THE APPLICATION OF COMPETITION LAW TO VIETNAM'S STATE MONOPOLIES: A COMPARATIVE PERSPECTIVE

Submitted by
TRAN THANG LONG
LL.B, LL.M (*Hochiminh City Law University)*

A thesis submitted in total fulfilment
of the requirements for the degree of
Doctor of Philosophy

School of Law
Faculty of Law and Management

La Trobe University
Bundoora, Victoria 3086
Australia

May 2011

TABLE OF CONTENTS

ABBREVIATIONS

ACCC	Australian Competition and Consumer Commission
ADB	Asian Development Bank
CCA	*Competition and Consumer Act 2010* (Cth) of Australia
CIEM	Central Institute for Economic Management of Vietnam
CPA	Competition Principles Agreement of the Commonwealth of Australia
CPV	Communist Party of Vietnam
CUTS	Consumer Unity & Trust Society
CUTS-CIER	CUTS Centre for Competition, Investment and Economic Regulation
DOJ	Department of Justice of the United States of America
EC	European Community
ECJ	European Court of Justice
ECMR	EC Merger Control
EG	Economic Group
EU	European Union
EVN	Electricity of Vietnam
FTC	Federal Trade Commission of the United States of America
GBEs	Government Business Enterprises
GC	General Corporation
ICN	International Competition Network
IMF	International Monetary Fund
JPA	Jetstar Pacific Airlines
M&As	Mergers and Acquisitions
MOIT	Ministry of Industry and Trade of Vietnam
NCP	National Competition Policy
OECD	Organisation for Economic Co-operation and Development
PA	Pacific Airlines
PE	Public Enterprise
SCP	Structure – Conduct – Performance
SIDA	Swedish International Development Cooperation Agency
SOEs	State-Owned Enterprises
SPT	Saigon Postel Corporation

TEC	Treaty Establising the European Community
TFEU	Treaty on the Functioning of the European Union
TNC	Transnational Corporations
TPA	*Trade Practices Act 1974* of the Commonwealth of Australia
UN	United Nations
UNCTAD	United Nations Conference on Trade and Development
UNDP	United Nations Development Programme
US	United States
USAID	United States Agency for International Development
USPS	United States Postal Service
USVTC	US-Vietnam Trade Council
VCAD	Vietnam Competiton Administration Department
VCC	Vietnam Competition Council
VINAPCO	Vietnam Aviation Petrol Company
VINASHIN	Vietnam Shipbuilding Industry Group
VNA	Vietnam Airlines
VNPT	Vietnam Post and Telecommunications Group
WB	World Bank
WTO	World Trade Organisation

ABSTRACT

Unlike other countries, monopolistic entities in Vietnam - mostly state firms - were established by administrative decisions. They are criticised for having detrimental effects on competition and undermining a healthy environment for doing business. Although it is stipulated that all anti-competitive behaviour must be fairly regulated, the application of competition rules to state monopolies is problematic. This is reflected in the poor enforcement of competition law and the limited intervention of the competition authority in cases involving state monopolies.

The thesis asks how competition law can be applied to anti-competitive behaviour committed by state monopolies. It offers suggestions as to what should be done in terms of law and enforcement mechanisms, so that the competition law can effectively address anti-competitive behaviour of state monopolies in Vietnam.

This thesis concludes that state monopolies exist as an inevitable trend to support the political determination of Vietnam's Communist Party. This, however, facilitates the ability of state monopolies to engage in monopolistic behaviour and creates obstacles for the application of competition law in Vietnam. There are shortcomings in the Law and the law should be modified as outlined in this thesis.

Finally, this thesis outlines directions for future reform regarding the application of competition law to state monopolies. In particular, Vietnam's competition authorities should be reformed to become more independent and accountable. There should be a number of modifications with regard to current anti-monopoly provisions. Finally, consideration of 'non law-matter' issues will be another factor contributing to the effective application of competition law to state monopolies.[1]

[1] This thesis has been prepared in conformity with the La Trobe University Handbook for Candidates and Supervisors for Masters Degrees by Reseach and Doctoral Degrees (Schedule B). Referencing and footnotes are in accordance with the legal citation style recommended in the *Australian Guide to Legal Citation* (Melbourne University Law Review Association Inc., 3rd ed, 2010).

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 or any other degree or diploma.

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

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

Date Signature

ACKNOWLEDGEMENTS

I am in debt to many people who have consistently supported me to complete this thesis.

I owe thanks to my family, wife and sons, for their sacrifices and devotion to my study. I am grateful to my parents who always beside me in spirit during my time in Australia.

I would like to express my special thanks to my supervisors for their whole-hearted dedication to my thesis. For Prof. Chen Jianfu, I am much indebted to you for your long time supervision, motivation and support given to me at difficult periods of my candidature. I am very thankful to David Wishart, a friendly supervisor who started working with the second stage of my thesis. Your hard working contribution and brilliant guidance keep me on track. I am grateful to Prof. Gordon Walker for your comments and valuable advice. For all of you, everything you have done for me is much more than supervisor's responsibilities. My special thanks goes to Gabi Duigu, for her enthusiastic struggle with my language and writing styles.

I would like to thank my home university, Hochiminh City University of Law and particularly Vietnam's Ministry of Education (MOET) for their facilitation and funding which gave me the opportunity to study in Australia. My particular thanks goes to La Trobe Law School and staff, for their support with facilities. A special appreciation also goes to my colleagues and friends at La Trobe University, who shared with me difficulties and experiences while working on the thesis.

Chapter 1

INTRODUCTION

1.1 Background

Monopolistic market structures and monopolistic behaviour resulting from the participation of state monopolies in the market are unexceptional in both developing and transitional countries. The concept of 'state monopoly', however, varies depending on how governments view their role in the economy. In general, countries regard state monopolies existing in the market as a normal phenomenon and as a positive factor contributing to the successful implementation of state policies. Many reasons can be given for preserving state monopolies as business entities and for the need to support them in many forms.

However, it appears that a market with state monopoly participation faces problematic issues, for example, the distortion of market forces. The market is vulnerable to anti-competitive behaviour of state monopolies which is easy to commit and whose adverse effects on a competitive environment are difficult to remove completely. A competition law in particular and competition policy in general, are the most powerful and effective instruments. At present, in many countries a competition law has been adopted,[2] covering the market behaviour of state monopolies under their regulation. However, such regulation is always exposed to a number of difficulties, because the intertwining relationship between the monopolies and state policy remains an important characteristic.

In Vietnam, such concepts as competition, competition law and the regulation of market activities by means of competition law have been concerns in Vietnam since the country launched the Doi Moi (Renewal) program in 1986. However, monopoly and anti-monopoly law were new concepts. It was not until 2004 that the anti-monopoly issue and the necessity to control monopolistic behaviour received much attention. Whether monopolistic behaviour of state monopolies should be subject to competition rules was a

[2] As highlighted in the UNCTAD Model Law on Competition in 2007, there were 113 countries and regional groupings that had adopted or were in the process of adopting competition legislation at the time. See UNCTAD, *Model Law on Competition* (TD/RBP/CONF.5/7/Rev.3, United Nations, 2007) <http://www.unctad.org/en/docs/tdrbpconf5d7rev3_en.pdf>.

topical debate during the drafting process of the first competition law. While the significance of a competition law in Vietnam was strongly advocated, the question of whether it should extend its coverage to state monopolies and to what extent competition rules were applicable to them, was met with hesitation from the ministries and state firms. It was also claimed that a market economy and its features had just been introduced into Vietnam and the priority of the Vietnamese government in the first period was to set up the necessary legal framework for a newly adopted market economy. In this context, the adoption of the *Competition Law* in 2004 was seen as a milestone, showing the determination of Vietnam's government to create a fair and healthy competitive environment. At the same time, it set the foundation for a long-term discussion regarding how competition law applies to state monopolies.

1.2 Monopolistic market structure in Vietnam

The long lasting reform of state-owned enterprises (SOEs) launched after Doi Moi brought remarkable changes and introduced new concepts and guidelines for the revision of this sector. In parallel with a reduction in their number, many SOEs were restructured into a series of state corporations and later state economic groups, each of which consisted of a significant number of state firms in a particular industrial sector. Benefiting from that reform, they took advantage of new business opportunities to expand into new areas and were able to turn into various forms of monopoly or oligopoly.

Unlike the practice in other countries, monopolistic firms in Vietnam were not developed in a traditional way. In general, a firm's monopoly position in the market is attained by its enlargement of economies of scale and scope, which are the results of the concentration and accumulation of capital or of success in competition.[3] Monopolistic entities in Vietnam, in fact, were mostly state firms established by administrative decisions. This situation was also contributed to by the limited accumulated large-scale capital and assets of the private firms and the strict control of foreign investment in the early years after Doi Moi. Consequently, the monopolistic market structure in Vietnam is mostly a matter of state monopolies, because there were no differences between the two concepts 'state monopoly' and 'natural monopoly' and all natural monopoly industries were previously

[3] For example, according to the US Supreme Court in *Verizon v Trinko*, a monopoly position of a firm may be achieved through 'growth or development as a consequence of a superior product, business acumen, or historic accident'. See *Verizon Communications Inc v Law Offices of Curtis V Trinko*, 540 US 398, 407 (2004).

in the hands of the state.

The administrative characteristics of Vietnam's state monopolies can be illustrated by their original development. In fact they were SOEs which were previously under the authorities of the relevant ministries. State monopolies could be found in all core industries, because each industry had its own general corporation, that later served as the core of a state monopoly in its industry.

This situation and the problems of state monopolies in Vietnam could be justified for both theoretical and practical reasons. From the theoretical side, it was said that state monopolies should exist as an inevitable trend and to be in conformity with the state's socialist orientation. A state monopoly presence could also be advocated as a necessity to guarantee a sufficient supply of public goods. Moreover, they were believed to be useful tools for the state to intervene in the economy when needed. Finally, the existence of large and powerful state firms was crucial to support the pace of Vietnam's international economic integration.

From the practical side, the close link between Vietnam's state monopolies and state management bodies was seen as an important factor of which both sides could make use to pursue their own interests. On the one hand, state monopolies found it beneficial to maintain a close relationship with their former state management bodies. This allowed them to receive direct and indirect support, legislative protection and administrative barriers to market entry, while it enabled them to gain advantages from lobbying in the decision and legislative making process. The performance of state monopolies remains connected to the direction and guidelines of state management bodies via chief personnel assigned from state officers. On the other hand, Vietnam's policy makers, government and local authorities and the industries themselves, found it necessary to support state monopolies in exchange for their support. They exchanged their role from that of an 'authority' to that of a 'sponsor' of state monopolies operating under their auspices. Hence, state management agencies could serve as 'representatives' for state monopolies, while they in turn played an active role as 'interest groups'.

1.3 Problems

Despite their considerable contributions to the development of Vietnam's economy, there have been growing concerns regarding the operation and market behaviour of state monopolies. In recent times the formation of state economic groups, their performance and their abuses of market dominance have become topical subjects.[4] There are two major issues regarding the state monopoly situation in Vietnam.

