement: a New Turn for Competition in Public Markets?* (Larcier, 2016) 121,122.

the debarment and still be eligible for participating in the public procurement if they can meet the strict requirements to ensure that their previous infringements will not be repeated in the future.⁴⁶⁸ Although it was first introduced in the new Directive 2014/24, it is not a new concept.⁴⁶⁹ In fact, self-cleaning theory has been accepted under the legislation of Germany and Austria and developed by Professor Arrowsmith and her colleagues.⁴⁷⁰

According to the EU Directive 2014/24, there are three main conditions that enterprises have to satisfy if they apply for the self-cleaning mechanism.⁴⁷¹ They include:

- (1) Compensating for the damage caused: the economic operators have to demonstrate that they have paid or undertaken to pay damages in terms of their misconducts;
- (2) Clarifying the facts and circumstances: The economic operators are obliged to cooperate with the investigating authorities to make any clarifications of relevant facts and circumstances. In such situations, it is highlighted by case law in Germany that special audits by outside certified public accountants or other independent persons can be most frequently required⁴⁷² and
- (3) Taking concrete technical, organisational and personnel measures to prevent repeat offences.

Insofar as the third requirement is concerned, as stated under the Recital 102 of the Directive:

[T]hese measures might consist ...the severance of all links with persons or organisations involved in the misbehaviour, appropriate staff reorganisation measures, the implementation of reporting and control systems, the creation of an internal audit

⁴⁶⁸ Sue Arrowsmith, Hans-Joachim Priess and Pascal Friton, 'Self-cleaning as a Defence to Exclusions for Misconduct: an Emerging Concept in EC Public Procurement Law?' (2009) 6 *Public Procurement Law Review* 257, 259.

⁴⁶⁹ It appeared in some draft proposals before the Directive 2004/18 came into effect. See Proposal for a Directive of the European Parliament and of the Council on the Coordination of Procedures for the Award of Public Works Contracts, Public Supply Contracts and Public Service Contracts, art 46(1), COM (2002) 275 final (8 January 2002)

⁴⁷⁰ Arrowsmith, Priess and Friton, above n 468, 257; Hans-Joachim Priess, 'The Rules on Exclusion and Self-Cleaning Under the 2014 Public Procurement Directive' (2014) 23 *Public Procurement Law Review*.

⁴⁷¹ EU Directive 2014/24 states:

For this purpose, the economic operator shall prove that it has paid or undertaken to pay compensation in respect of any damage caused by the criminal offence or misconduct, clarified the facts and circumstances in a comprehensive manner by actively collaborating with the investigating authorities and taken concrete technical, organisational and personnel measures that are appropriate to prevent further criminal offences or misconduct.

The measures taken by the economic operators shall be evaluated taking into account the gravity and particular circumstances of the criminal offence or misconduct. Where the measures are considered to be insufficient, the economic operator shall receive a statement of the reasons for that decision.

⁴⁷² Court of Appeals of Düsseldorf, court decision of 9 April 2003 - Verg 66/02; Regional Court of Berlin, court decision of 22 March 2006 - 23 O 118/04, reported in (2006) NZBau 397, 399.

structure to monitor compliance and the adoption of internal liability and compensation rules.

The case law in Germany also reveals that personnel measures may lead to the dismissal of relevant shareholders, executives and employees, while organisational measures tend to apply to compliance programs, including internal training to raise the awareness of preventing the wrongdoing.⁴⁷³ In some cases, ‘appointment of an intra-company or external compliance officer and/or an ombudsman as a contact person for whistle blowers’ may also be necessary.⁴⁷⁴

It bears mentioning that application of these measures does not guarantee that economic operators will definitely be exempted from the exclusion. In fact, competent authorities will need to assess whether the measures are sufficient.⁴⁷⁵ In a situation where the measures are considered to be insufficient, a statement of the reasons will be sent to relevant economic operators.⁴⁷⁶

The introduction of self-cleaning under the new EU Directive aims to harmonise between implementing the debarment policy and respecting the principles of proportionality and treatment equality.⁴⁷⁷ In other words, exclusion of competition infringers may be disproportionate due to the fact that it may go beyond what is necessary to achieve the objectives of the EU procurement process.⁴⁷⁸ Moreover, under the principle of equal treatment, bidders that are involved in self-cleaning measures may not be treated in the same way compared to those failures to eliminate the roots of exclusion.⁴⁷⁹

In light of the foregoing, the self-cleaning mechanism under the new EU Directive can be regarded as an effective tool to fight bid rigging and enhance competition.⁴⁸⁰ Initially, it is believed that firms taking self-cleaning measures comprehensively, such as establishing compliance guidelines, educating staff and appointing compliance officers, will improve their corporate culture and enable them to fight bid rigging more effectively in the long run.⁴⁸¹

⁴⁷³ Court of Appeals of Düsseldorf, court decision of 28 July, 2005 – Verg 42/05.

⁴⁷⁴ Court of Appeals of Brandenburg, court decision of 14 December 2007 - Verg W 21/07; reported in [2008] NZBau 277.

⁴⁷⁵ EU Directive 2014/24, art 57.6.

⁴⁷⁶ Ibid.

⁴⁷⁷ European Commission, *Green Paper on the Modernisation of EU Public Procurement Policy towards a More Efficient European Procurement Market* (COM(2011) 15 final, 27 January 2011) <http://ec.europa.eu/internal_market/consultations/docs/2011/public_procurement/20110127_COM_en.pdf>

⁴⁷⁸ Roman Majtan, ‘The Self-cleaning Dilemma: Reconciling Competing Objectives of Procurement Processes’ (2012) *The George Washington International Law Review* 45(2).

⁴⁷⁹ Ibid.

⁴⁸⁰ Ibid.

⁴⁸¹ Ibid.

Furthermore, self-cleaning measures will increase the pool of eligible bidders, given that bidders tend to adopt self-cleaning measures rather than face debarment.⁴⁸² It is reasonable to conclude that these effects will lead to the increased competition in the public procurement market.

A different picture concerning the exemption mechanism on debarred firms can be identified under the US *Federal Acquisition Regulation*. In fact, the FAR offers two different mechanisms in effort to treat debarred firms more leniently, given that the nature of the debarment is not to punish violators. First, the debarred firms may be allowed to enter a new contract with government if there is a ‘compelling reason’ determined by the agency head,⁴⁸³ implying that a waiver of debarment may only be granted on the basis of contracting authorities’ request.

Although the FAR is silent on the definition of ‘compelling reason’, examples of such reasons can be tracked via agency-specific regulations.⁴⁸⁴ However, it is noticeable that compelling-reason exceptions have been interpreted in a narrow manner, and there have been a limited number of debarred firms waived from debarment.⁴⁸⁵ Second, the FAR permits the debarring official to reduce the period or extent of debarment if the debarred firms show evidence on the basis of certain reasons.⁴⁸⁶ Given that exclusion of non-compliant bidders may lead to excessive restriction of competition in the public procurement market, the self-cleaning measures under the 2014 EU Directive and limited waivers of the debarment mechanism in the US FAR should be taken into consideration in the context of the PPL. The author posits that the debarment mechanism combined with the introduction of self-cleaning measures make the application of bid rigging sanctions more flexible, enhancing the prospect of competition in the public procurement market. Specifically, while the exclusion sanction aims at deterring the violators,

⁴⁸² Ibid.

⁴⁸³ FAR 9.405(2).

⁴⁸⁴ Under the regulation of the US Department of Defense, ‘compelling reason’ may include:

(i) Only a debarred or suspended contractor can provide the supplies or services; (ii) Urgency requires contracting with a debarred or suspended contractor; (iii) The contractor and a department or agency have an agreement covering the same events that resulted in the debarment or suspension and the agreement includes the department or agency decision not to debar or suspend the contractor; or (iv) The national defense requires continued business dealings with the debarred or suspended contractor.

See more at 48 CFR §209.405(a)(i)-(iv).

⁴⁸⁵ Kramer, above n 462, 543.

⁴⁸⁶ These reasons include:

(1) Newly discovered material evidence; (2) Reversal of the conviction or civil judgment upon which the debarment was based; (3) Bona fide change in ownership or management; (4) Elimination of other causes for which the debarment was imposed; or (5) Other reasons the debarring official deems appropriate.

See more at 48 CFR §9.406-4(c)(1)-(5).

the self-cleaning mechanism increases the number of eligible tenderers, especially in the industries where there are a limited number of bidders.

C. Criminal law sanctions

In addition to administrative fines and debarment under the *Competition Law* and *Public Procurement Law*, bid riggers are also imposed criminal sanctions under the VPC. According to Article 222 of the VPC, individuals who commit bid rigging will be sanctioned through either up to three years of community sentence (detention) or from one to five years of imprisonment, depending on the nature and danger of the crime to society, record of the offender, mitigating factors and aggravating factors.⁴⁸⁷ The level of criminal sanction will be increased up to 12 years of imprisonment if other aggravating circumstances exist, such as damages incurred from VND 300 million to under VND 1 billion or the use of deceitful methods. In the most serious cases, the sanction will be up to 20 years of imprisonment if damage incurred is valued from VND 1 billion.⁴⁸⁸

In the meantime, individuals engaging in other forms of cartel behaviour that are prohibited by Article 217 of the VPC will be fined from VND 200 million to VND 1 billion (around 9000 to 45000 USD) or face a community sentence⁴⁸⁹ of up to two years or imprisonment from three months to a maximum of two years. In terms of the magnitude of punishment, it is clear that the level of criminal sanctions for individuals in cases of bid rigging is higher than in cases of other forms of cartel despite the absence of the fine punishment.

From a comparative perspective, the *Japanese Antimonopoly Act* provides for imprisonment of up to five years or a fine up to 5 million yen (around 48,000 USD),⁴⁹⁰ the US *Sherman Act* provides a fine of up to 1 million USD or an imprisonment of up to ten years.⁴⁹¹ In the EU, the UK and Germany provide imprisonment of up to five years or a fine.⁴⁹²

⁴⁸⁷ Article 50 of the *Penal Code*.

⁴⁸⁸ Article 222.3 of the 2015 *Vietnamese Penal Code*.

⁴⁸⁹ According to Article 31 of the 2015 *Vietnamese Penal Code*, community sentence is imposed on people who commit less serious crimes or serious crimes defined by this Law and have stable jobs or fixed residences and do not have to be isolated from society. Under this sentence, offenders must be supervised and educated by the organisation or agency for which he/she works or by the People's Committee of the commune where he/she resides.

⁴⁹⁰ *Japanese Antimonopoly Act*, art 89(1).

⁴⁹¹ 15 USC Code 1 <<https://www.law.cornell.edu/uscode/text/15/1>>.

⁴⁹² In the UK, bid rigging offenders may be sanctioned to both imprisonment and fines: see *Cartel Offence of Enterprise Act 2002*, s 190 <<http://www.legislation.gov.uk/ukpga/2002/40/part/6>>. For Germany, see *Penal Code*, art 263, art 289.

Compared with the aforementioned jurisdictions, Vietnamese criminal sanctions for individuals for bid rigging are relatively high and therefore appear to be sufficient to serve as an effective deterrent despite the absence of fine punishment. However, standards of proof for aggravating circumstances focused on the incurred damage may be a challenge for facilitating criminal enforcement against bid rigging.

In terms of the sanctions for corporations, it is highlighted that Article 222 does not provide any criminal sanctions for bidding companies. From a comparative perspective, the US and Japan also impose severe criminal sanctions for such corporations.⁴⁹³ The absence of criminal sanctions for corporations in Vietnam may lead to under-deterrence, given that the fine under the competition law is still low. Also, this is inconsistent with Article 217, which imposes fines on corporations committing other forms of cartels. A comparison of sanctions imposed by the VCL, the PPL and the VPC on bid rigging practices is set out in the table below.

⁴⁹³ Corporations will be punishable with fines up to USD 100 million and 500 million Yen, respectively.

Table 1: Sanctions imposed on bid rigging under the Vietnamese anti-bid rigging laws

	Fines		Imprisonment		Other punishments	
	Individual	Corporation	Individual	Corporation	Individual	Corporation
Competition law sanctions	X	Up to 10% of total revenue	X	X	X	Confiscation of illegal income
Public procurement sanctions	X	X	X	X	X	3-year debarment
Criminal sanctions	X	X	3 years' community sentence or 1-5 years' imprisonment	X	Confiscation of assets	X

V. Bid rigging enforcement authorities

A. Competition law enforcement authorities

According to the *Competition Law*, there are two enforcement authorities: the Vietnam Competition Authority (VCA) and the Vietnam Competition Council (VCC). This section will briefly introduce the function and the organisational structure of each enforcement authority.

Vietnam Competition Authority

The VCA is a multi-functioning department established under the purview of the Ministry of Trade and Industry (MOIT).⁴⁹⁴ It is delegated to implement a broad scope of functions including

⁴⁹⁴ See more at Article 49 of the *Competition Law*; Article 2 of Decree No 06/2006/ND-CP CP dated 9 January 2006 on Functions, Duties, Powers and Organisational Structure of Competition Administration Department and Article 2 of Decision No 848/QĐ-BCT dated 5 February 2013 on Functions, Duties, Powers and Organisational Structure of Competition Authority.

competition, anti-dumping, anti-subsidies, application of self-protective measures and consumer protection. In terms of competition, the VCA, among other functions, acts as an investigation agency conducting investigation of cartels and bid rigging. It will then present its findings of investigation to the VCC to hear and resolve the case.

Vietnam Competition Council

The VCC was established by the Government in 2006. Under the current legislation, the VCC includes from 11 to 15 members appointed for a five-year renewable term and able to be dismissed by the Prime Minister on the recommendation of the Minister of Trade and Industry. In practice, these members are chosen from various ministries, making the VCC an inter-ministerial council.

While the VCA is in charge of investigating anticompetitive practices including cartels and bid rigging, the VCC is responsible for hearing and resolving cases investigated by the VCA. Specifically, after receiving investigation reports from the VCA, the VCC will set up a Competition Case Handling Council (Hoi Dong Xu Ly Vu Viec Canh Tranh – CCHC) embodying at least five VCC members to make decisions about the case. The CCHC holds a hearing to listen to presentations from the VCA, the complainants, if any, and the parties under investigation and then decides the case by a majority vote of the members. It is noted that the VCC itself does not initiate the case; rather, it only deals with cases brought by the VCA. Therefore, ‘effective enforcement of cartel and bid rigging cases depends on both a thorough investigation of the cases by the VCA and an independent and rigorous analysis by the VCC’⁴⁹⁵.

The independence of Vietnamese competition authorities and the impact on the enforcement against cartels and bid rigging

The institutional design of the VCA and the VCC has been criticised for the lack of independence from the government. This part examines the independence of the Vietnamese competition authorities. It further argues that the lack of independence of competition agencies has shaped the outcome of enforcement against cartels and bid rigging.

The independence of a competition agency from the executive branch can be assessed on the basis of structural and operational independence.⁴⁹⁶ From the perspective of structural

⁴⁹⁵ Le Thanh Vinh, above n 221.