First, state monopolies are being criticized for having detrimental effects on competition and undermining a healthy environment for doing business. Anti-competitive behaviour of state monopolies can be commonly seen in many forms, such as agreements in restraint of competition with regard to price fixing, market allocation and limitation of products/services and collusion among state firms or between state firms and private ones in tendering. More obviously, the abuses of state monopolies in crucial sectors and essential facilities in terms of high prices, overcharging fees and market entry prevention are common phenomena. The recent transfer from 'state monopoly' to 'enterprise monopoly'[5] has given rise to another concern, because newly formed state economic groups have become 'giants' in the economy, seizing the most crucial areas and expanding into many fields other than their original ones. This is criticised as limiting the

[4] For example, there have recently been complaints and debates regarding the collapse of VINASHIN, a state economic group in the shipbuilding industry. See Pham Thanh Son, 'Tai Co cau Hay Giai cuu Vinashin?' [Vinashin: Restructuring or Saving?] (2010) *Tuan Vietnam* (Online) <http://www.tuanvietnam.net/2010-07-08-tai-co-cau-hay-giai-cuu-vinashin- ; Nguyen Ngoc Bich, 'Tong Cong ty Va Nhung Sai lam Do Thieu thon Kien thuc' [State General Corporations and Mistakes due to the Lack of Knowledge] (2010) *Tuan Vietnam* (Online) <http://tuanvietnam.net/2010-07-13-de-khong-con-mot-vinashin-2>; Nguyen Sy Phuong, 'Tap doan o Vietnam: Cach Giai cuu Khong Giong ai' [Economic Groups in Vietnam: A Strange Rescue] (2010) *Tuan Vietnam* (Online) <http://www.tuanvietnam.net/2010-07-15-tap-doan-o-vn-chi-su-do-vo-la-giong-the-gioi-tap-doan-voi-mau-thuan-luat-thi-truong-va-quan-ly-tap-trung>. Another concern is the expansion of investment in other than major areas of state monopolies. This is criticized as creating possibilities to abuse of market dominance and causing difficulties for other enterprises which wish to compete with them in specific areas. See Bui Van Huyen, *Xay dung va Phat trien Tap doan Kinh te o Viet Nam* [Building and Developing Economic Groups in Vietnam] (National Political Publishing House, 2008) 170; Pham Chi Lan, 'Tap doan Kinh te: Da Dac quyen Khong the Doi hoi Them Quyen'[Economic Groups Cannot Ask for More than Their Current Privileges] (2008) <http://tuanvietnam.vietnamnet.vn/tap-doan-kinh-te-da-dac-quyen-khong-the-doi-them-quyen>.

[5] In this context, the terms 'state monopoly' and 'enterprise monopoly' in Vietnam are two different concepts. 'State monopoly' refers to a situation in which the state controls everything and runs the whole economy. Enterprises are state-run enterprises and merely operate as constituents of a whole enterprise – the state. This situation existed during the command planning economy. 'State monopoly' continues under new forms as state-owned enterprises during the transitional period, where state-owned enterprises are given more autonomy but are still run by the state. 'Enterprise monopoly' refers to the situation where large state-owned enterprises turn into monopolists by means of administrative consolidation. They may behave like any other monopoly firms on the market while retaining a linkage with the state and operating under state policies.

participation of competitors and restraining the choice of customers and obviously creates grounds for the commitment of anti-competitive behaviour.

Second, although it is stipulated that all anti-competitive behaviour must be fairly regulated, the application of competition rules to state monopolies faces critical challenges. They include the possibility of conflicts with the state and political determination; the reference to public benefits and the national interest; the resistance by interest groups representing state monopolies; and the desire of state monopolies to maintain their current benefits. These difficulties also challenge the potential for competition law enforcement by Vietnam's competition authority.

The question is whether or not competition law is applicable to state monopolies. The core debating questions relate to the concept of 'leading role' of the state sector and whether such a leading role affects a healthy competitive environment. And if competition law can (or must) apply to them, how the fairness and objectiveness of the law can be ensured. This is important because they are among criteria of a rule of law. Hence, there is a strong need for a better regulatory framework to deal with the monopoly situation in Vietnam.

1.4 Research question

Even though the *Competition Law 2004* has been in force for 6 years, it has not proved to be an effective measure for the state to address anti-competitive behaviour in general and by state monopolies in particular. Few cases have been reported either by the firms suffering from monopoly behaviour or by Vietnam's competition authority. There is also a lack of research in this domain (both in the global and domestic spheres). While studies about competition law and anti-monopoly law are abundant in Vietnam, few of them deal with state monopolies.

This thesis sets out to find an answer to the question: *how competition law can be applied to anti-competitive behaviour of state monopolies.* In other words, it asks how anti-competitive behaviour of state monopolies will be monitored and regulated by means of competition law. The separate questions relating to this are addressed in separate chapters, from both a general perspective and that of Vietnam's specific context.

- **From a general perspective**

The discussion covers:

(1) What a 'state monopoly' is and how it is defined in law, as well as the features that distinguish it from other entities in the market. Related issues are clarified, such as: rationales for the existence of state monopolies in a market economy, the ways in which they are created, the forms of their participation in the market, the link with the state and the implementation of the state's policies.

(2) Whether or not competition rules are applicable to anti-competitive behaviour committed by state monopolies. It is necessary to see if and how the state uses competition law to deter detrimental behaviour to competition and to discipline them.

- **From Vietnam's particular perspective**

The discussion deals with:

(1) Whether anti-monopoly provisions have been set up/transplanted successfully to Vietnam and whether such provisions match Vietnam's conditions. Since such market economy concepts as competition, competition law, monopoly and anti-monopoly have recently been introduced to Vietnam, it is important to see if a competition law framework in Vietnam has been fully created. It is also significant to see if the existing competition law has anticipated and set out measures to deal with anti-competitive behaviour committed by state monopolies.

(2) What anti-competitive behaviour that state monopolies may conduct and whether these types of behaviour are of the same nature as others committed by private firms. This is vital for the determination of what measures that the competition authority may take that would be sufficient to discipline them. It is also necessary to identify how competition law can be applied to specific behaviour.

(3) Whether or not the necessary tools for the application of competition law to state monopolies' anti-competitive behaviour have been fully provided. This normally requires a set of anti-monopoly provisions to be adopted, a workable mechanism for their implementation and a powerful and independent competition authority.

(4) What should be done for the successful and effective regulation of anti-competitive behaviour of state monopolies other than merely 'law-matters'. This question will only be answered once the shortcomings and defects of the existing law are identified and the deep-rooted reasons for such limitations are explained. It involves social and political issues.

1.5 Methodology

The main methodologies used in this thesis are legal analysis, case study examination and a comparative study. In particular:

- Legal analysis is used to examine the anti-monopoly provisions in the EU competition law as well as those in Vietnam's *Competition Law 2004* and relevant legislations. It aims to provide a comprehensive understanding of what they are and how they work. When examining legal provisions in relevant areas under EU competition law it relies on the analyses and interpretations of Articles 101 and 102 of the *Treaty on the Functioning of the European Union* – TFEU (formerly Articles 81 and 82 of the *EC Treaty* - TEC) as well as the works of the Commission and the European Court of Justice. A similar approach is employed for a legal analysis of relevant provisions of other competition jurisdictions.

- A case study analysis is partly employed when examining selected cases involving Vietnam's state monopolies. This supports arguments and conclusions related to the state monopoly situation in Vietnam. However, it only reviews facts and discusses issues arising from these facts, rather than examining legal points from settled cases.

- A comparative study is utilised when discussing anti-monopoly provisions in the EU competition law and relevant provisions in the US, Australian and some other competition legislations.

1.6 Scope of the thesis

The scope of thesis is limited to the following:

- It is narrowed down particularly to anti-monopoly law. The thesis does not cover other aspects of competition law, i.e. laws regulating unfair practices or on

customers' rights protection.

- For this purpose, the thesis deals only with state monopolies. Although the state monopoly concept varies among countries, the interpretation of the concept that matches Vietnam's condition is employed here. Hence it does not cover similar forms of state monopolies, known as non-profit entities.

- It is concerned with anti-competitive behaviour committed by state monopolies. Hence it does not include market behaviour which is in nature not a restraint of competition or is subject to other legislations, i.e. commercial law or unfair competition law, even though they are also committed by state monopolies.

- For Vietnam, it focuses on provisions in the current *Competition Law 2004* and major sub-laws providing guidance to the Law. Hence it does not concentrate on other relevant laws concerning competition such as the *Enterprise Law, Investment Law, Criminal Law and Law on Securities*, although a number of provisions in these laws are referred to in the discussion.

- It refers to the competition legislation of selected countries: the EU competition law, respective provisions in the US antitrust law and Australian competition law.

1.7 Thesis outline

The thesis is structured in accordance with the research question and is designed to find answers for the research question. Hence it contains two major parts:

The first one deals with theoretical issues related to concepts of monopoly and state monopoly and how they are understood and work in Vietnam. The first part, consisting of chapters 2 to 4, is mostly concerned with the state monopoly concept, its origin and basis and developmental stages and concerns arising from the state monopoly situation. Besides, it introduces Vietnam's legislation in relation to these issues.

The second one, consisting of chapters 5 to 9, concentrates on anti-competitive behaviour committed by state monopolies and considers how competition law applies to these types of behaviour. Based on the EU competition law, the chapters in this part examine separate groups of anti-competitive behaviour, analysing how far Vietnam's competition law deals with them and establishing what should be done to apply competition law to state

monopolies effectively. Chapter 5 connects the two parts, dealing mostly with the underpinnings of competition law and the implications for the application of competition law.

- Chapter 1: *Introduction*

This chapter sets out the background for the whole thesis and is concerned with a number of fundamental issues: problems, research questions, methodology, scope, thesis structure and expected significance.

- Chapter 2*: The Concept of State Monopoly and its Features in the Context of Competition Law*

This chapter discusses the general understanding of the state monopoly concept and its features from the perspective of competition law. As 'state monopoly' is undefined and its understanding varies from country to country, this chapter seeks a workable concept to describe state monopoly in Vietnam's context. It borrows relevant concepts in the EU competition law and takes into account similar interpretations in the US and Australian competition laws as well as other selected countries. It analyses the concept of state monopoly in Vietnam's context and discusses the features of Vietnam's state monopolies.

- Chapter 3: *State Monopolies in Vietnam – Theoretical Foundation, Development and Debates*

This chapter studies the development of state monopolies in Vietnam and the theoretical foundation of their existence, including rationales for the formation of state monopolies, their developmental stages and debates and concerns with respect to state monopolies and the monopoly situation in Vietnam. Finally, this chapter demonstrates the state monopoly situation in Vietnam through studies of selected state monopolies in three typical areas: electricity, telecommunication and aviation. Each of these is provided with a brief description of the state monopoly concerned and its anti-competitive behaviour is illustrated by relevant cases.

- Chapter 4*: Overview of Anti-monopoly Provisions in Vietnam's Competition Law 2004*

This chapter reviews the developmental stages of Vietnam's competition legislation and

examines the objectives of the *Competition Law 2004*. It demonstrates the process of transplantation of competition law into Vietnam and explains the factors contributing to the choice of competition law model that matches Vietnam's perspective. It focuses on the rationales for the adoption of the current *Competition Law*. It also introduces the basic anti-monopoly provisions embodied in the Law, namely definitions and categorisations, scope and addressees of the law and the basic principles for the application of the anti-monopoly law.

- Chapter 5: *Fundamentals for the Application of Competition Rules to State Monopolies*

This chapter focuses on theoretical matters regarding the application of competition rules to state monopolies. It explains their reasons for committing anti-competitive behaviour based on the structure–conduct–performance paradigm. It also examines the specific characteristics of the state regulation of state monopolies' market behaviour. Then it discusses the fundamental principles of competition law that can apply to state monopolies and considers how and to what extent they may apply. It also studies the implications for the application of competition law to state monopolies and argues how they influence the application process. Throughout the discussion, the advantages, problems and constraints for the application of competition rules to state monopolies are analysed.

- Chapter 6: *The Application of Competition Rules to State Monopolies' Anti-competitive Agreements*

This chapter focuses specifically on anti-competitive agreements. It relies extensively on Article 101 *TFEU* (ex Article 81 TEC). Besides, similar provisions in the US Antitrust Law and Australian competition law are noted. The first part is a brief study of the basic principles, namely definition, categories and the assessment of illegality of agreements, sanctions and exemptions. The next part discusses anti-competitive agreements by state monopolies and points out the difficulties in applying competition rules to them. The last part presents a study on Vietnam's *Competition Law 2004* in dealing with anti-competitive agreements by state monopolies. Shortcomings in the current legislation regarding anti-competitive agreements are particularly analysed.

- Chapter 7: *The Application of Competition Rules to the Abuse of Dominant Positions by State Monopolies*

As in Chapter 6, the pattern of this chapter depends largely on Article 102 *TFEU* (ex Article 82 TEC). It consists of a brief study of basic principles, namely definition, the assessment of market dominance and abusive behaviour and procedures and remedies applied to such abuses. Similarly, relevant rules in the US antitrust law, EU and Australian competition laws are considered in this study.

This chapter identifies abusive behaviour that is commonly conducted by state monopolies and discusses how they make use of their dominant positions in such behaviour. It also contains a study of current legislation and how it applies to such behaviour of state monopolies in Vietnam, including shortcomings in the law.

- Chapter 8: *The Control of Economic Concentration of State Monopolies under Competition Law*

This chapter studies the control of economic concentration under competition law and the control in Vietnam which focuses particularly on that of state monopolies. The first part of this chapter is a discussion about basic issues related to economic concentration, i.e. concepts, classification and impact on competition. The second is concerned with EU merger control. The subsequent part examines the control of economic concentration with relation to state monopolies, i.e. reasons and motivations, common forms, arising problems and their impacts on competition. The last part deals specifically with the control of economic concentration in Vietnam. It concentrates on the legal framework to control economic concentration, economic concentration of state monopolies and effects on competition.

- Chapter 9: *The Enforcement of Competition Law with regard to State Monopolies*

This chapter is designed as a comparative study of competition law enforcement mechanisms, with particular attention given to state monopolies. The first part focuses mostly on issues related to the competition authority. Then it discusses the implementation of competition law for the state monopolies, including issues occurring in the enforcement process, difficulties during the handling of competition cases and their

causes. The second part reviews the competition law enforcement mechanism in Vietnam. The basic issues are the competition law enforcers, their position, nature, functions and powers; the two channels for commencing the enforcement process, i.e. competition authority initiative and the firms concerned; procedures for handling competition cases in Vietnam and penalties and remedies against anti-competitive behaviour. In each section, relevant issues concerning state monopolies are the particular focus.

- Chapter 10*: Conclusion*

This chapter summarises the major findings, points out the significance of the thesis and ends with concluding remarks. It also identifies problems and summarises potential directions for reform with regard to the application of competition rules to state monopolies in Vietnam.

1.8 Significance

As mentioned above, the thesis seeks to find answers to the question of how to apply competition law to anti-competitive behaviour committed by state monopolies. Hence it is expected to offer suggestions as to what should be done in terms of law and enforcement mechanisms, so that the competition law can effectively address anti-competitive behaviour of state monopolies in Vietnam.

This thesis provides an overall understanding of the state monopoly concept and the monopoly situation in Vietnam. This contributes to the enrichment of competition law literature involving particularly state monopolies. This is noteworthy because there have been few studies dealing comprehensively with this subject. More importantly, it offers constructive recommendations for the adjustment and improvement of current competition law in the near future, which is one of the important tasks of the government in pursuing a healthy competitive environment in Vietnam. Finally, it hopes to provide useful lessons for dealing with the state monopoly situation, especially for developing and transitional countries.

Chapter 2

THE CONCEPT OF STATE MONOPOLY AND ITS FEATURES IN THE CONTEXT OF COMPETITION LAW

2.1 Introduction

For many reasons public enterprises continue to represent a significant portion of the economy in both developed and developing countries.[1] No matter what labels they are given, they play an important role in the economics and politics of countries, especially in socialist countries where they hold a dominant position.[2] However, there are few exact definitions of 'state monopoly' or of the factors that constitute the concept of 'state monopoly'. To understand the concept, we need to start with the common perception of 'monopoly' and then to link this to state involvement in the market.

The first part of this chapter sets out to provide an understanding of the concept of state monopoly' and of its features. It refers to the concepts of 'monopoly' and 'state control' to define what a 'state monopoly' is. Then it goes on to analyse the features of the concept of 'state monopoly', followed by four sub-sections. The first one notes that a 'state monopoly' must be a state enterprise which acts as an undertaking when participating in competition with others. Besides, the term 'state' makes it possible to view it as a public undertaking within the scope of competition law. The next section argues that the control of the state is an important factor in attributing the 'state

[1] Jan-Erik Lane, *Public Administration and Public Management – the Principal-agent Perspective* (Rutledge, 2005) 190; See further in UNCTAD, 'Model Law: the Relationships between a Competition Authority and Regulatory Bodies, including Sectoral Regulators' (TD/B/COM.2/CLP/23, 2001), 4 <http://www.unctad.org/en/docs/c2clp23&c1.en.pdf>; Frank Emmert, Franz Kronthaler and Johannes Stephan, *Analysis of Statements Made in Favour of and Against the Adoption of Competition Law in Developing and Transition Economies* (2005), 35 <http://www.iwh-halle.de/projects/competition_policy/Claims_final.PDF>; United Nations, Department of Economic and Social Affairs, *Public Enterprises: Unresolved Challenges and New Opportunities* (United Nations, 2008) iii; M Adil Khan, 'Reinventing Public Enterprises' in United Nations, Department of Economic and Social Affairs, *Public Enterprises: Unresolved Challenges and New Opportunities* (United Nations, 2008) 3; Swedish Competition Authority, *The Pros and Cons of Competition in/by the Public Sector* (2009), 85 <http://www.kkv.se/upload/Filer/Trycksaker/Rapporter/Pros&Cons/Pros_and_Cons_Comp_by_public_sector.pdf >; OECD, 'State-Owned Enterprises and the Principle of Competitive Neutrality' (Policy Roundtable, DAF/COMP(2009)37, 2009), 25 <http://www.oecd.org/dataoecd/43/52/46734249.pdf>.

[2] Ali Farazmand, 'Introduction: The Comparative State of Public Enterprise Management' in Ali Farazmand (ed) *Public Enterprise Management: International Case Studies* (Greenwood Publishing, 1996) 1.

monopoly' concept. The third one contends that a 'state monopoly' is an entity that benefits from privileges and exclusive rights and that this allows the entity in question to gain market strength. The last section shows that the possession of market power or the dominance over a substantial part of the market is a significant factor.

The second part of the chapter deals with the concept of 'state monopoly' in Vietnam. It is divided into two sections. The first one examines the development of this concept in Vietnam before and after the Doi Moi era, while the second one deals with the concept and its features in relation to the criteria discussed in the first section.

2.1.1 Monopoly

Generally, 'monopoly' refers to a situation in which there is exclusive control over the supply of goods and services[3]. It is defined as a market where there is only one seller, because of either the existence of barriers (perhaps legal barriers) which prevent other firms from participating in the market, or there is a natural monopoly (where only one undertaking can operate profitably on the market).[4] In the EU competition law, 'monopoly' refers to a market situation with a single supplier (monopolist) that has an extreme form of market power resulting from the absence of competition. The existence

[3] Jose Luis Buendia Sierra, *Exclusive Rights State Monopolies EC Law: Article 86 (former Article 90) of the EC Treaty* (Oxford, 2000) 5; Mark A Jamison and Sanford V Berg, *Annotated Reading List for a Body of Knowledge of Infrastructure Regulation* (2008) <http://www.regulationbodyofknowledge.org/documents/bok/chapter2.pdf>.

[4] Alison Jones and Brenda Sufrin, *EC Competition Law – Text, Cases and Materials* (Oxford University Press, 3rd ed, 2008) 8 Alfred Kahn, *The Economics of Regulation: Principles and Institutions* (MIT Press, Reissue Edition, 1988) Chapter 4. 'Natural monopoly' may refer to a single firm, so that an industry is a natural monopoly if a single firm can serve the market at a lower cost than multiple firms. See Sanford V Berg, 'Fundamentals of Economic Regulation' (paper presented at the Fifth Annual PURC/World Bank International Training Program on Utility Regulation, January 11, 1999).

According to the cost-based definition of monopoly, a firm is regarded as a natural monopoly if it is able to serve the entire market demand at a lower cost than any other smaller and more specialized firms, including the combination of them. See Jamison and Berg, above n 3; William W Sharkey, *The Theory of Natural Monopoly* (Cambridge University Press, 1982) 2; Frederik M Sherer, *Industrial Market Structure and Economic Performance* (Houghton Mifflin, 2nd ed, 1980); George Yarrow, 'The Economics of Regulation' in Venkata Vemuri Ramanadham (ed.) *Privatization and After:Monitoring and Regulation* (Routledge, 1994) 38. See also Organisation for Economic Co-operation and Development (OECD), *Corporate Governance of State-Owned Enterprises: A Survey of OECD Countries* (OECD, Publishing, 2005) 20.