⁴⁹⁶ Frédéric Jenny, ‘Competition Agencies: Independence and Advocacy’ in Ioannis Lianos and D Daniel Sokol (eds), *The Global Limits in Competition Law* (Stanford University Press 2012) 158, 162-163; UNCTAD Secretariat, ‘Independence and Accountability of Competition Agencies’ (United Nations Conference on Trade

independence, the competition agency is a separate entity outside the purview of government ministries, and its budget is independent from that of the government.⁴⁹⁷ From the perspective of operational independence, the competition agency should have the power to set up the priorities in choosing and declining to investigate cases and decide what enforcement actions to adopt.⁴⁹⁸

Structural independence and its impact on the enforcement against cartels and bid rigging

Examining this approach in the Vietnamese context, Vietnamese competition authorities including the VCA and the VCC are not structurally independent from the executive branch. The VCA as the investigative body was established as a department in a ministry.⁴⁹⁹ As such, the number of VCA staff, including investigators, is determined by the MOIT Minister. The functions, tasks, powers and organisational structure of divisions within the VCA and the establishment of representative offices in local cities and provinces are also under the discretion of the MOIT Minister.

As of the year 2015, the annual budget is VND 23.4 billion (around USD 1.05 million) and the total VCA staff is 95, only 35 of which are investigators.⁵⁰⁰ Investigators in the field of competition are around ten people allocated in three different divisions: the Antitrust Investigation Division, the Competition Policy Division and the Unfair Competition Investigation Division.⁵⁰¹ Despite its chief role in investigating bid rigging cases, the number of investigators in the Antitrust Investigation Division is only five. One of the former Heads of Antitrust Investigation Division interviewed by the author emphasises that:

and Development, 14 May 2008) 6; John Clark, 'Competition Advocacy: Challenge for Developing Countries' (2005) 6(4) *OECD Journal of Competition Law and Policy* 69, 70.

⁴⁹⁷ It is also argued that even a competition agency that is not structurally independent may obtain a significant degree of independence if it is aggressive and competent. The US Antitrust Division, for instance, is de facto independent although it falls within the purview of the Justice Department. See more at Clark, above n 496, 71; Jenny, above n 496, 162.

⁴⁹⁸ Jenny, above n 496, 163; UNCTAD Secretariat, above n 496, 6.

⁴⁹⁹ The establishment of the VCA under the control of the MOIT was explained for three main reasons. First, it is wasteful and cumbersome if another ministerial-level agency is established. Second, the MOIT is the only agency possessing competition experts and playing a leading role in drafting the *Competition Law*. Third, there are many successful competition authorities whose establishment is under the control of ministers. See more at Pham, 'The Development of Competition Law in Vietnam', above n 16, 560.

⁵⁰⁰ The financial and human resources are extremely limited compare to these of other countries. In Japan, as of 2014, the budget of JFTC is JPY 11.3 billion (approximately USD 113.9 million) while the number of total staff and investigators is 830 and 445, respectively. See more at <<http://www.jftc.go.jp/en/topics/topics151026.files/OECDAnnualReport2014.pdf.pdf>>.

In the US, as of 2015 the budget of the Antitrust Division is USD 162.2 million and the total staff is 697 people. See more at <<https://one.oecd.org/document/DAF/COMP/AR%282016%2922/en/pdf>>.

⁵⁰¹ Interviewee 3 (Hanoi, 24 August 2016).

[t]he investigating process is impossible given that investigators are ranging from two to three people. This is the case for not only bid rigging but also other cartel practices. While the public always ask why the enforcement record is still minimal over the years, they also have to know about the current human resources of the VCA and the tools the VCA possess.⁵⁰²

According to the VCA public officials interviewed by the author, the extreme lack of human resources results in low enforcement records. While one claims that a division within the purview of the VCA specialised in detecting and investigating bid rigging cases would enhance current enforcement,⁵⁰³ another asserts that the number of investigators will be only increased when the role and position of the VCA is enhanced.⁵⁰⁴ This implies that a structural independence that is not physically situated in a ministry would alleviate the challenges in relation to finance and human resources and thus enhance current competition enforcement.

While the VCA is designed as the investigative force as a ministerial department, the VCC is known as the adjudicative force acting as independent agency established by the Government.⁵⁰⁵ However, it is argued that its independence is restrained by the significant influence of the MOIT.⁵⁰⁶ Specifically, the MOIT is entrusted with submitting proposals to the Prime Minister with regard to the appointment and dismissal of the VCC's chairperson and members. In practice, the chairpersons of the VCC are among the leaders of the MOIT.⁵⁰⁷ In addition, the function, tasks and organisation of the VCC's Secretariats are adopted by the MOIT. Also, the VCC's budget is decided in accordance with the MOIT's annual budget scheme. From the perspective of structural independence, the VCC is clearly not completely independent from the executive branch.

Operational independence and its impact on the enforcement against cartels and bid rigging

⁵⁰² Interviewee 2 (Hanoi, 26 August 2016).

⁵⁰³ Interviewee 3 (Hanoi, 24 August 2016).

⁵⁰⁴ Interviewee 2 (Hanoi, 26 August 2016).

⁵⁰⁵ The independence of the VCC is emphasised in Decree No 07/2015/ND-CP. As such, Article 2 of this Decree stipulates: The Competition Council is an independent agency established by the Government.

⁵⁰⁶ Nguyen Ngoc Son, 'Mot So Y Kien Ve Dia Vi Phap Ly Cua Hoi Dong Canh Tranh Tai Viet Nam Trong Dieu Kien Hien Nay' [Comments on legal status of the Vietnam Competition Council under the current conditions] (2006) 37(6) *Tap Chi Khoa Hoc Phap Ly* [Journal of Judicial Science] 8, 10; Truong Hong Quang, 'Co Quan Quan Ly Canh Tranh o Viet Nam: Nhung Bat Cap Va Phuong Huong Hoan Thien' [Vietnam Competition Administration Authorities: Shortcomings and Proposals for reform] (2011) 6(191) *Tap Chi Nghien Cuu Lap Phap* [Journal of Legislative Studies] 47.

⁵⁰⁷ The current head of the VCC is Mr Tran Quoc Khanh, who also is the Vice-Minister of the MOIT. Also, the former head of the VCC is Mr Le Danh Vinh and he used to be the Vice –Minister of the MOIT.

Under the current law, the VCA is obliged to deal with all complaints received if these complaints meet the requirements in accordance with the current law.⁵⁰⁸ In such circumstances, the VCA does not grant the power to choose which cases among the complaints to investigate. Put differently, the VCA is not allowed to reject complaints unless such complaints fall outside the VCA's competence, the time limit is over or complainants fail to revise or supplement documents required by the VCA.⁵⁰⁹

This constraint makes the VCA less independent from an operational perspective and negatively affects priorities in enforcing the competition law. Interviews with public officials in the VCA reveal that, given the limited resources of a newly-established agency, the VCA has set up priorities in competition enforcement, although these priorities are informal and only communicated within the agency.⁵¹⁰ As such, enforcement against hard-core cartels including bid rigging is one of the priorities of the VCA over the years.⁵¹¹

Failing to choose or reject the cases to investigate may be a challenge for the VCA to fulfil priorities in enforcing the competition law and dealing with cartels and bid rigging cases.

B. Public procurement law enforcement authorities

Under the current legislation, the responsibility for imposing administrative sanctions on violators belongs to competent persons,⁵¹² who are entrusted with deciding on the approval of a project or on procurement as prescribed by law. Generally, they include the heads of local and central administrative authorities, members of boards of directors and chiefs of State-owned companies.

It is noted that bid rigging cases are usually brought to competent persons by bid assessing units, which are liable for organising the assessment of bidder selection. When assessing bidder selection process, bid assessing units⁵¹³ are obliged to give their opinions about the compliance

⁵⁰⁸ Article 47 of the *Competition Law*.

⁵⁰⁹ Article 46.2 of the *Competition Law*.

⁵¹⁰ Interviewee 1 (Hanoi, 23 August 2016); Interviewee 2 (Hanoi, 26 August 2016); Interviewee 3 (Hanoi, 24 August 2016).

⁵¹¹ Interviewee 2 (Hanoi, 26 August 2016); Interviewee 3 (Hanoi, 24 August 2016).

⁵¹² At the central level, competent persons are Ministers, Heads of Ministerial-level agencies, government-affiliated agencies and other central authorities. At local levels, which include province/city, district and ward/town/commune, competent persons are Presidents of the People's Committee of every level.

⁵¹³ These units are also established at the central and local levels. At the central level, assessing units are the Minister of Planning and Investment via its department – the public procurement agency; the authorities and organisations that are assigned to assess by the Ministers, Heads of ministerial-level agencies, Government-affiliated agencies, and other central authorities. At local levels, assessing units are Department of Planning and Investment at the Province level; functional bodies at the District and Commune levels. In the case of State-owned companies, assessing units are organisations assigned to assess by the Chief of such enterprises. In some cases where procuring entities are investors, assessing units are inner entities and individuals under the purview of such

with public procurement rules, give consensus or different opinions about the bidding result and propose measures for the noncompliance with public procurement rules during the selection of contractor.⁵¹⁴

C. Criminal law enforcement authorities

Bid rigging as a criminal offense is within the competence of the traditional tripartite regime of police's investigating force,⁵¹⁵ the People's Procuracy⁵¹⁶ and the criminal court⁵¹⁷ in accordance with the *Criminal Procedure Code*.⁵¹⁸ Basically, the process of solving a criminal case comprises several stages: Institution, investigation, prosecution, first instance trial, appellate trial and special stage.⁵¹⁹ It is noted that while police's investigating force is mostly involved in institution and investigation stage, the People's Procuracy is in charge of prosecution stage and the criminal court deals with first instance trial, appellate trial and special stage.

procuring entities. If these inner entities and individuals are ineligible, assessing units are external qualified advisory organisations appointed by investors.

⁵¹⁴ Article 106.4 of the *Public Procurement Law*.

⁵¹⁵ According to the Article 5 of the *Law on Organisation of Criminal Investigating Bodies*, the competence to investigate bid rigging as a criminal offense is entrusted to police's investigating bodies at central and local levels. In comparison with investigators from VCA, Police investigators have more investigatory powers including deterrent measures such as keeping persons in urgent cases or arrest and custody.

⁵¹⁶ The People's Procuracy system is a special organ evident in Vietnam. It was firstly developed in the Soviet Union to implement democratic centralism and imported into Vietnam in 1960. These bodies supervise the legality of criminal investigations and prosecute criminal violations; conduct self-investigations and prosecute criminal violations in judicial fields committed by judicial officials. They also supervise the legality and enforcement of court decisions. According to the Article 40 of the *Law on Organisation of the People's Procuracy*, the Procuracy system is organised into several levels: The Supreme People's Procuracy; Superior People's Procuracies; Provincial People's Procuracies; District People's procuracies and Military procuracies. The competence to prosecute bid rigging as a criminal offense is entrusted to either District-level People's Procuracies or Provincial-level People's Procuracies.

⁵¹⁷ According to the Article 3 of the *Law on Organisation of the People's Court*, the court system is organised into several levels: The Supreme People's court; Superior People's courts; Provincial People's courts; District People's courts and Military courts. Competence to hear first instance bid rigging case is entrusted to either District - level People's courts or Provincial-level People's courts.

⁵¹⁸ Article 34 of the *Criminal Procedure Code*.

⁵¹⁹ Institution is the first stage of the criminal process. Police's investigating force or the People's Procuracy must determine if an event has a 'criminal sign' in order to decide whether to initiate a criminal case. When a criminal case is initiated, the investigation process starts so that police's investigating force will collect, examine, and evaluate evidence relating to offences and offenders. The prosecution stage then follows when the procuracy receives the case file and an investigation conclusion report proposing prosecution from the investigating body. The Procuracy will examine and evaluate all evidence collected by the investigating body. When the procuracy issues an indictment to prosecute the accused, the case will be brought to the court to resolve followed by first-instance trial, appellate trial and special trial.

*D. The interaction between competition law enforcement authorities, public procuring
authorities and criminal law enforcement authorities*

*1. The interaction between competition law enforcement authorities and public procurement
authorities*

The fact that the cooperation between competition law enforcement authorities and public procurement authorities leads to a strengthened anti-bid rigging enforcement mechanism has been stressed by the OECD,⁵²⁰ the ICN⁵²¹ and many international scholars in the field of competition law and public procurement law.⁵²² In fact, there exist various forms of cooperation depending on domestic regulation and policy.⁵²³ Such cooperation can be grouped from the perspectives of public procurement and competition authorities, respectively.

From the public procurement authority perspective, there are two main ways to interact with competition authorities. First, public procurement authorities may act as complainants to report any signs of bid rigging to competition authorities. Given that public procurement entities are best positioned to unearth bid rigging cases, complaints from such entities are essential for competition authorities to initiate an investigation. In some countries like the US, reporting suspected bid rigging behaviours are the statutory duties of public contracting parties⁵²⁴ as it is clearly stated in the FAR that ‘[c]ontracting personnel are an important potential source of investigative leads for antitrust enforcement and should therefore be sensitive to indications of unlawful behaviour by offerors and contractors.’ In addition, public procurement officials should be given adequate incentives to encourage them to report bid rigging. The US experiences show that commendatory letters issued by the DOJ are often given to procurement

⁵²⁰ See OECD, *Competition in Bidding Markets* (2006); OECD, *Public Procurement – The Role of Competition Authority in Promoting Competition*, above n 135; OECD, *Designing Tenders to Reduce Bid Rigging*, above n 145; id.; OECD, *Collusion and Corruption*, above n 58; OECD, *Recommendation of the Council on Fighting Bid Rigging*, above n 95.

⁵²¹ International Competition Network, *Relationships between Competition Agencies and Public Procurement Bodies* (2015) <<http://internationalcompetitionnetwork.org/uploads/library/doc1036.pdf>>.

⁵²² They are, for example, William E Kovacic; Kai Hüscherlath or Albert Sánchez Graells. For their support of the cooperation between competition and public procurement authorities to address bid rigging, see more at Anderson, Kovacic and Müller, above n 6, 681, 712; Sanchez Graells, ‘Prevention and Deterrence of Bid Rigging’, above n 7, 171-98; Hüscherlath, above n 7, 185-91.

⁵²³ At least 23 nations are successful in cultivating the relationship between public procurement authorities and antitrust entities. See International Competition Network, *Relationships between Competition Agencies*, above n 521, Annex A. Over a half of public procurement institutes surveyed affirm that there is a close interaction between them and antitrust authorities. See more Laura Carpineti, Gustavo Piga and Matteo Zanza, ‘The variety of procurement practice: evidence from public procurement’ in Nicola Dimitri, Gustavo Piga and Giancarlo Spagnolo (eds) *Handbook of Procurement* (Cambridge University Press, 2006).

⁵²⁴ The 48 CFR 3.303 - Reporting suspected antitrust violations states: (a) Agencies are required by 41 USC 3707 and 10 USC 2305(b)(9) to report to the Attorney General any bids or proposals that evidence a violation of the antitrust laws.

officials, who play an important role in reporting bid rigging and assisting in prosecutions.⁵²⁵ Second, public procurement authorities may also act as informants to provide bid information and data that are valuable for the screening and intelligence activities of competition authorities. In fact, bidding data are often collected by public procurement authorities, as they are responsible for organising and managing the tender procedure. Without the support from such entities, competition authorities would be constrained in their application of screening and getting market intelligence.