Natural monopolies often operate in industries that provide public services to facilitate production and everyday life, such as public transportation, postal services and telecommunication; and those industries that involve public interest and leisure. See Xueguo Wen, 'Market Dominance by China's Public Utility Enterprises' (2008-2009) 75 *Antitrust Law Journal* 153.

of monopoly is equivalent to that of a dominant position.[5] However, 'monopoly' is an ambiguous word because it also refers to the undertaking or entity which exercises this control in the given market.[6]

It can be said that the concept of monopoly is closely intertwined with the definition of the market. The more narrowly the market concept is defined, the more likely is the determination if a firm has market power.[7] The definition of a market consists of both the product in question and a geographical space[8] and the definition is a tool to identify and define the boundaries of competition between firms[9]. In the EU, it states that 'a relevant product market comprises all those products and/or services which are regarded as interchangeable or substitutable by the consumer, by reason of the products' characteristics, their prices and their intended use'. And 'relevant geographic market' is defines as:

> The relevant geographic market comprises the area in which the undertakings concerned are involved in the supply and demand of products or services, in which the conditions of competition are sufficiently homogeneous and which can be distinguished from neighbouring areas because the conditions of competition are appreciably different in those area.[10]

In the US, a 'market' is defined as:

> A product or group of products and a geographic area in which it is produced or sold such that a hypothetical, profit-maximizing firm, not subject to price regulation, that was the only present and future producer or seller of those products in that area likely would impose at least a 'small but significant and non-transitory' increase in price, assuming the

---

[5] European Commission, *Glossary of Terms used in EU Competition Policy* (2002), 32 <http://ec.europa.eu/competition/publications/glossary_en.pdf >.

[6] Sierra, above n 3, 5.

[7] Patrick Massey, 'Market Definition and Market Power in Competition Analysis: Some Practical Issues' (2000) 31 (4) *Economic and Social Review* 310.

[8] The market is commonly defined as comprising two factors: the product and the geographical location involved.

[9] European Commission, *Commission Notice on the Definition of Relevant Market for the Purposes of Community Competition Law* (1997) OJ C 372 < http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:31997Y1209(01):EN:NOT >.

[10] Ibid; European Commission, *Glossary of Terms used in EU Competition Policy* (2002), 39 <http://ec.europa.eu/competition/publications/glossary_en.pdf >.

terms of sale of all other products are held constant.[11]

In Australia, s4E of the *Competition and Comsumer Act 2010* (formerly *Trade Practices Act 1974*) defines 'market', for the purpose of the Act, as 'a market in Australia and, when used in relation to any goods or services, includes a market for those goods or services and any other goods or services that are substitutable for, or otherwise competitive with, the first mentioned goods or services'. In *Universal Music Australia Pty Limited*, the concept of a 'market' held by the Full Federal Court is described as 'a range of competitive activities by reference to function, product and geography'.[12]

The main purpose of market definition is to identify in a systematic way the competitive constraints that the undertakings involved face. The objective of defining market (or relevant market in this context) is to 'to identify those actual competitors of the undertakings involved that are capable of constraining those undertakings' behaviour and of preventing them from behaving independently of effective competitive pressure'.[13]

Among other things, the concept of 'market power' is crucial.[14] It refers to the ability of the seller to exercise some control over the price it charges[15] or 'the ability of an individual firm or a group of firms to raise and maintain price above the level which would prevail under competition'[16] and the highest degree of market power is monopoly.[17]

---

[11] US Department of Justice and Federal Trade Commission, Horizontal Merger Guidelines (1992, revised 1997) <http://www.usdoj.gov/atr/public/guidelines/hmg.pdf>.

[12] *Universal Music Australia Pty Ltd v ACCC* (2003) 121 FCR 529, 53.

[13] European Commission, above n 9; Jones and Sufrin, above n 4, 60.

[14] Jones and Sufrin, above n 4, 58.

[15] US Department of Justice, *Competition and Monopoly: Single Firm Conduct under Section 2 of the Sherman Act* (2008), 19 <http://www.justice.gov/atr/public/reports/236681.pdf>; Fernando L Alvarado, *Market Power: A Dynamic Definition* (1998), <www.pserc.wisc.edu/documents/publications/papers/1998.../paper1.pdf>.

[16] Jones and Sufrin, above n 4, 58; D W Carlton and J M Perloff, *Modern Industrial Organisation* (Pearson Addison Wesley, 4th ed, 2005) 642; S G Corones, *Competition Law in Australia* (Thomson Reuters, 5th ed, 2010) 58.

[17] William M Landes and Richard A Posner, 'Market Power In Antitrust Cases' (1981) 94 *Havard Law Review* 937-938; CUTS International, *Competition in Vietnam: A Toolkit* (CUTS International, 2007) 36; UNTACD, 'Model Law on Competition: Draft Commentaries to Possible Elements for Articles of a Model Law or Law' (TD/RBP/CONF.5/7, 2000), 35 <http://www.unctad.org/en/docs/tdrbpconf5d7.en.pdf>.

The definition of a market plays an important role in the assessment of competition,[18] including the determination of market dominance and abuse of market dominance, the declaration of illegality of an agreement and the consideration of a merger.[19] For example, besides other criteria such as 'barrier to entry', the conclusion of market dominance and the declaration of abuse of market dominance rely significantly on the market shares of the firm or firms on the market.[20] This is only possible whenever a market where firms or firms operate is defined.[21] Hence, market definition is essential for determining the existence or absence of market power[22] or to conclude whether there is a monopoly in a relevant market.

2.1.2 The concept of 'state monopoly'

While 'monopoly' as a market situation is hard to define because it is closely related to economics, considering 'monopoly' as a firm/undertaking makes it easier to interpret what a 'state monopoly' is. For the purpose of this thesis, 'state monopoly' is regarded as an undertaking. According to Blum and Logue, 'state monopolies' are 'undertakings having a close relationship with the state and have been granted certain privileges by it. Such monopolies often operate as utility companies and also extend to companies in other

[18] Phillip Areeda, Hebert Hovenkamp and John Solow, *Antitrust Law* (1995); Massey, above n 7, 309. In the EU competition law, market must be defined before a conclusion on the market position of a firm or firms under investigation. See *Continental Can* (C-6/72) [1973] ECR 215.

[19] Market definition is important for the European Court of Justice before it applies Article 101 *TFEU* (ex Article 81 *TEC*) (to determine whether or not an agreement has as its effects the prevention, restriction or distortion of competition) or Article 102 *TFEU* (ex Article 82 *TEC*) (to consider whether or not there is an abuse of market dominance in a given market). It is significant for the application of the *Merger Regulation* (to conclude whether or not a merger leads to a significant impediment to effective competition, in particular as a result of the creation or strengthening of a dominant position). The ECJ has recognised the importance of market definition throughout its case law, such as *European Night Services v Commission* (T-374, 375 and 388/94) [1998] ECRII-3141; *Continental Can* (C-6/72) [1973] ECR 215; *Volkswagen AG v Commission* (T-62/98) [2000] ECR II 2707 231.

[20] The size of a firm's market share is considered as an important factor accounting for the existing of market power. See European Commission, *Glossary of Terms used in EU Competition Policy* (2002) <http://ec.europa.eu/competition/publications/glossary_en.pdf>.

[21] The assessment of market power based on market definition is one of the two methods for measuring the market power of a firm or firms. The first is a direct method in which market power is estimated by means of econometric methods, particularly the residual demand curve (the demand curve facing a single firm). See Carlton and Perloff, above n 13, 66-9. The second is called 'indirect', involves a structural approach and relies on the definition of 'relevant market' and an assessment of the effect of the market shares of a firm or firms on that market and barriers to entry analysis. This 'indirect' method is commonly applied by competition authorities throughout the world. See Jones and Sufrin, above n 4, 59; Corones, above n 16, 58.

[22] For example, in *Eastman Kodak*, it was observed by Justice Blackmun that 'because market power is often inferred from market share, market definition generally determines the result of the case'. See *Eastman Kodak Co. v Image Technical Services Inc* 504 US 451 (1992).

sectors'.[23]

Based on this approach, to define a state-owned enterprise/public enterprise or equivalent term as a 'state monopoly' and analyse its features, it is assumed that such an enterprise should satisfy the following criteria:

- It is a state-owned/public enterprise based on each country's relevant law;[24]
- It satisfies the status of an undertaking in accordance to competition/antitrust law;
- It is an enterprise that is under state control/influence;
- It is granted and benefits from exclusive rights and privileges;
- It possesses capacity that enables it to attain a dominant position in the market.

2.1.3 A state monopoly must be a 'state-owned enterprise' or a 'public undertaking'

State-owned enterprises (SOEs) or public enterprises are simply referred to as those owned by governments or their delegated authorities, rather than by private investors.[25] In the broadest sense, it refers to all industrial and commercial firms, mines, utilities, transport companies and financial intermediaries controlled to some extent by government.[26] SOEs were first created through a 'nationalisation' process taking place in

[23] Françoise Blum and Anne Logue, *State Monopolies under EC Law* (Wiley, 1998) 1.

[24] Public Enterprise (PE) and State-Owned Enterprise (SOE) are two interchangeable terms and are otherwise called Government Controlled Enterprise (GCE). See Prahlad K Basu, 'Reinventing Public Enterprises and Their Management as the Engine of Development and Growth' in United Nations, Department of Economic and Social Affairs, *Public Enterprises: Unresolved Challenges and New Opportunities* (United Nations, 2008) 10. The term 'State-Owned Enterprise' (SOE) will mostly be used in this chapter, but the term 'Public Enterprise' is also employed.

[25] David E M Sappington and Sidak J Gregory, 'Competition Law for State-Owned Enterprises' (2003) 71 (2) *Antitrust Law Journal* 479-523. According to Mary M Shirley, SOEs are characterised by the expectation of earning most of their revenue from the sale of goods and services, their self-accounting, the possession of a separate legal identity and the return on investment. They are distinguished from the rest of the government and thus hospitals, universities or similar institutions would be excluded. Besides, the degree of public control helps to distinguish SOEs from government departments or private firms. See Mary M Shirley 'Managing State-Owned Enterprises' World Bank Staff Paper No. 577 (1983) 2 <http://www-wds.worldbank.org/external/default/WDSContentServer/WDSP/IB/1999/09/17/000178830_98101903415637/Rendered/PDF/multi_page.pdf>.

[26] Shirley above n 25. SOEs are often found in utilities and infrastructure industries, such as energy, transport and telecommunication. See Organisation for Economic Co-operation and Development (OECD), *Guidelines on the Corporate Governance of State-Owned Enterprises* (OECD Publishing, 2005), 9 <http://www.oecd.org/dataoecd/46/51/34803211.pdf>.

the economic policies of most western economies in the 20th century.[27] Even though rationales for the maintenance of state enterprises are different among countries and industries, they are determined by social, economic and strategic interests.[28]

It is observed that the definition of 'state owned enterprise' is closely linked with the notion of 'state economic sector', with 'state-owned enterprise' regarded as a part of it.[29] While there are few exact definitions of 'state economic sector', the term 'public sector' is commonly used.[30] The 'state economic sector' or 'public sector' generally consists of government departments and public firms.[31]

Apart from 'public enterprise' (PE), a number of equivalent terms to 'state-owned enterprise' are employed in academic writing: terms such as government corporation, government-linked controlled company, parastatal, public company, public corporation, public sector enterprise, etc.[32] Besides, there are several terms involving the 'public enterprise' concept, depending on legal forms, such as 'state company' or 'state

[27] The emergence of state owned enterprises in economic history, together with the move to autarkic and state controlled policies in many Southern and Central European countries, the diffusion of collectivism and socialism in Eastern European countries and the progressive growth of mixed economies in Western European countries, were commonly explained as being due to the deep crisis in the period between the two world wars that affected liberal capitalism. See also OECD, *Corporate Governance of State-Owned Enterprises*, above n 4, 20-3.

Even though there were some differences in approach, the shared features of the reactions to this situation were generally as follows. first, the growing weakness of the free market economy, causing increasing market failures, led to the belief that the state could and should play a greater (or even total) role to overcome these failure; second, public sector enlargement through the nationalisation process of a few strategic activities and/or industries became a significant part of the new economic policies. See Pier Angelo Toninelli, 'The Rise and Fall of Public Enterprise – the Framework' in Pier Angelo Toninelli (ed) *The Rise and Fall of State-Owned Enterprise in the Western World* (Cambridge University Press, 2000) 1-4.

[28] OECD, *Guidelines on the Corporate Governance*, above n 26.

[29] For example, George and Quilty find that state-owned-enterprises are 'the foundation of the national economy' and are used by the state in order to direct and regulate its economy. See Elizabeth St. George and Mary Quilty, 'Reconfiguring Socialist Ideology in Vietnam: the 2006 Tenth National Party Congress and the lead-up to Vietnam's Entry into the World Trade Organisation' (Paper presented at the 16th Biennial Conference of the Asian Studies Association of Australia, Wollongong 26 - 29 June 2006).

[30] For example, the *Macmillan Dictionary of Modern Economics* defines '*public sector'* as '[t]he part of the economy which is publicly owned as opposed to privately owned...' See David W Pearce, *Dictionary of Modern Economics* (Macmillan, 1983).

[31] Ibid. The state economic sector/public sector 'includes all government departments and all public corporations such as electricity boards, water boards and so on. It should not be defined as the sector which produces public goods, although, typically, public goods will be provided via the public sector'.

[32] World Bank, *Held by the Visible Hand: The Challenge of SOE Corporate Governance for Emerging Markets* (World Bank, 2006), 1 <http://rru.worldbank.org/Documents/Other/CorpGovSOEs.pdf>; John Mary Kauzya, 'The Question of the Public Enterprise and Africa's Development Challenge: A Governance and Leadership Perspective' in United Nations, Department of Economic and Social Affairs, *Public Enterprises: Unresolved Challenges and New Opportunities* (United Nations, 2008) 74.

shareholding company', 'state concerns' (which can be found in the case of Italy); and the ways public enterprises are managed, such as 'state-owned enterprises' or 'state controlled enterprises'.[33] There is, however, little difference between the usages in terminology, since such a company is called 'public enterprise' in the European approach, while the term 'public utility' is preferred in the US. State ownership is obviously the main factor in defining a 'state-owned enterprise' and corresponding terms.

According to Donald Rutherford, a 'public enterprise' is '[an] independent business organisation owned by a government and subject to some political control…' And 'state enterprise' is a firm owned by the state.[34] The definition given by Kauzya seems to be fullest, in which public enterprise is defined as:

> [a]n organization established by government under public or private law as a legal personality which is autonomous or semi-autonomous and produces/provides goods and services on a full or partial self-financing basis and in which the Government or a Public body/agency participates by way of having shares or representation in its decision-making structure.[35]

The above definition is similar to that adopted by the UN International Centre for Public Enterprises (ICPE) Expert Groups.[36] Public enterprises are specifically defined according to their legal forms and origins including departmental undertakings; public corporations, statutory agencies, established by Acts of Parliament or joint stock companies registered under the Company Law.[37]

The concept of a public enterprise contains contradictions, depending on the kind of governance regime it has chosen.[38] Based on two ideal type regimes for public enterprises, it can be classified into two models or types of public enterprises.[39]

---

[33] Toninelli, above n 27, 5.

[34] Donald Rutherford, *Dictionary of Economics* (Routledge, 2002).

[35] Kauzya, above n 32.

[36] ICPE Expert Groups define a public enterprise as 'any commercial, financial, industrial, agricultural or promotional undertaking – owned by public authority, either wholly or through majority share holding – which is engaged in the sale of goods and services and whose affairs are capable of being recorded in balance sheets and profit and loss accounts'. See Basu, above n 21, 10.

[37] Basu, above n 24, 11.

[38] Lane, above n 1, 190.

[39] OECD, *Corporate Governance of SOEs,* above n 4, 36.

Under a *traditional regime*, a public enterprise is placed between a bureau and a firm and thus this is also called the trading department model. This type of public enterprise is in nature a public monopoly protected by public regulation and legally controlled by the finance ministry. Under a *neo-liberal regime*, public enterprise is modelled on a joint-stock company and operates in a deregulated environment where the role of government is strictly limited to that of owner of equity. The second type of public enterprise is applied in several countries with the move from the traditional enterprise model to that of a joint-stock company.[40]

In the United States, a public enterprise is 'a catchall term encompassing a set of quasi-governmental organisations that independently provide services and finance projects. Public enterprises primarily include special districts, public authorities and government-sponsored enterprises'.[41] In the UK, public enterprise in the format of a shareholding company in which the state holds majority shareholdings (there being a mixture of public and private ownership made up of divisible shareholdings) is exemplified by the case of British Petroleum (BP).[42]

In sum, a definition of state enterprise (or public firm and equivalent terms) should cover fundamental elements such as how it is set up, what its legal status is; what it provides and how the state is involved in its management. In this regard, the above definition given by Kauzya, as well as by ICPE Expert Groups, is valuable. The recognition of a state enterprise comes from the way the state is involved in the control, direct or indirect of management aspects and that it may wholly own shares or the majority of shares, allowing it to control the operation of that enterprise.

- **The notions of 'undertaking' and 'public undertaking' in EU competition law**

This section reviews the notions of 'undertaking' and 'public undertaking' in the EU

[40] Lane, above n 1, 190.

[41] Jerry Michell, 'Public Enterprises in the United States' in Ali Farazmand (ed) *Public Enterprise Management: International Case Studies* (Greenwood Publishing, 1996) 67.

[42] Based on the Anglo-Persian Oil Company, BP was created during Churchill's time and the British government controlled 51 per cent of shareholdings (once it went up 71 per cent in 1975). This pattern was followed by the Thatcher government in other cases such as British Telecom, even though Thatcher sold off those shares. See Roger Wettenhall, 'The Globalisation of Public Enterprises' (1993) 59 *International Review of Administrative Sciences* 387 < http://ras.sagepub.com/cgi/reprint/59/3/387>.

competition law to show how they contribute to the 'state-owned enterprise' concept. This is to support the viewpoint that the link with 'state' is essential for a definition of 'state monopoly', as a state monopoly must be a state/public undertaking. Hence it is different from other monopolists which can also possess criteria discussed in subsequent sections.

- *The notion of 'undertaking'*

As a SOE/public enterprise participates in the market, its behaviour is governed by relevant competition/antitrust laws. The term 'undertaking' is preferred in the competition law of many countries.[43] To understand the notion of 'public undertaking', it is necessary to see what 'undertaking' means.[44]

The term 'undertaking' is regularly used in the *Treaty on the Functioning of the European Union – TFEU* and actions by 'undertakings' are addressed in Article 101(1) (ex Article 81(1) TEC) and Article 102 *TFEU* (ex Article 82 TEC). However, no clear definition of 'undertaking' is found in the EC Treaty.[45] Rather, it is defined in the *ECSC Treaty of 1951*[46] and in EC competition law, where the concept of 'undertaking' is developed through interpretation throughout competition case law,[47] for which the landmark case

[43] Throughout the EC Treaty, key documents of the EU on competition and cases held by the European Court of Justice, the term 'undertaking' is commonly applied. This term is also employed by the EU state members' competition law. Some other countries have also accepted this term, such as China at Article 12 of the Chinese *Anti-Monopoly Law.* However, the *Sherman Act* of the United States uses the term 'person' instead.

[44] Jones and Sufrin, above n 4, 626.

[45] Mark R Joelson, *An International Antitrust Primer: A Guide to the Operation of United States, European Union and Other Key Competition Laws in the Global Economy* (Kluwer Law International, 3rd, 2006) 283; Piet Jan Slot and Angus Johnson, *An Introduction to Competition Law* (Hart Publishing, 2006) 27; Lennart Ritter and W David Braun, *European Competition Law: A Practitioner's Guide* (Kluwer Law International, 2005) 44; Gabriele Dara, 'Antitrust law in the European Community and the United States: A Comparative Analysis' (1986) 47 *Louisiana Law Review* 765.

[46] *ECSC Treaty* art 80.

[47] In an early case held by the ECJ, the *Mannesmann v High Authority of the European Coal and Steel Community*, the term 'undertaking' was described as '…[a] single organisation of personal tangible and intangible elements, united in an autonomous legal entity pursuing a given long-term economic aim. See *SNUPUT v High Authority* (C-19/61, C-42/50 and C-49/50 [1962] ECR 655.

was *Hofner*.[48]

The concept of undertaking covers a wide range of entities. An undertaking can be an individual, a corporation, a limited liability company, a partnership, sole proprietorship and other form of legal entity.[49] From the ECJ viewpoint, the legal form of an entity[50] and the way it is financed[51] does not matter, nor that the entity should make a profit.[52] The most important factor, according to the ECJ is that it must carry out economic activities in competition with other undertakings,[53] including the supply of goods or services.[54] This characteristic is also used to conclude that a non-legal personality is an 'undertaking'.[55] In the case of a non-profit entity, the performance of economic functions such as production or distribution is necessary for it to be considered as an undertaking, thus falling within the classification of undertaking under Article 101 *TFEU*.[56] In the concept of 'undertaking' it is important to distinguish between the tasks of governments and the activities of undertakings. A public body is deemed to be an undertaking when it conducts economic activity while enjoying economic independence.[57]

[48] *Höfner v Macrotron GmbH* (C-41/90) [1991] ECR I-1979, 21. This is one of the landmark cases held by the ECJ, when an employment office owned and run by the state which was involved in headhunting activities, even when no charges were made, was considered as an 'undertaking. The concept of 'undertaking' was held by the ECJ as: 'the concept of an undertaking encompasses every entity engaged in an economic activity regardless of the legal status of the entity and the way in which it is financed'. See Valentine Korah, *An Introductory Guide to EC Competition Law and Practice* (Hart Publishing, 8th ed, 2004) 40.

[49] Joelson, above n 45, 283.

[50] Sierra, above n 3, 32.

[51] Ritter and Braun, above n 45, 44.

[52] In the conclusion of the Commission in *Re Film Purchases by German Television Stations*, it was stated that '… the functional concept of undertaking in Article 101 (1) *TFEU* (ex Article 81(1) *TEC*) covers any activity directed as trade in goods and services irrespective of the legal form of the undertaking and regardless of whether or not it is intended to make profits'. See *Re Film Purchases by German Television Stations* [1989] OJ 1989 L 284/36.

[53] Slot and Johnson, above n 45, 28.

[54] *Airport of Milano* [2001] ECR I-185, 107-108; *Airport de Paris v Commission* (T-128/98) [2000] ECR II-3929, 75-79; *FENIN v Commission* (T-319/99) [2003] ECR II-357, 35-6.