From the perspective of competition authorities, they may act as advocates to educate and raise the awareness of public procuring entities of the harms of bid rigging and the importance of competition in the public procurement process. There are a number of different forms of advocacy. First, competition authorities can offer training for public procurement officials. This training is mostly focused on how to form contracts in a way that prevents bid rigging and the ability to detect bid rigging – which are considered the two essential skills that every procurement official need to be well-equipped with.⁵²⁶ The US DOJ is one of the international competition authorities actively offering training sessions for public procurement officials. Over 20,000 federal and state public procurement officials have been trained since March 2009, although these training sessions are optional and depend on public procurement agencies' willingness to participate.⁵²⁷

Second, competition authorities can publish educational material for public procurement agencies in the form of brochures, newsletters or guidelines. These educational materials generally include information about bid rigging, checklists for designing the tender process to decrease the possibility of bid rigging and checklists for detecting bid rigging, and measures to be taken when bid rigging is recognised.

These materials have been accepted as a part of the enforcement practice against bid rigging in the US and the EU. Specifically, the US DOJ has issued a pamphlet 'Red Flags of Collusion', which is available on the government website and which it has also distributed to all levels of public procurement agencies.⁵²⁸ This pamphlet seems to be useful in raising the awareness of

⁵²⁵ OECD, above n 432, 4.

⁵²⁶ Lauren Brinker, 'Introducing New Weapons in the Fight against Bid Rigging to Achieve a More Competitive U.S. Procurement Market' (2015) 43(1) *Public Contract Law Journal* 8; Anderson, Kovacic and Müller, above n 5, 681, 712.

⁵²⁷ OECD, above n 432, 4.

⁵²⁸ The content of this pamphlet could be found at <https://www.justice.gov/atr/red-flags-collusion>.

bid rigging not only of public officials but also of bidding companies. Many Fortune 500 companies have followed this guideline to develop their internal procurement training.⁵²⁹

Similarly, many EU members have created educational materials dedicated to bid rigging. In the UK, the Competition and Markets Authority (CMA), in cooperation with the Crown Commercial Service, has recently introduced an e-learning package aimed at educating procurement professionals about bid rigging.⁵³⁰ This material includes bid rigging's harm, its suspicious patterns and the way to mitigate bid rigging risks. Also, the CMA designed an open letter⁵³¹ sent to public procurers to emphasise the importance of detecting and preventing bid rigging. More interestingly, a 60-second summary on how to identify and address bid rigging in public procurement has also been made available to public procurers.⁵³² In the Netherlands, a guideline called 'Notification Form' for indications of anticompetitive agreements in construction projects tenders was adopted to provide basics of bid rigging information to public procurers.⁵³³

Third, competition authorities can set up the formal meeting with procurement agencies, either regularly or periodically. These meetings are designed not only to enhance the interaction between respective authorities but also to address challenges these authorities face in dealing with bid rigging. This kind of meeting is held annually in Japan between the JFTC and liaison persons in each central and local public procuring agency.⁵³⁴

Lastly, competition authorities can sign memoranda of understanding or other formal agreements with public procurement agencies. These agreements aim to share information in terms of detecting and preventing bid rigging and to share resources. By doing that, these authorities can benefit from each other's expertise and help achieve the goals of preserving and promoting fair, efficient and competitive processes.

⁵²⁹ OECD, above n 432, 4.

⁵³⁰ This new tool was first published on 20 June 2016. See more at: <<https://www.gov.uk/government/news/procurement-tool-targets-bid-rigging-cheats>>.

⁵³¹ The content of this letter could be found at <https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/529978/Open_letter_to_procurement_professionals.pdf>.

⁵³² This summary could be accessed at <<https://www.gov.uk/government/publications/bid-rigging-advice-for-public-sector-procurers>>.

⁵³³ The content of the guideline could be found at <https://www.pianoo.nl/sites/default/files/documents/documents/formuliermeldingvanaanwijzingennma.pdf>.

⁵³⁴ International Competition Network, above n 521, 28.

Given that interaction between competition authorities and public procurement entities contributes to the success of anti-bid rigging enforcement, the next part examines this relationship in the Vietnamese context.

From the perspective of public procurement authorities, the role of Vietnamese public procuring authorities both as complainants and informants will be examined in turn.

While complaints brought to the VCA could be used as a basis for commencing bid rigging investigations, they have gained little attention from the Vietnamese public procuring entities. The author's interviews reveal that there have been no complaints made by public procurers to the VCA since the VCL came into effect.⁵³⁵

As one interviewee states:

The contact numbers were exchanged between the VCA and the Public Procurement Administration Agency, specifically among functional departments of each entity. Since then, the VCA received several phone calls from the PPA. However, these calls were mostly to exchange technical issues. No complaints have been brought to the VCA by any public procurers.⁵³⁶

It can be inferred that public procurement entities in Vietnam, either central or local level, have failed to act on complaints to report any signs of bid rigging to the VCA. There are three likely reasons for this failure. First, according to the current laws, the Vietnamese public procurement bodies are not obliged to report suspicious patterns in public tender as well as the evidence of bid rigging to competition authorities. Second, unlike the US or some EU members, there is no incentive for public procurers to report such anticompetitive behaviours. Last, but not least, the current PPL empowers public procurement authorities to fight bid rigging by using their own procedures. In other words, the role of public procurement authorities may amount to that of real competition watchdog, given that they are allowed to put a sanction on bid rigging conspirators via the debarment mechanism. Therefore, it seems to be unnecessary for them to report bid rigging conspiracies to competition authorities while they can address them.

As outlined earlier, in addition to acting on complaints, public procurers also play an essential role in detecting bid rigging as they can act as informants. However, in the Vietnamese context, the availability of public tender information is very limited. Public procurers are not willing to

⁵³⁵ Interviewee 2 (Hanoi, 26 August 2016); Interviewee 3 (Hanoi, 24 August 2016).

⁵³⁶ Interviewee 3 (Hanoi, 24 August 2016).

provide information to the VCA, even when they are asked to do so. One interviewee affirmed this fact:⁵³⁷

Some newspapers previously reported some signs of bid rigging. For instance, there were identical spelling errors or similar formula to estimate the costs. However, when the VCA contacted the public procurer to access the bidding documents, they rejected to provide information. Even when the VCA requested in writing, it was answered that these bidding documents are confidential... Therefore, it is very difficult to access the bidding information. That is the reason why the VCA has not detected any bid rigging cases although the VCA is very interested in anticompetitive behaviours in public tender.

While the availability of public tender information depends on the diligence of public procurers, current regulations under the PPL are also an obstacle preventing public procurers from providing information. Specifically, the PPL stipulates that divulging relevant information and documents in the contractor selection process must be prohibited except for certain circumstances where information disclosure is required upon the request of the competent person,⁵³⁸ the inspection or examination body and the state public procurement administration agency.⁵³⁹ Unfortunately, the VCA and the VCC (as competent authorities for addressing bid rigging) have fallen outside the scope of this regulation. In other words, unless the PPL is amended to empower the VCA and the VCC as competent persons to request tender information, public procurers can hardly fulfil their roles as informants in the fight against bid rigging.

From the perspective of competition authorities, the role of the VCA and the VCC as competition law advocates also warrants examination.

As outlined earlier, acting as competition law advocacies, the Vietnamese competition authorities are expected to offer training, publish educational materials, organise formal meetings and sign memoranda of understanding with public procurement agencies to help enhance public procurers' awareness of bid rigging practices. These activities are essential, given that there are thousands of respective public procurement bodies throughout Vietnam,⁵⁴⁰

⁵³⁷ Interviewee 2 (Hanoi, 26 August 2016).

⁵³⁸ The explanation of the term 'competent person' can be found at section V.B of this chapter.

⁵³⁹ See more at Article 89.7 of the PPL.

⁵⁴⁰ This is because public procurement may be conducted by State bodies at both central and local levels, by State-owned companies and other organisations.

and their procurement capacity and consciousness of public procurement rules are uneven and generally limited in remote provinces.⁵⁴¹

However, there have been no training programs offered by the Vietnamese competition authority to educate public procurers about bid rigging. Neither Guidelines nor specific educational materials were introduced to address bid rigging conspiracies. To date, there has been no memoranda of understanding signed between the VCA and the PPA, although it is revealed by one interviewee that these memoranda have been signed between the VCA and other agencies.⁵⁴²

The only bright spot in this relationship is that the VCA has organised several workshops regarding bid rigging in public procurement at both international and domestic levels, and they also invited the representatives of the PPA to attend and express their voices. However, these workshops were not held annually, and they are not the formal channel for these agencies to share knowledge and exchange information.⁵⁴³ The failure of the Vietnamese competition authorities as competition law advocates likely stems from the challenges associated with their structure and operation (discussed in section V.A of this chapter).

On balance, neither the Vietnamese public procurement agencies nor the Vietnamese competition authorities have successfully fulfilled their cooperative roles in fighting against bid rigging. To deal with this failure, it is time for Vietnamese legislators to consider codifying the cooperation mechanism between these agencies under the law. The right to access confidential bidding documents of the VCA under the PPL should be recognised while providing incentives for public procurers to report signs of bid rigging. From the perspective of the VCA, challenges from its operation and function (noted in part V.A) should be dealt with so that they can enhance their performance as competition law advocates.

2. The interaction between competition authorities, public procurement authorities and criminal law enforcement authorities

The cooperation between competition authorities and public procurement authorities and criminal law enforcement authorities has been regulated under the *Competition Law* and the

⁵⁴¹ Vietnam's Ministry of Planning and Investment, [Report on Assessment of Implementing the Public Procurement Law], above n 8, 6.

⁵⁴² According to the interviewee 4 (Hanoi, 24 August 2016), the VCA has signed several MOUs with other agencies, such as the Electricity Regulatory Department or the Department of Foreign Investment.

⁵⁴³ Only two workshops regarding bid rigging were available on the website of the VCA. See more at <<http://www.vca.gov.vn/NewsDetail.aspx?ID=945&CatelD=304>>.

Administrative Procedure Law.⁵⁴⁴ Accordingly, the VCA and the public procurement authorities must transfer the case to criminal investigating bodies if indications of a criminal offence are identified during their investigation.

While the existence of bid rigging agreement and proof of such agreements are elements constituting offences under the *Competition Law* and the *Public Procurement Law*, criminal law requires additional requirements, which are the damage and proof of damages as a compulsory element constituting criminal offence (as already discussed in Chapter 3 of this thesis).

This means that the VCA and the public procurement authorities have to define the damage in bid rigging cases as a preliminary matter to determine which authorities have the competence to deal with the case.

Commenting on this issue, one interviewee claims:⁵⁴⁵

Normally, damage will be identified at the end of investigation process. However, according to current regulation, damage must be investigated first to determine whether the VCA or criminal law enforcement authorities are entrusted to deal with the case. This requires the establishment of a united and clear cooperation mechanism between these authorities.

To date, there has been no cooperation mechanism between these authorities established to deal with these cases. The absence of any cooperation mechanism among these relevant authorities may make prosecuting bid rigging as a criminal offence in Vietnam more challenging.

Conclusion

While effective enforcement mechanisms are just as important as having effective laws to address bid rigging successfully, enforcement eventuates to be one of the problematic issues contributing to the failure of detection and prevention of bid rigging practices in Vietnam.

While leniency programs and CIBDs as pre-emptive methods play an important role in detecting and preventing bid rigging cases in other jurisdictions, they have not been introduced yet in the Vietnamese context. The author further argues that even if a leniency program is

⁵⁴⁴ Article 94 of the *Competition Law* and Article 62 of the *Administrative Procedure Law*.

⁵⁴⁵ Interviewee 2 (Hanoi, 26 August 2016).

adopted, its effectiveness is constrained if bid riggers are not afraid of being detected and lenient applicants are not exempt from debarment and penal sanctions.

While e-procurement is recognised as an effective tool to prevent and detect bid rigging, it is just in its initial stage, although a comprehensive development strategy has been recently adopted. This chapter also identifies two main challenges to successful online procurement in Vietnam.

In terms of the sanctions, the general conclusion is that, except for the absence of criminal sanctions for bidding companies, the sanctions seem to have a relatively deterrent impact on bid riggers. Following the experiences from the US and the EU, a self-cleaning mechanism should be introduced to combine with a debarment mechanism in order to enhance competition in the public market.

The most challenging issue in anti-bid rigging enforcement is weak cooperation and interaction among competent enforcement authorities, particularly between public procurement and competition authorities. The strong relationship between public procurement and competition authorities has been considered the key factor contributing to the success of anti-bid rigging enforcement. On the one hand, public procurement authorities are in the best position to detect and inform competition authorities about the signs of bid rigging. On the other hand, competition authorities play their part in enhancing awareness about competition issues and supporting public procurers with instructions so that they can be vigilant about bid rigging. Unfortunately, this chapter's analysis reveals that public procurement and competition authorities detect and investigate bid rigging as separate watchdog agencies without any cooperation among these agencies. This is the main reason why competition authorities have not received any complaints and reports from the public procurers.

CHAPTER 6: PRIVATE ENFORCEMENT OF BID RIGGING IN VIETNAM

Competition law enforcement is mostly based on two enforcement pillars: public enforcement and private enforcement. While Chapter 5 chiefly focuses on public enforcement mechanisms, this chapter turns the discussion to the private enforcement of bid rigging in Vietnam. This chapter consists of two main parts. The first part introduces the legal regime applicable to private enforcement of bid rigging in Vietnam. The second part identifies and scrutinises challenges for implementing private enforcement of bid rigging in the Vietnamese context.

I. Legal framework governing private enforcement of bid rigging in Vietnam

While public enforcement refers to enforcement by a government through either a competition authority or a prosecutor, private enforcement can be defined as litigation initiated by an individual, an enterprise or a public entity such as a procuring agency to ask courts to establish a competition law offence and order the recovery of damages incurred or stop illegal acts.⁵⁴⁶ In the context of bid rigging enforcement, this mechanism may encourage public entities – the main victims of bid rigging offences – to seek legal redress and further have a deterrent impact on bid riggers by improving the possibility of detection and the magnitude of the administrative fines.⁵⁴⁷

There have been no bid rigging cases reported by Vietnamese Courts. This is hardly surprising because the recognition of private enforcement of competition law remains contested in Vietnam.⁵⁴⁸ The current *Competition Law* contains no provision explicitly recognising private enforcement. Rather, Article 117.3 of this law contains within it a provision stipulating that those who have caused damage to the interests of the State or the legitimate rights and interests of any other organisations or individuals shall be liable to pay compensation in accordance to the provisions of the Law. Article 6 of Decree No 71/2014 reinforces this rule, stating:

⁵⁴⁶ OECD, *Relationship between Public and Private Antitrust Enforcement* DAF/COMP/WP3 (2015) 3.

⁵⁴⁷ Simon Vande Walle, 'Private Enforcement of Antitrust Law in Japan: An Empirical Analysis' (2011) 8(1) *The Competition Law review* 22. Also see Jones and Sufrin, above n 218, 1082.

⁵⁴⁸ Le Thanh Vinh, above n 221.

1. Any organisation or individual breaching the competition law and thereby causing loss to the interests of the State or to the lawful rights and interests of other organisations and individuals must pay compensation for such loss.

2. Payment of compensation for loss as stipulated in clause 1 of this article shall be implemented in accordance with the civil law.