[55] Joelson, above n 45, 283.

[56] Ibid, 284.

[57] Ibid.

- *The notion of 'public undertaking' in the EU competition law*

A definition of 'public undertaking' is also not provided in the *EC Treaty*.[58] The *European Commission's Transparency Directive*, based on the grounds of state influence, defines it as 'any undertaking over which the public authorities may exercise directly or indirectly a dominant influence'.[59] The concept is further endorsed in the *France, Italy and UK v Commission Cases.*[60] As a clear definition of the term 'public undertaking' is absent, the approach in both the Commission's Directive and the ECJ decision has commonly been applied. The notion of 'influence' exercised by the state is the major factor in considering an entity to be a public undertaking.[61] Similarly, it is found in the recommendation made by the Advocate General in the *Muller (Hein)* case of 1971.[62]

Moreover, the notion of 'public undertaking' in EC competition law has a wide-ranging meaning. It is compatible with the concept of 'undertaking' held in *Hofner.*[63] It is not necessary that a public undertaking must have its own legal personality. Rather, it can be an integral part of a member state's administration.[64] It is not required that a public undertaking must be financed by the state.[65] As the most important factor is that activities must be of an economic nature, any kind of social activities[66] or acts of sovereignty are excluded from the concept.[67]

---

[58] Blum and Logue, above n 23, 8; Sierra, above n 3, 34.

[59] 'Public undertaking' under EC competition law is defined as '*any undertaking over which the public authorities may exercise, directly or indirectly, a dominant influence by virtue of their ownership of it, their financial participation therein, or the rules which govern it'*. See Article 2 of the Commission's *Transparency Directive* I (1982) ECR 2545, 25-6; It can also be found in Article 2(1) *Directive* (1993) 93/38/EEC L1999/84 which provides a definition of 'public undertaking' in the public procurement (Directive of 1993 relating to the excluded sectors); *Alpha Flight/Áeroports de Paris* [1998] OJ L 230/10, 50; *Ilmailulaitos/Luftfartverket* [1999] OJ L 69/24, 21-22; See also Article 2.2 of the *Commission Directive 2000/52/EC amending Directive 80/723/EEC on the transparency of financial relations between Member States and public undertakings* [2000] OJ L 193/75.

[60] *France, Italy and UK v Commission Cases* (C-188/190) [1982] ECR 2545, 25–6.

[61] Blum and Logue, above n 23, 9.

[62] *Ministère Public du Luxemburg v Muller* (C-10/71) [1971] ECR 723.

[63] *Höfner v Macrotron GmbH* (C-41/90) [1991] ECR I-1979.

[64] *Commission v Italy (Transparency Directive II)* C-118/85 (1987) ECR 2599, 5-10; *Ilmailulaitos/Luftfartverket (Finish Airports)* [1999] OJ L 69/24, 21-22.

[65] *FENIN v Commission* (T-319/99) [2003] 35.

[66] *Poucet* (C-159/91) [1993] ECR I-637; *Job Center II* (C-55/96) [1997] ECR I-7119.

[67] *LTU* (C-29/76) [1976] ECR 1541; *Leclecr – French Gasoline Prices* [1985] ECR 306; *SAT/Eurocontrol* (C-364/92) [1994] ECR I-43, 30; *Job Center II* (C-55/96) [1997] ECR I-7119.

2.1.4 A state monopoly must be under 'state control'

A SOE is distinct from a government department or a private firm by the degree of public control.[68] Simply put, SOEs/public undertakings are those over which the state 'has significant control, through full, majority or significant minority ownership', according to an OECD definition.[69] The concept of 'state control' is closely related to the question of corporate governance in SOEs. How the state exercises its control in a SOE depends on its status and form under its legal system and this is determined by the ownership policy of each government.[70] This section examines the notion of 'state control' through the following four factors: financial contribution, legal status, categories and ways of implementing state control in SOEs.

First of all the financial contribution is undoubtedly one of the most important factors. In former socialist and transitional countries, before undertaking their SOE reforms SOEs were established by the state and the establishment implied a financial contribution. Since the state was the only owner, assets and capital were simply entrusted to state enterprises in order to implement the state's plans and objectives. Under the reforms and privatisation of SOEs around the world, the financial contribution of the state in the enterprise is currently viewed as a portion of the investment. In this regard, the state acts as an investor in such an enterprise. This can be observed in state shareholding companies, which allow the participation of the private sector.

Secondly, it is evident that the legal status of SOEs varies in from country to country. Generally, they are in the form of a shareholder owned company. In some countries a uniform system for the legal status of SOEs is followed, as the state is a shareholder, even when the state is the only shareholder. The state powers are exercised through the general meeting of shareholders, including the ability to select board members.[71] In other countries a wider range of legal forms for SOEs is employed, depending on what level of government owns the enterprise, how the enterprise was founded, where it falls within public administration, the purpose of the SOE and whether or not the enterprise is in the

[68] Shirley, above n 25.

[69] OECD, *Guidelines on the Corporate Governance*, above n 26.

[70] World Bank, *Held by the Visible Hand*, above n 32, 7.

[71] Ibid. For example in Bulgaria, Chile, Peru and Singapore.

process of being privatized.[72] Such forms can be seen in the state wholly owned enterprises, including departmental corporations, statutory corporations and government limited liability companies;[73] or shareholding companies which can be listed or not listed in the stock market, where the state holds the majority of shares or significant ownership,[74] or joint-ventures with private companies or government linked companies, where the state owns the shares through government pension funds, asset management, or restructured corporations, development lenders, or some other part of the government.[75]

Depending on the legal status, there are two situations in which an undertaking is deemed to be a public undertaking.[76] First, if an undertaking is governed by public law, it will be under the control of public powers and therefore is clearly a public undertaking. Second, in the case where an undertaking is structured under private law, such as a limited company, it is also a public undertaking if it is controlled by a public authority. Public control is presumed when a majority of shares is owned by public authorities. If the state just has a minority shareholding, but this is still sufficient to allow the state to control the company, public control will still exist.[77]

Thus, in the case of a state wholly owned enterprise, the control of the state is quite apparent. The state can set out objectives for the SOE performance which include government policies other than business interests and can require an agreement between

[72] World Bank, *Held by the Visible Hand*, above n 32, 7.

[73] For example, in New Zealand, as the result of public sector reform taking place in 1984, the model of limited liability companies was introduced and corporatization became the major method of the deregulation which went with the privatisation process, targeted at encouraging competition on a `level playing field' basis. Thus, the government's major trading undertakings as state-owned enterprises (SOEs) were corporatized and other services previously run by the government such as research institutes, public hospitals, government's social housing and specialist education services were restructured in the form of companies. See Peter Mc Kinlay, 'State-owned Enterprises and Crown Companies in New Zealand' (1998) 18 (3) *Public Administration and Development* 229. India, another example, has three types of state wholly owned enterprises: departmental enterprises (or undertakings) are integrated into their controlling ministry and follow many of the same procedures as other government departments; statutory corporations are established by an official act of the legislature, wholly owned by the state but organized to have greater operational autonomy; and government limited companies which are organized like companies in the private sector, with the state as the main shareholder. See World Bank, *Held by the Visible Hand*, above n 32, 8.

[74] World Bank, *Held by the Visible Hand*, above n 32, 8.

[75] Ibid; OECD, *Corporate Governance of SOEs*, above n 4, 36.

[76] Sierra, above n 3, 38-39.

[77] Ibid 39-40.

the government and the enterprise or its board and chief executive.[78] In the case of a share holding company, the control of the state is exercised through the powers of the majority share holders in deciding the vital matters of the enterprises. Representatives of the state capital in shareholding companies will participate in the general meeting of the SOE, nominating board members and exercising other powers held by shareholders.[79]

Thirdly, how the state exercises its control over state owned enterprises depends on different ownership forms for SOEs: centralised, decentralised and dual.[80] In the first case, a government body, acting as an *ownership entity* such as a ministry or holding company, will be responsible for the government's stake in all SOEs.[81] In the second case, different ministries will be responsible for overseeing SOEs and and SOEs may also have widely varying requirements and relationships with other parts of the administration.[82] The last type is characterised by indirect control by the state, while certain ownership functions for all SOEs are performed by one single ministry, such as the ministry of finance, or a specialized body, but other functions are performed by different ministries for different SOEs.[83]

Finally, the control of the state is implemented through its representatives in the

---

[78] World Bank, *Held by the Visible Hand*, above n 32, 9.

[79] Ibid 13.

[80] Ibid 11.

[81] Ibid. For example, Singapore, Poland and Indonesia. In Singapore, Temasek is the national holding company, which is 100 per cent owned by the Ministry of Finance, holding responsibility for the state investment in all SOES. In Poland, the Ministry of the Treasury is responsible for privatisation and SOE governance. In Indonesia, the Ministry of State-Owned Enterprises exercises the state's ownership rights in SOEs.

[82] World Bank, *Held by the Visible Hand*, above n 32, 12. An example for this category is China. The Chinese State-owned Assets Supervision and Administration Commission of the State Council (SASAC) is an organisation authorised by the State Council to perform the responsibility of the investor and guide and of pushing forward the reform and restructuring of state-owned enterprises; supervision of the preservation and incrementation of the value of state-owned assets for enterprises under its supervision and enhancement of the management of state-owned assets; advancement of the establishment of a modern enterprise system in SOEs and perfection of corporate governance; and propelling the strategic adjustment of the structure and layout of the state economy. See SASAC website <http://www.sasac.gov.cn/n2963340/n2963393/2965120.html>. There is an allocation in carrying out these activities between central and local SASAC for large and smaller SOEs. Other SOEs or the national pension fund may also be important shareholders. The Ministry of Finance or a local finance bureau acts as the designated shareholder for banks or financial institutions, See also William P Mako and Zhang Chunlin, 'State Equity Ownership and Management in China: Issues and Lessons from International Experience' (Paper presented at the Policy Dialogue on Corporate Governance in Shanghai, China, 2004).

[83] Examples for this form are Brazil, Bulgaria, India, Kenya, Mexico, South Africa, Turkey and Vietnam. See World Bank, *Held by the Visible Hand*, above n 32, 11-12.

composition of the managing board. However, the state representative in the composition of SOE boards varies considerably from country to country and is decided by the relative influence of the state, the presence of employee representatives and the significance of private sector experts and 'independent' members.[84] Besides, the number of state representatives on the board is different in each country and and can range from 'zero' (no state representative[85]) to almost the entire board,[86] according to country-specific legislation.

In the EU, the concept 'control' is clarified through EC regulations and academic works, but the term 'influence' is preferably employed. In summary, the state participation in the provision of capital and and state involvement in administrative and managerial issues is a core constituent of the 'state influence' concept.[87] Similarly, the exercise of state control is summarized in the *European Commission's Transparency Directive* when the public authorities:

(i) directly or indirectly hold the major part of the undertaking subscribed capital;

(ii) control the majority of the votes, or

(iii) can appoint more than half of the members of its administrative, managerial or

[84] According to an OECD survey, state representatives can be civil servants from the ownership or sector ministries; or 'external' personalities from the private sector, or others (academics, experts, etc.). OECD, *Corporate Governance of SOEs*, above n 4, 123.

[85] Ibid 123-124. It can be seen in those countries that follow a centralised ownership model such as Demark, Norway, the Netherlands, Australia and Korea or in the type of wholly owned SOEs in such countries as the UK. In some countries such as Sweden, Germany and Finland, Italy or in the UK when the state is not a sole shareholder, the number of state representatives varies from one to two; or a proportion corresponding to the ownership in the case of Austria, Czech Republic, Slovak Republic, New Zealand and Spain; or a fix number in those countries such as France (1/3) or Mexico (50 per cent).

[86] Ibid 123.

[87] As observed in *Muller-Hein*, a company is deemed to be a public undertaking under Article 90 (1) if it has the following features: (i) the state participates in the capital of a company; (ii) the establishment of the company must arise from a unilateral act of the public authorities (e.g. a law) and (iii) the state must participate in the management of the company. According to Advocate General, this is evidenced by the power to choose the number of members representing the public authorities on the managing bodies. See Recommendation by the General Advocate in *Muller-Hein* [1971] ECR 723.

supervisory body.[88]

The term 'influence' can be used interchangeably with 'control', because the influential activities of the state in the managerial matters of state firms make it possible for the state to control and direct the operations of the firms in question. Besides, as the concept of 'state control' has changed with the introduction of financial contributions, legal forms of firms, ownership and methods of management, 'influence' can be seen as being in accordance with the 'control' concept.

State control can be in direct or indirect form. The direct form means the state will control the company through its public authorities and and the indirect form means this control is exercised through state holding companies. Besides, it does not necessarily mean that the state should exercise this control. The decisive point is the existence of control, rather than its exercise.[89] Based on answers to the International Competition Network (ICN) by its state members,[90] there are also several terms relating to the term 'state monopoly'. Among other things, 'state-owned monopolies' are those undertakings that are under 100 per cent ownership of the state and and 'state controlled monopolies' are those that are under state shareholding, regardless of the percentage of the state share.[91]

2.1.5 A state monopoly is an entity that enjoys exclusive and special rights

A monopoly generally attains its monopoly position by means of capital accumulation and success in competing with other firms. This principle does not exclude state monopolies. However, they can conquer a monopoly position in the market by benefiting from exclusionary rights and other privileges granted by their governments. There are various explanations for this, such as the need for a leading force in the market, or the

[88] Article 2 of the Commission's *Transparency Directive* I (1982) ECR 2545, 25-26; It can also be found in Article 2(1) of the *Council Directive* 93/38/EEC [1993] L 99/84 which provides a definition of 'public undertaking' in the public procurement (Directive of 1993 relating to the excluded sectors); *Alpha Flight/Áeroports de Paris* [1998] OJ L 230/10, 50; *Ilmailulaitos/Luftfartverket*, [1999] OJ L 69/24, 21-22; See also Article 2.2 of the *Commission Directive 2000/52/EC amending Directive 80/723/EEC on the transparency of financial relations between Member States and public undertakings* [2000] OJ L 193/75.

[89] Sierra, above n 3, 40-41.

[90] International Competition Network (ICN), *Report on the Objectives of Unilateral Conduct Laws, Assessment of Dominance/Substantial Market Power and State-created Monopolies* (2007), 65 <http://www.icn-moscow.org/page.php?id=7>.

[91] Ibid.

desire for national champions, etc.[92] Practices in developed and developing countries show that state monopolies are often given exclusive and special rights that enable them to have a dominant position in the market. Simply put, exclusive rights and privileges granted to a public undertaking make it possible for this undertaking to become a monopoly. This is demonstrated through the practice of EC competition law.

As the object of the grant of exclusive rights is to exercise an economic activity, an entity to which exclusive rights are granted must be an undertaking. Exclusive rights can be granted to an undertaking by a member state[93] and can be given to both public and private undertakings. Such rights are defined by the European Commission as:

> [t]he rights granted by a member state or a public authority to one or more public or private bodies through any legal, regulatory or administrative instrument, reserving for them the right to provide a service or undertake an activity…[94]

A similar definition is also found in a number of directives by the European Commission regarding competition in telecommunication services,[95] even though the two concepts 'special' and 'exclusive rights' were previously considered to be one and the same.[96] By contrast, the ECJ considers them as two distinct concepts and this is generally advocated by scholars.[97] In the simplest meaning, special rights are those granted to a limited number of undertakings,[98] while exclusive rights are given to a single one.[99] Thus, the distinction primarily lies in the number of beneficiaries. It is noted that state monopolies in this question are different from other monopolies which also benefit from the government (sometimes these are called government granted monopolies). Even though

[92] UNCTAD, 'Relationships between a Competition Authority and Regulatory Bodies', above n 1, 4.

[93] Sierra, above n 3, 29.

[94] *Spain, Belgium and Italy v Commission* joined cases (C-271/90) (C-281/90) and (C-289/90) [1992] ECR I-5833.

[95] For example, Article 1 (1) and recital 2 of the *Commission Directive (EEC)* 90/388 *on Competition in the markets for telecommunication services* [1990] OJ L192/10, 10-16.

[96] Sierra, above n 3, 5.

[97] Ibid; Françoise Blum and Logue, above n 23; Ritter and Braun, above n 45; Jones and Sufrin, above n 4.

[98] For example, according to the Advocate General's opinion in *Spain, Belgium and Italy v Commission (Telecom Services)* at an oral hearing, the European Commission explained that: 'special rights are the rights held by a limited number of telecommunications organisations chosen in discretionary and subjective manner by the State concerned'. See *Spain, Belgium and Italy v Commission* joined cases (C-271/90) (C-281/90) and (C-289/90) [1992] ECR I-5833.

[99] Sierra, above n 3, 12. See also *Air Inter SA v Commission (Air Inter)* (T-260/94) [1997] ECR II-0997 120-121.

they both enjoy exclusive rights and privileges, state monopolies are in nature state owned enterprises, while the latter can be private firms. This is important because state monopolies are special subjects under competition law. They participate in the market as business entities, while maintaining links with their governments. Special and exclusive rights make it possible for them to hold market powers in the market where they can also serve political purposes.

In EU competition law, the term 'exclusive rights' refers to those granted to a single undertaking by excluding competitors, in order to reserve a certain activity in a given geographic area.[100] A non-exhaustive list of exclusive rights is taken from the EC Commission's Directives and ECJ cases. They are enumerated by Lennart Ritter and David Braun[101] as monopolies for importing, supplying, connecting, putting into service and maintaining goods or equipment, such as telecommunications terminal equipment,[102] the exclusive rights to provide telecommunications services,[103] the exclusive right or franchise for commercial television advertising,[104] the exclusive right to operate an employment agency,[105] the exclusive power to collect and distribute mail,[106] the grant of exclusive licenses for collecting waste oil,[107] the exclusive right to insure certain types of insurance risks,[108] to issue conformity certificates for imported vehicles,[109] or telecommunications terminals,[110] or to provide funeral services within a certain geographic area.[111]

Hence, it can be inferred that exclusive rights granted to a public undertaking

[100] Ritter and Braun, above n 45, 64.

[101] Ibid 64 -65.

[102] *Telecommunications Directive Terminal Equipment* (1991) ECR I-1223, 31-44.

[103] *Telecommunications Directive Services* (1992) ECR I-5833.

[104] *Sacchi v Tele Biell* (C-155/73) [1974] ECR 409, 12-15; *Telemakerting* (C-311/84) [1985] ECR 3261, 11-18.

[105] *Hoffner v Macrotron* (C-41/90) [1991] ECR I-1979, 25.

[106] *Corbeau* (C-320/91) [1993] ECR I-2533; *Commission's Notice on Portal Services* [1998] OJ C 39/2, 4 interpreting *Directive 97/67/EC on Portal Services* [1998] OJ L 15/14.

[107] *SNFR v Inter-Huile* [1983] ECR 555.

[108] *Ameyde v UCI* [1977] ECR 1091, 18-22.

[109] *General Motors* (C-26/75) [1975] ECR 1367, 4-10; *British Leyland* [1986] ECR 3263, 3-10.

[110] *Telecommunications Directive Terminal Equipment* [1991] ECR I-1223, 31-44.

[111] *Funeral Services* (C-30/87) [1988] ECR 2479, 16.

(public/state-owned enterprise) will enable it to be a monopoly in a certain area. In other words, a monopoly position of a public enterprise in a particular industry (the provision or supply of goods and services) results from the benefits of the grants of exclusive rights from its state government or public authorities.

When exclusive rights are granted to a public undertaking there is a blurred distinction between the public authority which grants the rights and the public undertaking which receives them.[112] Thus, the term 'state monopoly' does not cover all undertakings which are granted exclusive rights. Exclusive rights can be granted to an undertaking directly and indirectly and and the aims of granting exclusivity to the beneficiary are also varied, resulting in different consequences.

An exclusive right will enable the granted undertaking to be the only one to carry out a certain economic activity and will imply the exclusion of other competitors who wish to participate in this given area. Not only will exclusivity facilitate the beneficiary to attain a prevailing position in the market, it will help to prevent third parties from exercising the rights in question by making use of the *jus prohibendi* principle. Whether or not permission to carry out activities is given to third parties depends on the authorisation of the beneficiary.[113] The concept of 'exclusive rights' is different from that of 'dominant position' and and it does not necessarily mean a grant of exclusivity will always bring a dominant position in the market to a beneficiary, because it still depends on the scope of the relevant market.[114]

In any case, it is possible to say that exclusivity is important for turning an undertaking into a monopoly. As governments have good reasons to grant exclusivity to their public enterprises, the creation of state monopolies by means of exclusivity is understandable. Furthermore, as the definition of 'exclusive rights' is wide and and the legislation and procedures by which exclusivity is given to a public undertaking are not clearly limited, due to the lack of formalism, countries seem to find it useful to maintain the grant of exclusivity, while substituting other terms for it, such as 'concessions', 'franchises',

[112] Sierra, above n 3, 30.

[113] Ibid 7.

[114] In the *GT Link*, the ECJ held the viewpoint that the grant of exclusive rights to an undertaking will automatically create a dominant position to this undertaking if '…[t]he reserved activity constituted by itself a relevant market or a substantial part of a relevant market'. See *GT- Link* (C-242/95) [1997] ECR I-4449.

'licences', 'authorisations', etc.[115]

With regard to special rights, even though they may be granted to a limited number of undertakings, it can also be concluded that such rights will enable a certain group of undertakings to achieve, or have more opportunity to achieve, economic strength in the market, thus making it possible for them to turn into monopolies in particular markets or industries. It can consequently be inferred that a group of public undertakings for that reason finds it easier to become state monopolies.