This means that although Vietnamese *Civil Code* does not itself order damages, injured parties are allowed to initiate a separate action before courts to claim damages pursuant to civil law. Tracking this regulation in the 2015 *Civil Code*, it is noted that the new *Civil Code* fails to provide any provisions regulating the damages for those harmed by competition law. Instead, it can be governed on the basis of the general provisions regarding damages in tort which is inscribed in the current law. Accordingly, the Vietnamese *Civil Code*, Article 584, provides for damages in tort since:

those who infringe upon the life, health, honour, dignity, prestige, property, rights, or other legitimate interests of individuals or infringe upon the honour, prestige and property of legal persons or other subjects and thereby cause damage shall have to compensate.

To initiate the case for damages action under Article 584, a plaintiff must prove (1) unlawful conduct, (2) damage incurred and (3) the causation between the damage incurred and unlawful conduct.⁵⁴⁹ Regarding damage incurred, the victims will have to state clearly every actual damage incurred, the compensation level demanded and present evidence for these damages.⁵⁵⁰ Like the EU,⁵⁵¹ the basic principle of damages is that the plaintiffs have the right to claim and

⁵⁴⁹ In comparison with the previous version, the current law does not list ‘intention or negligence of defendants’ as a condition for plaintiffs to prove. The exclusion of this element will alleviate the burden of proof belonging to plaintiffs in civil cases. See more at Article 604 of the *Civil Code 2005* and the Resolution No 03/2006/NQ-HĐTP regulation providing guidance for the application of a number of provisions of the *2005 Civil Code* on damages in tort. For general comments on this issue, see more at Do Van Dai, Binh Luan Khoa hoc Nhung Diem Moi Cua Bo Luat Dan Su Nam 2015 [Comments on the revised Civil Code 2015] (Hong Duc Publishing House-Vietnam Lawyers’ Association, 2016).

⁵⁵⁰ Section I.5 of Resolution No 03/2006/NQ-HĐTP.

⁵⁵¹ The principle of ‘full compensation’ is stipulated in the Article 3 of the 2014 EU Directive as below:

1. Member States shall ensure that any natural or legal person who has suffered harm caused by an infringement of competition law is able to claim and to obtain full compensation for that harm.
2. Full compensation shall place a person who has suffered harm in the position in which that person would have been had the infringement of competition law not been committed. It shall therefore cover the right to compensation for actual loss and for loss of profit, plus the payment of interest.
3. Full compensation under this Directive shall not lead to overcompensation, whether by means of punitive, multiple or other types of damages.

obtain the full compensation for the harm incurred.⁵⁵² This may include actual loss, loss for profit and any other damage incurred.⁵⁵³

It appears that proving either the unlawful conduct or damage incurred in terms of bid rigging cases is a great challenge for plaintiffs. In a situation where the plaintiff brings the case to the court after the VCC has already uncovered the conduct, it remains unclear whether the plaintiff has to prove *Competition Law* violation offences on the part of the infringers. Meanwhile, in such situations, the plaintiff, according to the *Japanese Antimonopoly Act*, does not need to discharge this burden of proof,⁵⁵⁴ although the right to claim for damages only takes place after the decision rendered by Japan Fair Trade Commission has become final and binding.⁵⁵⁵

When the proof of unlawful conduct is met, the victims will have to demonstrate and estimate the loss they suffered. This also challenges plaintiffs because most of the evidence needed is generally possessed by infringers. In an effort to deal with this issue, Article 5 of the EU Directive on antitrust damages actions⁵⁵⁶ regulates that national courts can have the defendant or a third party present evidence. Besides, the national courts can ask a competition authority to turn over the documents in the file of this organisation.⁵⁵⁷

II. Challenges in private enforcement of bid rigging in Vietnam

In addition to ambiguities in the legal framework, private enforcement of bid rigging also faces two main hurdles. The first is the relationship between Vietnamese competition authorities and Courts. The second is obstacles preventing plaintiffs from bringing bid riggers in front of courts. Both are examined in turn below.

⁵⁵² From the comparative perspective, the US federal competition law authorizes the award of treble damages as a chief tool in the antitrust enforcement scheme. The treble damages under the US approach is designed to compensate victims of antitrust violations for their injuries and also to ensure that private parties have an adequate economic incentive to undertake costly antitrust litigation. This approach is different from that of Vietnam and the EU where damages cannot exceed actual damage. Therefore, the experience of the US in determining damages in private enforcement will not be taken into consideration in the Vietnamese context.

⁵⁵³ Article 589 the *Civil Code 2015*.

⁵⁵⁴ Vande Walle, 501, 9.

⁵⁵⁵ Article 26 of the *Japanese Antimonopoly Act*. In addition, damages actions can be filed according to the *Japanese Civil Code*.

⁵⁵⁶ Directive of the European Parliament and of the Council on certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and of the European Union was adopted on 10 November 2014.

⁵⁵⁷ Article 6 of the EU Directive on antitrust damages actions.

A. Relationship between Vietnamese competition authorities and Courts

Although damage actions have been stipulated in the *Competition Law*, whether the Courts can hear stand-alone bid rigging cases or only handle follow-on competition damages claims in Vietnam remains unclear.⁵⁵⁸

On the one hand, the *Civil Code 2015* grants the right to parties to initiate a lawsuit against illegal acts that cause damage and the jurisdiction to resolve these cases belongs to the Courts in accordance with the *Civil Procedure Code 2015*.⁵⁵⁹ In theory, such illegal acts may include a *Competition Law* violation. In other words, injured parties can pursue damages actions against *Competition Law* violations including bid rigging cartels on the basis of a stand-alone case. In these circumstances, the courts will independently determine whether or not the acts in question violate the *Competition Law*.

On the other hand, the *Competition Law* itself only provides for two enforcement authorities to investigate and adjudicate *Competition Law* infringements.⁵⁶⁰ It implies that the VCL does not invest judges with jurisdiction in dealing with these offences. In support of this argument, the judge interviewed by the author claimed that the court is not able to determine infringements of the VCL, including bid rigging.⁵⁶¹ According to him, bid rigging cases brought to the court will have to be suspended until the infringement decision of the VCC is adjudicated in accordance with Article 214.1.d of the *Civil Procedure Code 2015*.⁵⁶²

While the current laws fail to give a clear answer as to whether the courts are able to hear stand-alone bid rigging cases, it is highly unlikely that, in any event, the courts will hear the case before the VCC's releases its decision on the case in question. This assumption is supported not only by the judge interviewed by the author but also by the fact that bid rigging cases as

⁵⁵⁸ For general comments on the issue, see more Le Thanh Vinh, above n 221; Le Anh Tuan, *Phap Luat ve Chong Canh Tranh Khong Lanh Manh o Viet Nam* [Law governing unfair competitive practices in Vietnam] (National Political Publisher, 2009) 247.

⁵⁵⁹ Article 25.6 *Civil Procedure Code 2015*.

⁵⁶⁰ Article 58 of the VCL stipulates that:

Organisations and individuals considering that their lawful rights and interests have been infringed as a result of a breach of the provisions of this Law (hereinafter referred to as complainants) shall have the right to lodge a complaint at the administrative body for competition and Article 56 of the Law emphasises that The resolution of competition cases concerning practices in restraint of competition shall be carried out in accordance with this Law.

⁵⁶¹ Interviewee 14 (Hochiminh City, 1 September 2016).

⁵⁶² Interviewee 14 (Hochiminh City, 1 September 2016).

well as other anticompetitive agreements are too sophisticated to resolve if the courts just rely on the evidences submitted by litigants in accordance with civil proceedings rather than the investigation report and infringement decision issued by the VCA and the VCC, respectively.⁵⁶³

Another issue arising from the relationship between the Vietnamese competition authorities and the Courts is the binding effect of decisions adjudicated by the VCC in subsequent cases. It is not clear whether the courts will rely on the findings of the VCC in similar prior cases or determine independently whether there has been bid rigging. In terms of this issue, it is argued that the Courts should have their own independence in making judgments.⁵⁶⁴ The decision adopted by the VCC or any other organisations should be considered a reference for the judges to make judgments.⁵⁶⁵ They can therefore allow those decisions to be debated in court if there is some uncertainty – but they should not be binding on the court. This argument contrasts with that of Le Anh Tuan who argues that decisions adjudicated by the VCC regarding the establishment of competition law infringements should be approved by the Courts.⁵⁶⁶ He argues that there is no need to re-determine whether there is the existence of competition law infringements.⁵⁶⁷

While the effect of a decision of Vietnamese competition authorities on the courts is unclear, the situation in the EU clearly supports final infringement decisions of national competition authorities being binding. At the EU level, the Directive on Antitrust Damages Actions recognises the binding effect of these decisions by clearly stating that:

Member States shall ensure that an infringement of competition law found by a final decision of a national competition authority or by a review court is deemed to be irrefutably established for the purposes of an action for damages brought before their national courts under Article 101 or 102 TFEU or under national competition law.⁵⁶⁸

⁵⁶³ While bid rigging cases are frequently investigated by the VCA within up to 11 months in accordance with Article 87.1 and Article 90.2 of the *Competition Law*, the time limit for the first instance hearing at the Courts ranges from 4 months up to a total of 6 months from the date of acceptance of the case. Despite this, VCA officials claimed that this time limit is too short in comparison with ones in foreign countries that take place up to several years removed. See more at Le Thanh Vinh, above n 221.

⁵⁶⁴ Do Van Dai and Nguyen Thi Hoai Tram, 'Boi Thuong Thiet Hai Do Hanh Vi Canh Tranh Khong Lanh Manh Gay Ra' [Damage Actions Arising from Unfair Competitive Practices] (2012) 2(69) *Legal Science Journal* 68-69.

⁵⁶⁵ Ibid.

⁵⁶⁶ Le Anh Tuan, above n 558, 247.

⁵⁶⁷ Ibid.

⁵⁶⁸ Article 9 the EU Directive.

As the member level, half of the EU's member countries recognise the binding effect of the competition authority's final decision on follow-on civil claims for damages.⁵⁶⁹

In light of these facts, the EU approach, which recognises the binding effect of final infringement decisions of competition authorities, should be adopted in the Vietnamese context. While this approach may help enhance the political position of the VCC, it also sticks to the initial decision of the Vietnamese legislators following the EU model which relies primarily on administrative authorities to enforce the law.

B. Obstacles for Vietnamese public procurers and aggrieved competitors regarding the quantification of damages

In bid rigging cases, there are two main potential victims bringing claims for damages before the Courts: public procurers as the direct purchasers of goods and services offered by bid riggers and other aggrieved bidders who are not part of bid rigging collusions.⁵⁷⁰ One of the challenges that both claimants have to face is the quantification of damages in bid rigging cases.

1. Public procurers

Public procurers are known as the most direct victims in bid rigging cases, thus they are in the best position to claim for damages. The actual losses that public procurers may claim include the expenses of organising the public tender and the price difference between the competitive bid price offered and the rigged bid price.

In Vietnam, the expenses of organising public tenders are divided into two main types: the cost of drafting bidding documents and pre-qualification applications and the cost of evaluating pre-qualification applications and proposals.⁵⁷¹ Every single expense is equivalent to the ratio ranging from 0.03 per cent to 0.1 per cent of the tender price, with the maximum up to of 50 VND million.⁵⁷² The public officers working in the local public procurement agencies

⁵⁶⁹ See more Section 47A and 58A of the United Kingdom *Competition Act 1998*, Article 88/B of the Hungarian *Competition Act 2005*, Article 35(1) of the Greek *Competition Act*, Section 33(4) of the German *Act against Restraints on Competition*. See more at OECD, *Relationship between Public and Private Antitrust Enforcement*, above n 546, 14.

⁵⁷⁰ Marsela Maci, 'Private Enforcement in Bid-rigging cases in the European Union' (2012) 8(1) *European Competition Journal* 213.

⁵⁷¹ Article 9 of Decree 63/2014/ND-CP.

⁵⁷² Article 9 of Decree 63/2014/ND-CP.

interviewed by the author claim that these expenses are too minimal for public procurers to bring the case before the court.⁵⁷³

Unlike the expenses of organising public tenders, collecting the evidence to distinguish the difference between the competitive bid price and the rigged bid is more challenging, as these evidences are primarily in the hands of bid riggers. Additionally, bid riggers may take precautions to reduce the possibility of detection. As Howard and Kaserman have stated:⁵⁷⁴

Bid worksheets show the amount of overcharge after the ‘rig’ is set. In such cases, the bidder may work up a ‘legitimate’ bid, then go back and mark it up once he knows he has the job rigged. In some situations these ‘write-ups’ are not labelled; in other situations they have been deceptively labelled as ‘contingency’ or ‘weather’, etc...

Without the investigative power to enter any place of business, inspecting suspicious materials and dawn raids entrusted to Vietnamese competition authorities or investigation agencies in criminal cases, it is highly unlikely that public procurers can effectively detect evidence of surcharges in bid rigging cases and thus the possibility of pursuing the damage claim before court is minimal.

2. Aggrieved bidders

When bid rigging is detected before and during the tender, the bid will be cancelled in accordance with Article 17 of the *Public Procurement Law*. In such cases, it is highly likely that an aggrieved bidder would have been awarded the contract if his bid remained the only valid one in the tender, excluding the bids of bid-riggers. Therefore, the aggrieved bidder may look for any actions for claiming his or her loss of profit resulting from the cancellation of the bid in which he or she was involved.

Although there have been no bid rigging cases brought to the courts to claim damages, this assumption that the quantification of loss of profit in these cases is complicated could be reaffirmed by re-examining Decision No 29/2009/DS-GDT dated 9 September 2009 issued by the Judge Committee of the Supreme People’s Court in which the plaintiffs claimed loss for profits incurred by unfair competition acts. In this decision, it was held that:

[d]uring the resolution of the case, the representative of Gedegon Co., Ltd [Plaintiff] claims that the amount of unsold medicine resulting from the unfair competition act triggered by

⁵⁷³ Interviewee 15 (Hanoi, 26 August 2016); Interviewee 16 (An Giang, 31 August 2016).

⁵⁷⁴ Jeffrey H Howard and David Kaserman, ‘Proof of damages in construction industry bid-rigging cases’ (1989) *The Antitrust Bulletin* 359, 364.

Trung Nam Co., Ltd and Binh Duong Co., Ltd [Defendants] is 1.224.605 boxes; The profit rate is 30 per cent; If the imported price in the year 2002 is 0.4 USD per box, the loss for profit will be 149,659.60 USD. However, the evidence submitted by Gedeon is merely a result of a self-investigated report conducted in the market of contraceptive pills in two years of 2002 and 2003 and has not been accepted by the Vietnamese competent authorities.⁵⁷⁵

These comments imply that the calculation of damages needs to be accepted by the Vietnamese competent authorities. However, the case law fails to elaborate the reason why the acceptance of competent authorities is needed. Neither does it clarify which competent authorities should be appropriate in the case. This decision seems to make the burden of proof on the plaintiffs much more onerous. In the Vietnamese context, where most enterprises are small- and medium-sized ones,⁵⁷⁶ investigating and collecting proof to claim for damages would be a time-consuming and costly task that may prevent SME bidders from bringing bid riggers before a court.

From a comparative perspective, if the quantification of damage is extremely difficult, the widening of the national court's powers to determine the damages is one of the effective solutions that could be adopted from the EU and Japan. For example, the new EU Directive clearly states that:

the national courts are empowered, in accordance with national procedures, to estimate the amount of harm if it is established that a claimant suffered harm but it is practically impossible or excessively difficult precisely to quantify the harm suffered on the basis of the evidence available.⁵⁷⁷

This regulation is based on the principle of effectiveness and equivalence stipulated in Recital 11 of this Directive. Also, as the courts seem not to be as familiar with the competition issues compared to competition authorities, they may request the aid from competition authorities to determine the quantification of damages.⁵⁷⁸

Similarly, the Japanese *Code of Civil Procedure* has the same approach. It is stipulated that:

⁵⁷⁵ The Decision No 29/2009/DS-GDT on 9 September 2009 of The Judge Committee - The Supreme Court, cited in Do Van Dai and Nguyen Thi Hoai Tram, 'Boi Thuong Thiet Hai Do Hanh Vi Canh Tranh Khong Lanh Manh Gay Ra' [Damage Actions Arising from Unfair Competitive Practices] (2012) 2(69) *Legal Science Journal* 69.

⁵⁷⁶ It is reported that small and medium enterprises account for 97.5 per cent of enterprises in the Vietnamese economy. See more at ERIA Research Working Group, above n 447.

⁵⁷⁷ Article 17.1 of Directive 2014/104/EU of the European Parliament and of the Council of 26 November 2014 on certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and of the European Union.

⁵⁷⁸ Article 17.3 The 2014 EU Directive.

Where it is found that any damage has occurred, if it is extremely difficult, from the nature of the damage, to prove the amount thereof, the court, based on the entire import of the oral argument and the result of the examination of evidence, may determine a reasonable amount of damage.

In a bid rigging case judged by the Nagoya District Court in December 2009, the amount of damages was calculated as five per cent of the actual contract price as elaborated below:

[B]etween the estimated price and the actual contract price, such estimated price did not actually exist and is extremely difficult to determine the price based upon various factors such as the type, size, place, details of the work (i.e. work to be performed under a contract based upon biddings), the number of bidders for the work, economic and financial situation of bidders at the time of bidding, terms and conditions, price and amount of other works in bidding at the same time, and the regional locality relating to the bid. Therefore, in this case, the court can recognize the plaintiff suffering some damage but it is extremely difficult, from the nature of the damage, to prove the amount thereof. Therefore the court determines a reasonable amount of damages based on the entire import of the oral argument and the result of the examination of evidence, pursuant to Article 248 of the Code of Civil Procedure.⁵⁷⁹

It is claimed by Kawai and Shimada that the amount of damages in bid rigging cases determined by the Japanese Courts ranges from five per cent to 13 per cent of the contract value.⁵⁸⁰ It is also noted that, given the challenges in quantification of damages, public procurers in Japan tend to predetermine the amount of damages resulting from bid rigging by adding a liquidated damages clause in the contract when awarding it to bidders.⁵⁸¹ The amount that bid riggers have to compensate in such cases is ten per cent of the contract price.

Conclusion

The overarching conclusion of this chapter is that private enforcement of competition law in general - and bid rigging in particular - is extremely underdeveloped. To date, there have been no bid rigging cases brought to the courts.

⁵⁷⁹ Nagoya District Court, Judgment, 11 December 2009; Hanrei Jiho (2072)88[2010]. Mitsuo Matsushita and Kazunori Furuya, 'Private Antitrust Actions in Japan' 2013 (1) *CPI Antitrust Chronicle* <<https://www.competitionpolicyinternational.com/assets/Uploads/MatsushitaAPR-131.pdf>>.

⁵⁸⁰ Kozo Kawai, Madoka Shimada and Masahiro Heike, 'Japan' in Ilene Knable Gotts (ed), *The Private Competition Enforcement Review* (Law Business Research, 2012) 247, 255.

⁵⁸¹ Akinori Uesugi, 'Can Collective Actions Be a Solution to Improve Access to Justice in Japan – Examination of Measures to Enhance the Private Enforcement of Competition Law in Japan' in Stefan Wrzka, Steven Van Uytsel and Mathias M Siems (eds) *Collective Actions – Enhancing Access to Justice and Reconciling Multilayer Interests* (Cambridge University Press, 2015) 214.

While the current VCL contains no provision explicitly recognising private enforcement, the application of general rules in the *Civil Code* does not fully consider the particularities of antitrust claims in general and bid rigging claims in particular. To initiate the case for damage actions, plaintiffs must provide evidence of illegal conduct, the harm suffered from such conduct and a causal link between the conduct, the harm and the damage. This current mechanism places a burden on plaintiffs which can be seen as an obstacle to effective private enforcement.

In addition to shortcomings under the legal framework governing private enforcement, other challenges including the relationship between Vietnamese competition authorities and courts, obstacles for Vietnamese public procurers and aggrieved competitors to quantify the damages make current enforcement inefficient. As outlined in this chapter, good practices from the EU and Japan could be adopted to deal with some of these problems. More specifically, while the binding effect of final decisions adjudicated by the VCC should be acknowledged, the widening of Vietnamese courts' powers to estimate the amount of harm in certain cases is vital.

CHAPTER 7: CONCLUSION

In view of the anecdotal evidence provided through Vietnamese media, adjudicated cases and inspection reports, as well as interviews conducted by the author with stakeholders in the Vietnamese public market, it is clear that bid rigging practices are prevalent in the Vietnamese public procurement market.⁵⁸² These practices may do substantial harm, not only to public procurers but also to the final users of public services and taxpayers.⁵⁸³ Nevertheless, no bid rigging cases, surprisingly, were investigated and adjudicated by the Vietnamese competition authorities. A significantly limited number of cases were adjudicated by only one local public procurement authority. The analysis undertaken in the thesis provides a number of reasons for this relative lack of detection and action. These include failures of anti-bid rigging laws and their enforcement in Vietnam, stemming from deficiencies in the law and law enforcement mechanisms and also from a range of other issues, which are closely connected with socioeconomic and political context in Vietnam.⁵⁸⁴

In terms of the law, the provisions governing bid rigging in the *Competition Law*, *Public Procurement Law* and the *Penal Code* all contain shortcomings and ambiguities, and, more fundamentally, there are also inconsistencies and conflicts between these laws.⁵⁸⁵ Vietnamese public procurement legislation and the administrative practices of public procurers facilitate the formation and stability of bid rigging arrangements.⁵⁸⁶

Turning to the enforcement mechanisms, the analysis undertaken in this thesis also reveals that Vietnamese enforcement mechanisms are as problematic as legal regulations in contributing to the failure of the detection and prevention of bid rigging. Of greatest concern is the quality and

⁵⁸² See Chapter 4, section I.

⁵⁸³ For a review of the pernicious influence of bid rigging collusion on public procurement markets, see Chapter 1, section I.A.

⁵⁸⁴ The interference of power and politics in enforcement activities in Vietnam has been emphasised in numerous studies. See more at Tom Ginsburg, 'Does Law Matter for Economic Development? Evidence from East Asia' (2000) 34(3) *Law & Society Review* 829,846; Dror Ben-Asher, 'What's the Connection? Vietnam, the Rule of Law, Human Rights and Antitrust' (1999) 21(3) *Houston Journal of International Law* 431; John Gillespie, 'Understanding Legality in Vietnam' in Stephanie Balme and Mark Sidel (eds), *Vietnam New Order: International Perspectives on the State and Reform in Vietnam* (Palgrave Macmillan, 2007); Pip Nicholson, 'Judicial Independence and the Rule of Law: The Vietnam Court Experience' (2001) 3 *Asian Law Journal* 37, 37-41; John Gillespie, *Transplanting Commercial Law Reform: Developing a 'Rule of Law' in Vietnam* (Ashgate Publishing, 2006).

⁵⁸⁵ See more at Chapter 3 of this thesis.

⁵⁸⁶ See Chapter 4, section II.

nature of the connections between and cooperation amongst Vietnamese competition authorities and public procurement agencies.⁵⁸⁷

The thesis also considers the context in which anti-bid rigging regulation operates. It demonstrates that challenges facing bid rigging enforcement arise not just from doctrine but also result from underlying socio-economic and political issues. Of particular concern is the participation of SOEs in bid rigging cases involving corrupt practices⁵⁸⁸ and the lack of political will of Vietnamese political leaders leading to the limited independence of the Vietnamese competition authorities.⁵⁸⁹

Applying the law reform research approach, combined with comparative law and empirical research in the form of in-depth interviews, a number of directions for law reform emerge.

I. Recommendations on anti-bid rigging laws

A. Address inconsistencies and shortcomings in provisions governing bid rigging under the VCL, the PPL and the VPC

First, Chapter 3 points out that there is an inconsistency in defining and classifying the forms of bid rigging under the VCL and the PPL. The definition of bid rigging in the PPL appears not to fully capture *complementary bidding (cover bidding)* and *bid rotation* as forms of bid rigging and is much narrower than that of the VCL. Also, neither the VCL nor the PPL classifies *subcontracting* and *market allocation* as forms of bid rigging, which is incompatible with the approach of the OECD and other international competition authorities. This inconsistency and the failure of the two laws in covering all popular forms of bid rigging may be an obstacle for competent authorities to detect and demonstrate the existence of bid rigging agreements.

To deal with this first issue, the definition and forms of bid rigging in the PPL should be amended to align with those in the VCL. The forms of bid rigging should be revised to follow the recommendations of the OECD and the US, which include *subcontracting* and *market allocation*. The consistency between these two laws will enhance the interaction between competition and public procurement authorities in the fight against bid rigging practices.

⁵⁸⁷ See Chapter 5, section V.

⁵⁸⁸ See Chapter 4, section I.B and section II.A.

⁵⁸⁹ See Chapter 5, section V.A.

Second, this thesis has shown that, while joint bidding agreements may be the result of an anticompetitive scheme subject to the antitrust scrutiny of many jurisdictions including the EU and the US, such agreements fall outside the scope of the current VCL.⁵⁹⁰ This seems to be particularly problematic in the Vietnamese public market, given that the PPL does not impose any constraints on the formation of joint bidding agreements. The silence of these two laws on the legality of joint bid may challenge public procurers to assess whether the joint bid is genuinely competitive or not.⁵⁹¹

The solution for the second issue, therefore, needs to be addressed from the perspective of both competition law and public procurement law. Regarding the *Competition Law*, a comprehensive definition of anticompetitive agreements should be provided to replace Article 8 of the VCL, which only lists eight particular forms of anticompetitive agreement.⁵⁹² The new definition should be designed as a ‘basket clause’ to capture all forms of anticompetitive agreements including anticompetitive joint bidding arrangements. The proposed definition of an anti-comprehensive agreement could be modelled on Article 101(1) of the TFEU or Section 1 of the *Sherman Act* or Article 2.6 of the *Japanese Antimonopoly Act*.⁵⁹³

Further, criteria to determine the legality of joint bidding agreements should be imposed. Accordingly, parties to joint bids should be able to demonstrate that they can only submit a compliant tender if they participate together, or that the terms of their joint bid are substantially better for the public procurer than those they could offer independently. In terms of the *Public Procurement Law*, it needs to be set clearly in the PPL that public procurement rules on joint bidding are subject to regulations on anticompetitive agreements in the VCL. Such regulation is necessary to ensure the consistency between the PPL and the VPL about anticompetitive joint bidding. It is also necessary to serve as a reminder to tenderers as well as public procurers about competition issues under public tendering. In addition, restrictions on the formation of joint bidding agreements should be legalised in the PPL. Such restrictions could be in line with

⁵⁹⁰ See Chapter 3, section I.B.3.i.

⁵⁹¹ This thesis argues that deficiencies in provisions governing joint bidding facilitate the formation and stability of bid rigging in the public procurement market. See Chapter 4, section II.B.

⁵⁹² Trade associations’ decisions including their recommendations, rules and unilateral acts that serve to support the members’ collusive agreements should be prohibited under the purview of this anti-competitive agreement definition. The analysis of the thesis reveals that the current VCL does not cover practices facilitating bid rigging orchestrated by trade associations. Although no bid rigging cases have been investigated by the VCA, other investigated cartel cases in Vietnam reveal that trade associations were behind these collusive agreements. Experiences from the EU and Japan also demonstrate that trade associations not only provide the platform for bidding companies to exchange information but also directly promote and enforce bid rigging. Failure to capture practices of facilitating bid rigging of such trade associations may contribute to the prevalence of bid rigging in the Vietnamese context.

⁵⁹³ See Chapter 3, section I.B.3.i.

proposed criteria determining the legality of joint bidding agreements aforementioned in the VCL.

Following these restrictions, the PPL could expressly require members of joint bidding to clarify purposes and merits of their grouping decisions and associated efficiencies in the joint bidding agreements. By doing so, it would support public procurers to evaluate the compatibility with the competition law and therefore reduce the possibilities of using a joint bid mechanism to rig bids. Also, warnings that joint bidding (and/or subcontracting) may be indicative of bid rigging should be mentioned in bid rigging guidelines and training materials (discussed below). Such warnings are indeed useful pointers for public procurers and competition authorities seeking to determine when to investigate.

Third, there are inconsistencies between the *Competition Law* offence stipulated in Article 217 and bid rigging offence in Article 222 under the *Penal Code*, which may negatively affect the enforcement of the criminal laws prohibiting bid rigging in practical terms.⁵⁹⁴ The first inconsistency is that while the subject of the cartel offence is both individuals and companies, the subject of bid rigging offences is limited only to individuals. The absence of criminal sanctions for companies in Vietnam may lead to under-deterrence, given that the fine under the competition law is still low.⁵⁹⁵

Additionally, Vietnamese legislators seem to misunderstand the subject of the bid rigging offence. While the subject of the bid rigging offence as drafted is individuals in bidding companies in accordance with the definition of bid rigging provided by the VCL and the PPL, the *Penal Code* puts an emphasis on public officials who are involved in bid rigging practices. Clearly, this leads to the conflicts between the *Penal Code* and the VCL and the PPL.

Another inconsistency is the definition of the term ‘damage’ – one of the compulsory criteria which must be proved for convictions under Article 222 and Article 217 of the *Penal Code*. More specifically, while the scope of ‘damage’ under Article 217 extends to both damage

⁵⁹⁴ As outlined in Chapter 2, criminalising cartels including bid rigging is the reflection of local factors, depending on domestic institutional structures, capacities and legacies. Looking into the criminal sanctions for bid riggers that have been recently legalised in the newly revised *Penal Code*, the thesis reveals that criminalisation of bid rigging under the Vietnamese context fully reflects its own domestic factors. Instead of classifying bid rigging as a competition infringement, Vietnamese legislators chose to categorise this practice as a public procurement offence. The thesis argues that this legislative choice leads to inconsistencies and shortcomings in the *Penal Code*.

⁵⁹⁵ For a critical analysis of fine sanctions in the VCL, see Chapter 5, section IV.A.

caused by the offending behaviour and illegal income such as bribes or compensation among cartel members, the scope of ‘damage’ under Article 222 does not cover illegal income.⁵⁹⁶

To deal with the inconsistencies and deficiencies identified above, the bid rigging offence under the *Penal Code* should be separated from other public procurement law offences under Article 222 and classified as a form of cartel offence provided in Article 217 of the *Penal Code*. This modification will help broaden the subject of bid rigging offence to bid rigging companies instead of merely individuals. By doing so, it will also exclude public officials from the subject of bid rigging offences. The scope of ‘damage’ under Article 217 also extends to illegal income such as bribes or compensation among cartel members. In other words, Article 217 targets the current inadequacy of Article 222, which does not cover illegal income as a source of damage.

Fourth, the current PPL fails to provide any exemptions of the debarment sanction for bid riggers. As analysed in Chapter 5, debarring bid riggers for a long time in the absence of an exemption policy may restrict the number of potential bidders and lessen the competition in tendering procedures.

By briefly considering the system applicable in the EU, it seems desirable to review the PPL by introducing the self-cleaning mechanism. Self-cleaning measures under the EU Directive 2014/24 are a good example for Vietnam to follow.⁵⁹⁷ The introduction of self-cleaning measures in tandem with debarment mechanisms under the PPL will make the application of bid rigging sanctions more flexible and enhance the prospect of competition in the public procurement market by increasing the number of eligible tenderers - especially in the industries where there are a limited number of bidders.

II. Recommendations on bid rigging enforcement

A. Enhance the relationship between competition and public procurement authorities

In terms of the enforcement mechanism, the utmost concern is the interaction between the Vietnamese competition authorities and public procurement agencies in the fight against bid

⁵⁹⁶ Given that proving receipt of illegal income is likely to be much easier than providing proof of damage, proving and quantifying damage with the exclusion of illegal income are real challenges to competent authorities. Without any further guidance from the Supreme Court in this issue, criminalisation of bid rigging may prove to be a ‘paper tiger’, failing to bring about prosecutions of any bid riggers under this criminal provision.

⁵⁹⁷ See chapter V, section IV.B.1.

rigging. While such cooperation is vital to strengthen anti-bid rigging enforcement mechanisms, this thesis argues that neither the Vietnamese public procurement agencies nor the Vietnamese competition authorities have successfully fulfilled their roles in cooperating to fight against bid rigging. In particular, the Vietnamese public procurement entities have failed to act as both complainants and informants in reporting any signs of bid rigging, nor actively providing information for competition authorities while they are in the best position to do so. In the similar vein, Vietnamese competition authorities have failed to act as competition law advocacies towards educating and raising the awareness of bid rigging to public procurers. To foster such a cooperative relationship, efforts need to be made from the both sides – competition authorities and public procurement authorities.

From the perspectives of competition authorities, the VCA and the VCC need to act as advocates to educate and raise the awareness of public procuring entities of the harms of bid rigging and the importance of competition in public procurement process. A number of activities should be carried out.

First, more training sessions should be designed and offered to public procurement officials at central and local levels. As analysed in Chapter 5, these training sessions should focus on how to form contracts in a way that prevents bid rigging and on how to detect bid rigging -two essential skills that every procurement official needs in order to be well-equipped.

Second, bid rigging guidelines should be published as part of the enforcement practice against bid rigging. These guidelines could be modelled on the OECD guidelines, which have been widely applied by many countries around the globe. Essential information in such guidelines should include: information about bid rigging (definition and forms of bid rigging, its impact on public tenders and the economy, checklists for designing the tender process to decrease the possibility of bid rigging and checklists for detecting bid rigging, and measures to be taken when bid rigging is recognised).

Third, the VCC and the VCA could enhance their relationship with public procurement agencies by co-signing memoranda of understanding or other formal agreements. The MOUs would be a platform for competition and public procurement agencies to fulfil their roles in the fight against bid rigging in Vietnam.

From the perspectives of public procurement agencies, the Vietnamese public procurement bodies at central and local levels should act as active complainants and informants. *First*, the public procurers should be obliged to report any signs of bid rigging to competition authorities.

This obligation should be stipulated not only in any MOU but also in the public procurement rules. Also, more incentives should be provided to public procurers to encourage them to fulfil this obligation. *Second*, the interaction between the two will be enhanced if public procurers are more active to provide bid information and data which are valuable for the screening and intelligence activities of competition authorities.

B. Develop effective tools in detecting and preventing bid rigging such as e-procurement system and Certificate of Independent Bid Determinations (CIBDs)

The thesis also argues that the underdevelopment of e-procurement⁵⁹⁸ and the absence of the CIBDs⁵⁹⁹ as effective tools in detecting and deterring bid rigging greatly contribute to the failure of current enforcement.

To enhance the efficiency of e-procurement, it is essential to deal with one of its major obstacles - the inertia of public procurers resulting from conflicts of group interests. Accordingly, severe sanctions on either public procuring agencies or public officials failing to conduct the e-procurement as required are essential. It is also high time that the Vietnamese legislators took CIBDs into consideration. Specifically, CIBDs should be designed as a compulsory bidding document. Failing to submit a CIBD, should, thus, lead to the ineligibility of bidders to participate in public tenders. The content of a CIBD could emphasise bidders' commitments regarding bid price as the CIPD in the US. The forms of bid rigging and sanctions for this practice, as well as sanctions stipulated in public procurement law, in *Competition Law* and the *Penal Code*, should also all be mentioned in order to maximise the deterrent impact of any CIBD on bidding companies.

C. Facilitate private antitrust enforcement

Chapter 6 of the thesis points out that private enforcement of competition law in general - and bid rigging in particular - is extremely underdeveloped in Vietnam. The application of general rules in the *Civil Code* does not fully consider the particularities of antitrust claims in general and bid rigging claims in particular.⁶⁰⁰ Of strong concern is the ambiguous relationship between

⁵⁹⁸ See Chapter V, section II.

⁵⁹⁹ See Chapter V, section I.

⁶⁰⁰ See Chapter VI, section I.

the competition authorities and courts as well as the onerous burden on public procurers and bidding companies in proving the existence and the amount of damages.⁶⁰¹

To remedy these shortcomings, it is essential to develop specific rules governing private antitrust enforcement. The proposed rules (which may follow the precedent set by the EU Directive 2014/104/EU) should provide common standards for disclosure of evidence, the binding effect of competition authorities' decisions as well as quantification of harm. Accordingly, Vietnamese regulators should empower courts to call the defendant or a third party to present evidence and to ask a competition authority to turn over all relevant documents in their files. The binding effect of final decision adjudicated by the VCC should also be acknowledged, and the widening of Vietnamese courts' powers to estimate the amount of harm in certain cases is vital.

III. Recommendations on other issues

As identified in Chapter 4, bid rigging practices are pervasive not only in private enterprises but also State-owned companies. Arguably, the most serious and biggest cases tend to take place among State-owned enterprises. This is because SOEs get exclusive enjoyment to get involved in big public purchasing projects thanks to their substantial capital and collaborative relationships with other state firms. More seriously, such practices are closely linked with bid corruption, given that SOEs normally possess strong social network connections with public procurers and other state agencies.

It appears to be politically difficult for public procurement agencies and competition authorities to take enforcement action in bid rigging cases involving corruption on the SOEs' part. However, the incidence of bid rigging among State-owned companies may be reduced if the number of SOEs is significantly reduced through the existing Equalisation Program and the political powers of the Vietnamese competition authorities are significantly increased.

This thesis has also shown that the lack of independence of the Vietnamese competition authorities from the perspectives of structural and operational aspects contributed to the weak enforcement against bid rigging practices. The deep-rooted reason for these constraints is the Vietnamese leaders' political will. It is difficult to see how Vietnamese competition authorities

⁶⁰¹ See Chapter VI, section II.

can be genuinely independent if top leaders are not conscious of the importance of competition in a market economy⁶⁰²

The clear direction for reform is that the VCA and the VCC need to be more structurally and operationally independent. In this regard, these agencies' political powers as well as human resources and budget should be significantly increased. However, unless wider administrative and political reforms are undertaken, it is difficult to see how competition agencies can be truly politically independent in Vietnam.

The reform recommendations in this thesis undoubtedly burden Vietnamese legislators and Vietnamese government with the responsibility to deal with deficiencies in legal regulations and enforcement mechanisms. However, these recommendations are essential to detect and prevent bid rigging in public procurement, which reportedly accounts for 22 per cent of Vietnam's GDP. They are also essential to maintain and restore the attractiveness of Vietnam as a destination for international aid and show its commitment to use public funds effectively to the nation's donors.

⁶⁰² Interviewee 3 (Hanoi, 24 August 2016).

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C.1 Vietnam

C.1.1 Legislation

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Thong tu so 03/2015/TT-BKHDT cua Bo Ke hoach va Dau tu ngay 6 thang 5 nam 2015 ve Quy dinh chi tiet lap ho so moi thau xay lap [Circular No 03/2015/TT-BKHDT of Ministry of Planning and Investment dated 6 May 2015 on detailing the preparation of bidding documents for civil works]

Thong tu so 05/2015/TT-BKHDT cua Bo Ke hoach va Dau tu ngay 16 thang 6 nam 2015 ve Quy dinh chi tiet lap ho so moi thau mua sam hang hoa [Circular No 05/2015/TT-BKHDT of Ministry of Planning and Investment dated 16 June 2015 on detailing the preparation of bidding documents for goods]

Thong tu so 17/2010/TT-BKHDT cua Bo Ke hoach va Dau tu ngay 22 thang 7 nam 2010 ve Quy dinh chi tiet thi diem dau thau qua mang [Circular No 17/2010/TT-BKH of Ministry of Planning and Investment dated 22 July 2010 on detailing pilot online bidding]

C.1.2 Quasi-Legislative Materials

Cong van so 2608/VPUBND-DTXD cua Van phung Uy ban nhan dan tinh An Giang ngay 5 thang 8 nam 2014 ve xu ly coc nhà thau vi pham trong dau thau cung cap thiet bi [Official letter No 2608/ VPUBND-DTXD of Office of People's Committee of An Giang province dated 5 August 2014 on handling violations in bidding project of supplying equipment]

Cong van so 648/BCT-PC cua Bo Cong thuong ngay 21 thang 1 nam 2015 ve viec gup y du an Bo luat honh su sua doi [Official letter No 648 /BCT-PC of MOTI dated 21 January 2015 on opinions on the revised Penal Code proposal]

Cong van so 575/SKHDT-TTĐD cua Van phung Uy ban nhan dan tinh An Giang ngay 6 thang 6 nam 2014 ve xu ly coc nhà thau vi pham trong dau thau cung cap thiet bi cho truong THPT chuyen Thoi Ngoc Hau [Official letter No 575/SKHDT-TTĐĐ of Department of Planning and Investment of An Giang province dated 6 June 2014 on handling violations in bidding project of supplying school equipment for Thoi Ngoc Hau high school for the gifted]

Quyết định số 2107/QĐ-UBND của Ủy ban nhân dân tỉnh An Giang ngày 26 tháng 11 năm 2014 về việc xử lý vi phạm trong đấu thầu cung cấp thiết bị dạy học cho Trường THPT chuyên Thoại Ngọc Hầu [Decision No 2107/QĐ-UBND of People's Committee of An Giang province dated 26 November 2014 on handling violations in bidding project of supplying school equipment for Thoại Ngọc Hầu high school for the gifted]

Quyết định số 202/QĐ-UBND của Ủy ban nhân dân tỉnh An Giang ngày 02 tháng 2 năm 2015 về việc xử lý vi phạm trong đấu thầu gói thầu Cung cấp và lắp đặt thiết bị y tế (khu vực 400 giường) thuộc Dự án đầu tư xây dựng bệnh viện đa khoa khu vực Châu Đốc (500 giường) [Decision No 202/QĐ-UBND dated 02 February 2015 of People's Committee of An Giang province on handling violations in the bidding package of providing and supplying office's equipment under the construction project of Chau Doc Hospital]

Quyết định số 350/QĐ-UBND của Ủy Ban nhân dân tỉnh An Giang tỉnh ngày 7 tháng 3 năm 2012 về việc hủy kết quả đấu thầu cung cấp và lắp đặt hệ thống điều hòa không khí trung tâm thuộc công trình: Bệnh viện đa khoa thị xã Tân Châu (giai đoạn 1), tỉnh An Giang [Decision No 350/QĐ-UBND of People's Committee of An Giang province on cancellation of bid package's result of supply and installation of air conditioners under the bidding project of Tan Chau hospital (1st phase), An Giang Province]

Quyết định số 2370/QĐ-UBND của Ủy Ban nhân dân tỉnh An Giang ngày 19 tháng 12 năm 2012 về việc hủy chào hàng cạnh tranh trang bị phần mềm dạy tiếng Việt cho thư viện các trường tiểu học của Sở Giáo dục và Đào tạo và cam tham gia hoạt động đấu thầu đối với nhà thầu vi phạm pháp luật về đấu [Decision No 2370/QĐ-UBND of People's Committee of An Giang province dated 19 December 2012 on cancellation of shopping on the Vietnamese-teaching software for primary schools' libraries under the control of Department of Education and Training and on prohibition of tender's participation of violated bidders]

Quyết định số 2367/QĐ-UBND của Ủy ban nhân dân tỉnh An Giang ngày 18/12/2012 về việc phê duyệt kết quả đấu thầu cung cấp và lắp đặt trang thiết bị phòng thí nghiệm thuộc công trình: Trường Trung Học cơ sở Bui Hữu Nghĩa, phường Mỹ Phú, thành phố Long Xuyên, tỉnh An Giang [Decision No 2367/QĐ-UBND of People's Committee of An Giang province dated 18 December 2012 on ratification of bidding result in terms of providing and installing laboratory's equipment for Bui Huu Nghia Secondary school in My Phuoc Ward, Long Xuyen City, An Giang Province]

C.2 European Union

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Directive 2014/24/EU of the European Parliament and of the Council of 26 February 2014 on public procurement and repealing Directive 2004/18/EC

Directive 2004/18/EC of the European Parliament and of the Council of 31 March 2004 on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts

Directive 2014/104/EU of the European Parliament and of the Council of 26 November 2014 on certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and of the European Union

Guidelines on the method of setting fines imposed pursuant to Article 23(2)(a) of Regulation No 1/2003

Guidelines on the applicability of Article 101 of the Treaty on the Functioning of the European Union to horizontal co-operation agreements

C.3 Japan

Act on Prohibition of Private Monopolisation and Maintenance of Fair Trade 1947 (The Antimonopoly Act) (Japan)

Act on Elimination and Prevention of Involvement in Bid Rigging, etc. and Punishments for Acts by Employees that Harm Fairness of Bidding, etc. 2002

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C.4 United States

Sherman Antitrust Act of 1890, 15 USC (1994)

Federal Acquisition Regulation

Federal Conspiracy Law, 18 USC 371

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Criminal False Statement Act 18 USC 1001

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C.5 Others

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APPENDIX 1: INTERVIEW SCHEDULE			
Interviewee	Date of Interview	Place of Interview	Background Description
Interviewee 1	23-Aug-16	Hanoi	Deputy Chief of VCC's office, former deputy head of division of the VCA
Interviewee 2	26-Aug-16	Hanoi	Former head of division of the VCA
Interviewee 3	24-Aug-16	Hanoi	Head of division of the VCA
Interviewee 4	24-Aug-16	Hanoi	Deputy head of division of the VCA
Interviewee 5	23-Aug-16	Hanoi	Deputy head of division of the PPA
Interviewee 6	27-Aug-16	Hanoi	Former director general of the PPA
Interviewee 7	25-Aug-16	Hanoi	Head of division of the PPA
Interviewee 8	27-Aug-16	Hanoi	Deputy head of division of the PPA
Interviewee 9	25-Aug-16	Hanoi	Lecturer, Competition Law expert
Interviewee 10	22-Aug-16	Hanoi	Lecturer, Competition Law expert
Interviewee 11	24-Aug-16	Hanoi	Competition Law expert
Interviewee 12	23-Aug-16	Hanoi	Lecturer, Committee members drafting the revised Penal Code
Interviewee 13	25-Aug-16	Hanoi	MOJ official, Committee members drafting the revised Penal Code
Interviewee 14	1-Sep-16	Hochiminh City	Judge, Economic Court
Interviewee 15	26-Aug-16	Hanoi	Secretary General, VACC
Interviewee 16	31-Aug-16	An Giang Province	Director, Center for evaluating construction-investment project
Interviewee 17	16-Aug-16	Hochiminh City	Public Procurement law expert, official of HCMC Department of Planning and Investment

APPENDIX 2: INTERVIEW QUESTIONS

UNDER THE FIELDTRIP IN VIETNAM

(AUGUST 2016)

Group I: Interview questions for Vietnamese government officers from Competition Administration Department and Competition Council

1. What are the enforcement priorities of Vietnamese Competition Authorities?

Những vấn đề nào được ưu tiên trong việc thực thi pháp luật cạnh tranh bởi các cơ quan quản lý cạnh tranh Việt Nam?

2. In the decision regarding bid rigging collusion 2014 adopted by the President of An Giang province's people's committee, the suppliers of school equipment submitted their bids with identical spelling mistakes and the same formats. Although no direct evidence of a bid rigging agreement had been proved, it was submitted that there existed bid rigging collusion based on the identical patterns in bidding documents. In the absence of direct evidences, can competition authorities use the circumstantial evidence to prove bid rigging case?

Trong một quyết định về xử lý hành vi thông thầu năm 2014 của UBND tỉnh An Giang, các nhà thầu cung ứng thiết bị trường học đã nộp hồ sơ mời thầu giống nhau ở cả về hình thức lẫn những lỗi chính tả. Mặc dầu không có một bằng chứng trực tiếp về hành vi này được chứng minh, cơ quan có thẩm quyền cho rằng có sự tồn tại hành vi thông thầu dựa trên những yếu tố trùng khớp với nhau trong hồ sơ mời thầu. Trong trường hợp vắng mặt những bằng chứng trực tiếp, liệu rằng cơ quan quản lý cạnh tranh có thể sử dụng những bằng chứng theo hoàn cảnh để chứng minh sự tồn tại của hành vi thông thầu không?

3. If a bid rigging case was detected and adjudicated by a public procurement authority, could it be sanctioned following the investigation of VCA?

Nếu hành vi thông thầu được phát hiện và xử lý bởi cơ quan mua sắm công, liệu rằng nó có thể tiếp tục được xử lý bởi cơ quan quản lý cạnh tranh?

4. Given that public procurement entities are best positioned to unearth bid rigging cases, what should be done to improve the cooperation between VCA and public procurers?

Thực tế là chính các cơ quan mua sắm công là những đơn vị dễ dàng phát hiện các hành vi thông thầu, do vậy, biện pháp gì được đặt ra để cải thiện mối quan hệ giữa cơ quan quản lý cạnh tranh và cơ quan này?

5. The fact that bid rigging can be investigated by both the VCA and public procurement authority make the Vietnamese anti-bid rigging mechanism unique. What are the advantages and disadvantages of this mechanism?

Hành vi thông thầu có thể được xử lý bởi cả cơ quan quản lý cạnh tranh và cơ quan mua sắm công, điều này mang đến nét đặc trưng trong cơ chế xử lý hành vi này tại Việt Nam. Đây là điểm thuận lợi và bất lợi từ cơ chế này?

6. To what extent do you agree that bid rigging conspiracies in Vietnam frequently involves corruption? Does it challenge competition authorities in terms of detecting and investigating bid rigging?

Anh chị đồng ý đến mức độ nào khi có ý kiến cho rằng hành vi thông thầu ở Việt Nam thường kết nối với hành vi tham nhũng? Trong những trường hợp như vậy, liệu rằng cơ quan cạnh tranh có gặp phải thách thức gì trong việc điều tra và xử lý những hành vi này không?

7. What has been done so far to introduce the leniency program in Vietnam? What place is there for leniency program in the Vietnamese competition law?

Công tác chuẩn bị cho việc thực thi chính sách khoan hồng tại Việt Nam đã được triển khai đến đâu? Liệu rằng chương trình khoan hồng sẽ được quy định trong luật cạnh tranh Việt Nam?

8. Does the proposed leniency program insulate bid riggers from debarment penalties and criminal sanctions?

Chương trình khoan hồng dự kiến có giúp các nhà thầu vi phạm thoát khỏi chế tài cấm tham gia đấu thầu theo Luật đấu thầu và chế tài hình sự theo quy định của BLHS?

9. What are the challenges to implementing the leniency program in Vietnam?

Những thách thức trong việc thực thi chính sách khoan hồng tại Việt Nam là gì?

10. The introduction of criminal sanctions on individuals involved in bid rigging collusion may raise the issue of cooperation between VCA and criminal law enforcement authorities. What are the challenges and opportunities arising from this relationship? What should be done to deal with challenges if any?

BLHS sửa đổi với việc áp dụng chế tài hình sự cho cá nhân thực hiện hành vi thông thầu đã đặt ra vấn đề về mối quan hệ giữa cơ quan quản lý cạnh tranh và cơ quan tố tụng hình sự. Đây là cơ hội và thách thức phát sinh từ mối quan hệ này?

11. In the first seven drafts, bid rigging offense was stipulated as a competition infringement. However, from the time the draft 8 was introduced to the time the Penal Code was officially adopted, bid rigging crime was no longer recognised as a competition law infringement. Instead, it was considered as a public procurement law offense under the Article 222. What are the possible rationales for this shift? Does this challenge competition authorities in terms of bid rigging enforcement?

Trong 7 bản dự thảo BLHS, thông thầu được xếp vào hành vi vi phạm pháp luật cạnh tranh. Tuy nhiên, từ lần dự thảo thứ 8 đến khi Luật được ban hành, thông thầu được xếp vào tội phạm vi phạm pháp luật về đấu thầu tại Điều 222. Đây là lý do cho sự thay đổi này? Sự thay đổi này có ảnh hưởng gì đến việc điều tra xử lý cạnh tranh của cơ quan cạnh tranh không?

12. To what extent do you satisfy with the legal framework of criminalising big rigging under the Article 222 of the Penal Code?

Mức độ hài lòng của anh chị về quy định hình sự hóa tội phạm thông thầu theo Điều 222 của BLHS?

13. Given that there have been no bid rigging cases either investigated by VCA or adjudicated by VCC, do you think that the Vietnamese public market is exempt from bid rigging conspiracies? If not, what can be explained for the failure of the current anti-bid rigging enforcement mechanism?

Hiện nay chưa có hành vi thông thầu nào được xử lý bởi cơ quan quản lý cạnh tranh tại Việt nam. Có phải hành vi này không phổ biến tại thị trường mua sắm công Việt Nam? Nếu không phải, theo anh (chị), điều gì có thể lý giải cho vấn đề này?

Group II: Interview questions for Vietnamese government officers from public procurement Administration agency

1. Do you think that unnecessary and excessive selection criteria are quite common in the Vietnamese public procurement market? What is the rationale behind this practice?

Anh chị có cho rằng việc đưa ra các tiêu chí không cần thiết và không phù hợp trong việc lựa chọn nhà thầu (dẫn đến việc làm giảm đi số lượng nhà thầu tham dự) là khá phổ biến tại Việt Nam? Đây là lý do của hiện tượng này?

2. Is it popular for investors to give priorities to certain local bidders by imposing criteria fitting only such local bidders?

Việc chủ đầu tư ưu tiên nhất định đối với các nhà thầu địa phương (thông qua việc đưa ra một số tiêu chí nhất định chỉ phù hợp đối với một hoặc một số nhà thầu địa phương) là có phổ biến không?

3. Do you think joint bidding and sub-contracting may result in bid rigging? Are there any possible methods to detect bid rigging in these cases?

Anh chị có cho rằng trường hợp liên danh thầu và cơ chế thầu phụ có thể có khả năng là kết quả của sự thông đồng trong đấu thầu giữa các doanh nghiệp không? Có cách nào có thể nhận dạng dấu hiệu hành vi thông thầu trong trường hợp này không?

4. Can you tell in which kind of public tender pre-bid clarification meeting is organised? Is it frequent?

Theo kinh nghiệm của anh chị, việc tổ chức hội nghị tiền đấu thầu thường diễn ra trong những gói thầu nào? Việc tổ chức những hội nghị này có phổ biến không?

5. The Certificate of Independent Bid determination (CIBD) has been widely used by the majority of public procurement authorities (including the US, the UK and Canada) and highly recommended by OECD as a pre-emptive method to prevent bid rigging. This certificate is designed to require bidders to certify that they bid independently without any consultation or communication with other competitors for the purpose of restricting competition. However, such certificate has not been introduced in Vietnam. What are the prospects for introducing this tool in Vietnam?

Cam kết đấu thầu độc lập (CIBD) đã được sử dụng rộng rãi bởi nhiều cơ quan mua sắm công trên thế giới, gồm cả Hoa Kỳ, Anh, Canada và đang được đề xuất sử dụng bởi OECD như một phương pháp phòng ngừa thông thầu. Cam kết này được thiết kế để xác nhận rằng nhà thầu đã tham gia đấu thầu độc lập mà không có sự tham vấn hoặc giao tiếp với các nhà thầu khác với mục đích hạn chế cạnh tranh. Tuy nhiên, cam kết này vẫn chưa được giới thiệu ở Việt Nam. Theo anh chị, việc áp dụng công cụ này có giúp giảm thông thầu tại Việt Nam?

6. What challenges public procurers may face in detecting bid rigging collusion?

Đâu là thách thức mà các đơn vị mua sắm công đối mặt trong việc phát hiện hành vi thông thầu?

7. Theo anh chị, để ngăn ngừa hành vi thông thầu trong hoạt động mua sắm công, những giải pháp nào có thể được đưa ra?

8. Self-cleaning mechanism⁶⁰³ under the EU public procurement legislation is regarded as an effective tool to fight bid rigging and enhance competition as it may increase the number of eligible tenderers, especially in the industries where there are a limited number of bidders. Should we apply this mechanism to harmonize the current strict debarment policy?

Cơ chế tự sửa chữa trong pháp luật mua sắm công của EU được đánh giá là một công cụ hiệu quả để chống thông thầu và thúc đẩy cạnh tranh bởi vì nó có thể tăng số lượng nhà thầu đủ tiêu chuẩn tham gia dự thầu, đặc biệt trong bối cảnh mà số lượng nhà thầu trong một số lĩnh vực là hạn chế. Liệu chúng ta có nên áp dụng cơ chế này để hỗ trợ cùng cơ chế cấm tham gia đấu thầu theo quy định hiện hành?⁶⁰⁴

⁶⁰³ The concept of self-cleaning refers to the probability that bidders, irrespective of their past misconducts, may avoid the debarment and still be eligible for participating in the public procurement if they can meet the strict requirements to ensure that their previous infringement will not be recommitted in the future. According to the EU Directive 2014/24, there have three main conditions that enterprises have to satisfy if they apply for the self-cleaning mechanism. It includes:

- (1) Compensate the damage caused
- (2) Clarify the fact and circumstances
- (3) Take concrete technical, organisational and personnel measures to prevent the repeat offences

⁶⁰⁴ What do you understand by the term ‘compliance’ and what are the prospects for implementation of this system in the Vietnamese public procurement arena?

Anh chị hiểu như thế nào về thuật ngữ ‘compliance’ (tuân thủ pháp luật) và liệu rằng việc thực thi chương trình này có phù hợp trong lĩnh vực mua sắm công tại Việt Nam?

9. To what extent do you agree that the competence to fight bid rigging should be entrusted to competition authority only?

Anh chị đồng ý đến mức độ nào khi có ý kiến cho rằng thẩm quyền xử lý hành vi thông thầu nên chỉ được giao cho cơ quan quản lý cạnh tranh?

10. There have been five bid rigging cases adjudicated by public procurers and all of cases detected in An Giang province only. Do you believe this number accurately reflects the incidence of bid rigging in Vietnam?

Hiện có 5 quyết định xử lý hành vi thông thầu và các quyết định này được ban hành tại tỉnh An Giang. Anh/chị có cho rằng con số này phản ánh chính xác mức độ thông thầu tại Việt Nam?

11. Are bid rigging practices prevalent in state-owned companies or private-owned companies?

Theo kinh nghiệm của anh chị, hành vi thông thầu diễn ra phổ biến ở các doanh nghiệp nhà nước hay các doanh nghiệp ngoài quốc doanh?

Group III: Interview questions for Committee members drafting the revised Penal Code

1. What are the reasons for introducing the penal sanction for bid rigging under the revised criminal law?

Đâu là nguyên nhân của việc giới thiệu chế tài hình sự đối với hành vi thông thầu trong Bộ luật hình sự sửa đổi?

2. It is claimed that the significant movement towards criminalisation of cartel activity across a number of jurisdictions is a ‘top-down’ rather than ‘bottom-up’ process, in the sense that it has been led by transnational enforcement interests rather than a more wide-spread popular belief in a level of delinquency justifying the moral opprobrium of the criminal law. To what extent do you agree with this statement from the Vietnamese context?

Có quan điểm cho rằng việc hình sự hóa các thỏa thuận hạn chế cạnh tranh, bao gồm hành vi thông thầu là một quá trình ‘từ trên xuống’ thay vì là một quá trình ‘từ dưới lên’. Điều này có nghĩa là việc hình sự hóa là kết quả của xu hướng thực thi pháp luật xuyên quốc gia, hay nói cách khác là sản phẩm của chính sách chứ không phải là sự thay đổi trong nhận thức chung của xã hội về hành vi nguy hiểm của tội phạm. Anh chị đồng ý về quan điểm này đến mức nào?

3. In the first seven drafts, bid rigging offense was stipulated as a competition infringement. However, from the time the draft 8 was introduced to the time the Penal Code was officially adopted, bid rigging crime was no longer recognised as a competition law infringement. Instead, it was considered as a public procurement law offense under the Article 222. What are the rationales for this shift?

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4. What are the reasons for the absence of criminal sanctions on corporates involved in bid rigging while these sanctions on corporates still imposed on other cartels?

Đây là nguyên nhân cho sự vắng mặt của chế tài hình sự đối với pháp nhân liên quan đến hành vi thông thầu trong khi chế tài cho đối tượng này vẫn áp dụng đối với các thỏa thuận hạn chế cạnh tranh khác?

5. How can be the term ‘individual’ in Article 222 understood? Does it include any employees in companies engaging in bid rigging or it is just limited to executives and management members of bidding companies?

Cụm từ ‘Người nào’ trong Điều 222 được hiểu như thế nào? Cụm từ này có bao gồm tất cả các nhân viên trong công ty có tham gia vào hoạt động thông thầu hay chỉ giới hạn ở cấp lãnh đạo/ điều hành doanh nghiệp?

6. In the case where bid rigging damage caused is under the threshold of 100 million VND, individuals would be liable for criminal responsibility only when they were disciplined for the same offence before. One may argue that this regulation excludes the subject of bid rigging offence, which are individuals in bidding companies (not the public officials) as disciplinary sanctions are only applied to public officials. To what extent do you agree to this argument?

Trong trường hợp thiệt hại gây ra dưới 100 triệu VND, cá nhân chỉ bị xử lý hình sự nếu họ đã bị xử lý kỷ luật về hành vi này. Tuy nhiên, có ý kiến cho rằng chủ thể của hành vi thông thầu là cá nhân trong các doanh nghiệp, không phải là công chức nhà nước nên không thể bị xử lý kỷ luật như quy định. Do vậy, vô hình chung quy định này đã loại trừ khả năng chủ thể bị xử

lý hình sự nếu mức phạt dưới 100 triệu VND. Anh chị đồng ý đến mức độ nào về quan điểm này?

7. In the decision regarding bid rigging collusion 2014 adopted by the President of An Giang province's people's committee, the suppliers of school equipment submitted their bids with identical spelling mistakes and the same formats. Although no direct evidence of a bid rigging agreement had been proved, it was submitted that there existed bid rigging collusion based on the identical patterns in bidding documents. In the absence of direct evidences, could competent authorities use the circumstantial evidence to prove bid rigging case?

Trong một quyết định về xử lý hành vi thông thầu năm 2014 của UBND tỉnh An Giang, các nhà thầu cung ứng thiết bị trường học đã nộp hồ sơ mời thầu giống nhau ở cả về hình thức lẫn những lỗi chính tả. Mặc dầu không có một bằng chứng trực tiếp về hành vi này được chứng minh, cơ quan có thẩm quyền cho rằng có sự tồn tại hành vi thông thầu dựa trên những yếu tố trùng khớp với nhau trong hồ sơ mời thầu. Trong trường hợp vắng mặt những bằng chứng trực tiếp, liệu rằng cơ quan tố tụng hình sự có thể sử dụng những bằng chứng theo hoàn cảnh để chứng minh sự tồn tại của hành vi thông thầu không?

8. Given that no bid rigging cases has been investigated by Competition authorities and a few were adjudicated by public procurement authorities, do you believe that the introduction of criminal sanctions will enhance the enforcement against bid rigging?

Thực tế là chưa có vụ việc thông thầu nào được điều tra và xử lý bởi cơ quan quản lý cạnh tranh, chỉ có một số ít vụ được xử lý bởi cơ quan hành chính địa phương. Anh chị có cho rằng việc giới thiệu chế tài hình sự sẽ giúp cải thiện việc xử lý hành vi thông thầu?

9. To what extent do you satisfy with the legal framework of criminalising big rigging under the Article 222 of the Penal Code?

Mức độ hài lòng của anh chị về quy định hình sự hóa tội phạm thông thầu theo Điều 222 của BLHS?

Group IV: Interview questions for the Vietnam's Association of Construction Contractors

1. There have been five bid rigging cases adjudicated by public procurers and all of cases detected in An Giang province only. Do you believe this number accurately reflects the incidence of bid rigging in Vietnam?

Hiện có 5 quyết định xử lý hành vi thông thầu và các quyết định này được ban hành tại tỉnh An Giang. Anh/chị có cho rằng con số này phản ánh chính xác mức độ thông thầu tại Việt Nam?

2. How big is the problem of bid rigging in Vietnam? What tools could be used to measure it?

Hành vi thông thầu phổ biến như thế nào tại Việt Nam? Công cụ nào có thể được sử dụng để đo lường hành vi này?

3. Are bid rigging practices prevalent in state-owned companies or private-owned companies?

Hành vi thông thầu diễn ra phổ biến ở các doanh nghiệp nhà nước hay các doanh nghiệp ngoài quốc doanh?

4. To what extent do you agree that bid rigging conspiracies in Vietnam frequently involves corruption? Does it challenge public procurement authorities in detecting and investigating bid rigging?

Anh chị đồng ý đến mức độ nào khi có quan điểm cho rằng hành vi thông thầu ở Việt Nam thường kết nối với hành vi tham nhũng? Trong trường hợp có sự kết nối, điều này có gây khó khăn gì trong quá trình phát hiện và điều tra hành vi thông thầu không?

5. Do you think that unnecessary and excessive selection criteria are quite common in the Vietnamese public procurement market? What is the rationale behind this practice?

Anh chị có cho rằng việc đưa ra các tiêu chí không cần thiết và không phù hợp trong việc lựa chọn nhà thầu (dẫn đến việc làm giảm đi số lượng nhà thầu tham dự) là khá phổ biến tại Việt Nam? Đây là lý do của hiện tượng này?

6. Anh chị có cho rằng trường hợp liên danh thầu và cơ chế thầu phụ có thể có khả năng là kết quả của sự thông đồng trong đấu thầu giữa các doanh nghiệp không?

7. The Certificate of Independent Bid determination (CIBD) has been widely used by the majority of public procurement authorities (including the US, the UK and Canada) and highly

recommended by OECD as a pre-emptive method to prevent bid rigging. This certificate is designed to require bidders to certify that they bid independently without any consultation or communication with other competitors for the purpose of restricting competition. However, such certificate has not been introduced in Vietnam. What are the prospects for introducing this tool in Vietnam?

Cam kết đấu thầu độc lập (CIBD) đã được sử dụng rộng rãi bởi nhiều cơ quan mua sắm công trên thế giới, gồm cả Hoa Kỳ, Anh, Canada và đang được đề xuất sử dụng bởi OECD như một phương pháp phòng ngừa thông thầu. Cam kết này được thiết kế để xác nhận rằng nhà thầu đã tham gia đấu thầu độc lập mà không có sự tham vấn hoặc giao tiếp với các nhà thầu khác với mục đích hạn chế cạnh tranh. Tuy nhiên, cam kết này vẫn chưa được giới thiệu ở Việt Nam. Theo anh chị, việc áp dụng công cụ này có triển vọng trong tương lai tại Việt Nam không?

8. What challenges public procurers may face in detecting bid rigging collusion?

Đâu là thách thức mà các đơn vị mua sắm công đối mặt trong việc phát hiện hành vi thông thầu?

Group V: Interview questions for Vietnamese judges

1. With regard to private enforcement of bid rigging in Vietnam, do you think that the courts could hear stand-alone cases or just handle follow-on competition damages claims?

Trong trường hợp một bên khởi kiện ra Tòa yêu cầu bồi thường thiệt hại do hành vi thông thầu gây ra, theo anh chị, việc Hội đồng cạnh tranh xử lý và kết luận vụ việc có ảnh hưởng đến việc ra quyết định thụ lý vụ việc không?

Hay nói cách khác, nếu vụ việc chưa được xử lý, hoặc đang xử lý nhưng chưa có quyết định của Hội đồng cạnh tranh, thì hướng xử lý của Tòa án trong trường hợp nhận đơn kiện của các bên liên quan như thế nào?

2. In the case of follow-on private actions, should decisions adjudicated by the VCC be binding on the courts?

Quyết định của Hội đồng xử lý vụ việc cạnh tranh về việc tồn tại hành vi thông thầu có được Tòa án công nhận không?

3. What are challenges for the future of private enforcement in bid rigging cases in Vietnam?

Những thách thức nào được đặt ra đối với thực thi cơ chế bồi thường thiệt hại do hành vi thông thầu gây ra tại Việt Nam?

4. It is claimed that the significant movement towards criminalisation of cartel activity across a number of jurisdictions is a ‘top-down’ rather than ‘bottom-up’ process, in the sense that it has been led by transnational enforcement interests rather than a more wide-spread popular belief in a level of delinquency justifying the moral opprobrium of the criminal law. To what extent do you agree with this statement from the Vietnamese context?

Có quan điểm cho rằng việc hình sự hóa các thỏa thuận hạn chế cạnh tranh, bao gồm hành vi thông thầu là một quá trình ‘từ trên xuống’ thay vì là một quá trình ‘từ dưới lên’. Điều này có nghĩa là việc hình sự hóa là kết quả của xu hướng thực thi pháp luật xuyên quốc gia, hay nói cách khác là sản phẩm của chính sách chứ không phải là sự thay đổi trong nhận thức chung của xã hội về hành vi nguy hiểm của tội phạm. Anh chị đồng ý về quan điểm này đến mức nào?

5. To what extent do you satisfy with the legal framework of criminalising big rigging under the Article 222 of the Penal Code?

Mức độ hài lòng của anh chị về quy định hình sự hóa tội phạm thông thầu theo Điều 222 của BLHS?

Group VI: Interview questions for Vietnamese Scholars

1. In the decision regarding bid rigging collusion 2014 adopted by the President of An Giang province’s people’s committee, the suppliers of school equipment submitted their bids with identical spelling mistakes and the same formats. Although no direct evidence of a bid rigging agreement had been proved, it was submitted that there existed bid rigging collusion based on the identical patterns in bidding documents. In the absence of direct evidences, could competent authorities use the circumstantial evidence to prove bid rigging case?

Trong một quyết định về xử lý hành vi thông thầu năm 2014 của UBND tỉnh An Giang, các nhà thầu cung ứng thiết bị trường học đã nộp hồ sơ mời thầu giống nhau ở cả về hình thức lẫn những lỗi chính tả. Mặc dầu không có một bằng chứng trực tiếp về hành vi này được chứng minh, cơ quan có thẩm quyền cho rằng có sự tồn tại hành vi thông thầu dựa trên những yếu tố

trùng khớp với nhau trong hồ sơ mời thầu. Trong trường hợp vắng mặt những bằng chứng trực tiếp, liệu rằng cơ quan tố tụng hình sự có thể sử dụng những bằng chứng theo hoàn cảnh để chứng minh sự tồn tại của hành vi thông thầu không?

2. The fact that bid rigging can be investigated by both the VCA and public procurement authority make the Vietnamese anti-bid rigging mechanism unique. What are the advantages and disadvantages of this mechanism?

Hành vi thông thầu có thể được xử lý bởi cả cơ quan quản lý cạnh tranh và cơ quan mua sắm công, điều này mang đến nét đặc trưng trong cơ chế xử lý hành vi này tại Việt Nam. Đây là điểm thuận lợi và bất lợi từ cơ chế này?

3. Should competence to investigate bid rigging cases be entrusted to either VCA or public procurement authorities?

Thẩm quyền điều tra xử lý hành vi thông thầu có nên được giao về hoặc là cho cơ quan cạnh tranh hoặc là cơ quan mua sắm công có thẩm quyền hay không?

4. To what extent do you agree that bid rigging conspiracies in Vietnam frequently involves corruption? Does it challenge public procurement authorities in detecting and investigating bid rigging?

Anh chị đồng ý đến mức độ nào khi có quan điểm cho rằng hành vi thông thầu ở Việt Nam thường kết nối với hành vi tham nhũng? Trong trường hợp có sự kết nối, điều này có gây khó khăn gì trong quá trình phát hiện và điều tra hành vi thông thầu không?

5. Given that there have been no bid rigging cases either investigated by VCA or adjudicated by VCC, do you think that the Vietnamese public market is exempt from bid rigging conspiracies? If not, what can be explained for the failure of the current anti-bid rigging enforcement mechanism?

Hiện nay chưa có hành vi thông thầu nào được xử lý bởi cơ quan quản lý cạnh tranh tại Việt Nam. Có phải hành vi này không phổ biến tại thị trường mua sắm công Việt Nam? Nếu không phải, theo anh (chị), điều gì có thể lý giải cho vấn đề này?

6. Given that no bid rigging cases has been investigated by Competition authorities and a few were adjudicated by public procurement authorities, do you believe that the introduction of criminal sanctions will enhance the enforcement against bid rigging?

Thực tế là chưa có vụ việc thông thầu nào được điều tra và xử lý bởi cơ quan quản lý cạnh tranh, chỉ có một số ít vụ được xử lý bởi cơ quan hành chính địa phương. Anh chị có cho rằng việc giới thiệu chế tài hình sự sẽ giúp cải thiện việc xử lý hành vi thông thầu?

7. It is claimed that the significant movement towards criminalisation of cartel activity across a number of jurisdictions is a ‘top-down’ rather than ‘bottom-up’ process, in the sense that it has been led by transnational enforcement interests rather than a more wide-spread popular belief in a level of delinquency justifying the moral opprobrium of the criminal law. To what extent do you agree with this statement from the Vietnamese context?

Có quan điểm cho rằng việc hình sự hóa các thỏa thuận hạn chế cạnh tranh, bao gồm hành vi thông thầu là một quá trình ‘từ trên xuống’ thay vì là một quá trình ‘từ dưới lên’. Điều này có nghĩa là việc hình sự hóa là kết quả của xu hướng thực thi pháp luật xuyên quốc gia, hay nói cách khác là sản phẩm của chính sách chứ không phải là sự thay đổi trong nhận thức chung của xã hội về hành vi nguy hiểm của tội phạm. Anh chị đồng ý về quan điểm này đến mức nào?

8. To what extent do you satisfy with the legal framework of criminalising big rigging under the Article 222 of the Penal Code?

Mức độ hài lòng của anh chị về quy định hình sự hóa tội phạm thông thầu theo Điều 222 của BLHS?

9. To what extent do you agree that the leniency program should insulate applicants from criminal sanction and debarment sanction?

Anh chị đồng ý đến mức độ nào với quan điểm rằng chương trình khoan hồng nên giải thoát trách nhiệm hình sự và chế tài cấm tham gia đấu thầu từ pháp luật đấu thầu?

10. What are the challenges to implementing the leniency program in Vietnam?

Những thách thức trong việc thực thi chính sách khoan hồng tại Việt Nam là gì?

11. The introduction of criminal sanctions on individuals involved in bid rigging collusion may raise the issue of cooperation between VCA and criminal law enforcement authorities.

What are the challenges and opportunities arising from this relationship? What should be done to deal with challenges if any?

12. With regard to private enforcement of bid rigging in Vietnam, do you think that the courts could hear stand-alone cases or just handle follow-on competition damages claims?

Trong trường hợp một bên khởi kiện ra Tòa yêu cầu bồi thường thiệt hại do hành vi thông thầu gây ra, theo anh chị, việc Hội đồng cạnh tranh xử lý và kết luận vụ việc có ảnh hưởng đến việc ra quyết định thụ lý vụ việc không?

Hay nói cách khác, nếu vụ việc chưa được xử lý, hoặc đang xử lý nhưng chưa có quyết định của Hội đồng cạnh tranh, thì hướng xử lý của Tòa án trong trường hợp nhận đơn kiện của các bên liên quan như thế nào?

13. In the case of follow-on private actions, should decisions adjudicated by the VCC be binding on the courts?

Quyết định của Hội đồng xử lý vụ việc cạnh tranh về việc tồn tại hành vi thông thầu có được Tòa án công nhận không?

14. What are challenges for the future of private enforcement in bid rigging cases in Vietnam?

Những thách thức nào được đặt ra đối với thực thi cơ chế bồi thường thiệt hại do hành vi thông thầu gây ra tại Việt Nam?