2.1.6 A state monopoly must possess market power or the dominance of a substantial part of the market

As a monopoly concerns the ability of an entity to make decisions concerning prices and other influences in the market, there is no doubt that to be a monopoly one must possess a substantial degree of economic strength or market power. Despite being defined in different ways in competition/antitrust laws, market power generally refers to the ability of a firm (or group of firms where they act jointly), to profitably maintain prices above competitive levels for a significant period of time.[116] This allows the firm in question to hold dominance in the market, enabling it to control or influence the setting of prices. On this basis, a similar inference can be drawn in the case of a state firm. No matter whether its market power is gained from the achievement of its market position through competition or from receiving its government's exclusive rights, a state firm is deemed to be a state monopoly when and if it can control and influence prices on the market by its market power.

Competition/antitrust laws of countries show differences in defining what 'dominant position' means. In some cases, the existence of the two terms 'monopoly' and 'dominance' itself entails the difference.[117] However, the dominance of the market is a characteristic of a monopoly and and conversely, a monopoly is declared if it attains dominance in the market.

---

[115] Sierra, above n 3, 8. For example, European countries seek to avoid the prohibitions contained in the EC Treaty while keeping the benefits inherent in a monopoly situation by using some of the above terms in their legal texts relating to the grant of exclusivity to their public undertakings.

[116] Landes and Posner, above n 17, 937-96.

[117] For example, Vietnam's *Competition Law 2004* separates cases where a firm can attain a 'monopoly position' from those with 'dominant position' in the market. See *Competition Law 2004* arts 11-12. See further in Chapter 4.

- **The European Community**

In the EU competition law, the concept of 'dominance' is preferred.[118] Even though a definition of 'dominant position' is absent, it is clarified in the cases held by the ECJ. In *Hoffman-La Roche* (1979)[119] and *United Brands* (1978),[120] the concept of 'dominance' was described, in the observation of Article Article 102 *TFEU* , as a 'position of economic strength enjoyed by an undertaking which enables it to prevent effective competition being maintained on the relevant market by affording it the power to behave to an appreciable extent independently of its competitors, its customers and ultimately of the consumers'.[121] Country courts of EU members have employed this explanation, for example, the UK Courts,[122] the French 'Conseil de la Concurrence' (the Competition Council),[123] Germany,[124] etc.

- **The United States**

In the US antitrust law the terms 'monopoly' and 'attempt to monopolise' are applied correspondingly.[125] One of the two elements constituting the offence of monopoly under

[118] Article 102 *TFEU* (ex Article 82 *TEC*) states that 'any abuse by one or more undertakings of a dominant position within the common market or in a substantial part of it shall be prohibited as incompatible with the common market in so far as it may affect trade between Member States'.

[119] *Hoffmann-La Roche and Co AG v Commission* (C-85/76)[1979] ECR 461, 38.

[120] *United Brands Co v Commission* (C- 27/76) [1978] ECR 207, 65.

[121] *Hoffman La Roche v Commission* (C-85/76) [1979] ECR 461. See also *N. V. Netherlands Banden Industrie Michelin v Commission of the European Communities* (C-322/81) [1983] ECR 3461 6. The concept 'dominant position' mentioned in Article 102 *TFEU* does not include 'monopoly position', but when a firm holds 100 per cent of the market, it is regarded as having a monopoly position and 'monopoly' in this case itself contains 'dominant position' because there will be naturally no competition. See Slot and Johnson, above n 45, 112.

[122] ICN, *Response of the United Kingdom to Unilateral Conduct Working Group Questionnaire* (2007), 38. <http://www.internationalcompetitionnetwork.org/media/library/unilateral_conduct/questionnaire/UnitedKingdomQuestionnaireResponse.pdf>.

[123] ICN, *Response of France to Unilateral Conduct Working Group Questionnaire* (2007), 9 <http://www.internationalcompetitionnetwork.org/media/library/unilateral_conduct/questionnaire/FranceQuestionnaireResponse.pdf>.

[124] ICN, *Objectives of Unilateral Conduct Laws,* above n 90.

[125] Section 2 of the *Sherman Act* states that 'every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a felony…'.

Section 2 of the *Sherman Act* is the possession of 'monopoly power'.[126] 'Monopoly power' is defined as the power of the entity in question to control prices or to restrict or exclude competition.[127] This viewpoint was expressed in *American Tobacco Co. v United States,*[128] when the Court concluded that a monopoly exists if '[p]ower exists to raise prices or to exclude competition'. The concept of power to control and influence prices and exclude competition can also be found in numerous landmark cases such as *American Professional v Harcourt,*[129] *Pepsico Inc. v The Coca Cola Co,*[130] *Country Food Market, Inc v Bottling Group, LLC and Bottling Group Holdings, Inc.,*etc.[131]

- **Other countries**

In some countries, the term 'monopoly' is used separately from that of 'dominance' or it is used to describe two degrees of market power control of a firm (group of firms). 'Monopoly position' means that an enterprise or group of enterprises can rule the relevant market without any other competitors. 'Dominant position' refers to the triumph of an enterprise or a group of enterprises over other competitors in the control of the relevant market.

According to the *German Act against Restraints of Competition (ARC) of 1958,*[132] the

---

[126] As was stated in *United States v Grinnell Corp* 'the offence of monopoly under 2 of the Sherman Act has two elements: (1) the possession of monopoly power in the relevant market and (2) the wilful acquisition or maintenance of that power as distinguished from growth or development as a consequence of a superior product, business acumen, or historic accident' . See *United States v Grinnell Corp* 384 US 563 (1966).

[127] Areeda, Hovenkamp and Solow, above n 18; Massey, above n 7, 309; Landes and Posner, above n 17, 937-938.

[128] *United States v American Tobacco Co,* 328 US 781 (1946).

[129] *American Professional v Harcourt,* 108 F.3d 1147 (9th Cir, 1997).

[130] *Pepsico Inc. v The Coca Cola Co,* 315 F.3d 101 (2nd Cir, 2002).

[131] *Green Country Food Market, Inc v Bottling Group LLC and Bottling Group Holdings Inc.* 371 F.3d 1275 (10th Cir, 2004). In *United States v E L du Pont de Neumours and Co* it was observed that '… [A] party has monopoly power if it has, over any part of the trade or commerce among the several States, a power of controlling prices or unreasonably restricting competition'. See *United States v E L du Pont de Neumours and Co* (1956) 351 US 377. Market power is defined as '…[t]he ability to raise prices above those that would be charged in a competitive market'. See *Jefferson Parish Hospital Distt No. 2 v Hyde* 466 US 2 (1984) citing *inter alia United States Steel Corp v Fortner Enterprises* 429 US 610 (1977). It was held that 'market power' was the power of an entity to force a purchaser to do something he would not do in a competitive market. It has also been defined as the ability of a single seller to raise prices and restrict output. See *Eastman Kodak Co. v Image Technical Services Inc.* 504 US 451 (1992).

[132] *German Act against Restraints of Competition (ARC) of 1958* s.19.2.

dominance of an undertaking is divided into two categories.[133] The first one refers to the situation where the undertaking in question has no competitors or is not exposed to any substantial competition.[134] This undertaking is able to restrict the scope of action of its competitors by its market-strategic conduct. In the second category, an undertaking has a paramount market position in relation to its competitors if its scope of action is not sufficiently controlled by its competitors. This market position allows the undertaking in question to act effectively against possible actions of its competitors and to influence the market to a certain degree. An undertaking's paramount market position is assessed by determining a number of criteria, such as market share, financial power, its access to supplies or markets and and its links with other undertakings, etc.[135]

The Australian competition law employs the concept 'substantial degree of power in the market' instead.[136] As the concept 'substantial degree of power in the market' is not defined in the Act, a number of statements made in Australian cases have contributed to its interpretation. Like with the US definition, 'market power' is concerned with the ability of a firm to raise prices and to act independently of competition or of constraint.[137] This interpretation was cited in *Melway Publishing Pty Ltd.*[138] The ability to raise prices

[133] Section 19.2 of the *ARC* states 'An undertaking is single-firm dominant if it (1) has no competitors or is not exposed to any substantial competition, or (2) has a paramount market position in relation to its competitors'.

[134] As explained in the *ARC 1958*, 'no competitor' means no single actual competitor exists and the undertaking in question possesses 100 per cent of market shares. An undertaking is 'not exposed to any substantial competition' when it is able to determine its conduct in the relevant market without taking consideration of any possible reactions of its competitors. See *ARC* s.19.2.

[135] According to Section 19 (2) No. 2 of the *ARC*, an undertaking's paramount market position is assessed by determining '… [i]ts market share, its financial power, its access to supplies or markets, its links with other undertakings, legal or factual barriers to market entry by other undertakings, actual or potential competition by undertakings established within or outside the scope of application of this Act, its ability to shift its supply or demand to other goods or commercial services, as well as the ability of the opposite market side to resort to other undertakings'.

[136] This concept and its interpretation are also employed in New Zealand competition law. New Zealand's *Commerce Amendment Bill to the Commercial Act Corporations 1986* stated the intention that the phrase should be interpreted in a similar manner to the equivalent Australian threshold in sections 46 and 46A of the *Competition and Consumer Act 2010* (Cth) (formerly *Trade Practices Act 1974* (*Cth*)). See ICN, *Response of New Zealand to Unilateral Conduct Working Group Questionnaire* (2007), 10 <http://www.internationalcompetitionnetwork.org/media/library/unilateral_conduct/questionnaire/NewZealandQuestionnaireResponse.pdf>.

[137] In *Queensland Wire Industries Pty Ltd* the Australian High Court held that 'Market power can be defined as the ability of a firm to raise prices above the supply cost without rivals taking away customers in due time, supply cost being the minimum cost an efficient firm would incur in producing the product'. See *Queensland Wire Industries Pty Ltd v Broken Hill Pty Co Ltd* [1989] 167 CLR 177.

[138] *Melway Publishing Pty Ltd v Robert Hicks Pty Ltd* [2001] HCA 13.

can also be found in *Universal Music Australia Pty Limited.*[139]

Market power as the ability of a firm to act independently was also described in *Re: Eastern Express Pty Limited*[140] as follows: 'Market power is concerned with power which enables a corporation to behave independently of competition and of the competitive forces in a relevant market...' and the absence of constraint is said to be an element of 'market power' in *Boral Besser Masonry Ltd.*[141]

In the Vietnamese context, exclusive rights and privileges granted to state monopolies are barriers to entry and important sources of market power. Vietnam's state monopolies use them to hinder the market entry of competitors and maintain their monopoly positions. Vietnam Posts and Telecommunications (VNPT), Vietnam Electricity (EVN) and Vietnam Airlines are businesses which made use of exclusive rights and privilleges to prevent the market entry of new competitors in telecommunications, electricity production and distribution and aviation.

In sum, even though a clearly expressed definition in competition rules is absent, it is concluded that 'state monopoly' refers to a monopoly created, sponsored and maintained by the state and linked with the state through administration management. In this vein, a state monopoly can be primarily regarded as a state enterprise, though in different legal forms.[142] This approach seems to cover a broader meaning than that of China or Vietnam. It also refers to a situation resulting from the existence of state enterprises benefiting from exclusive rights and privileges granted by their state, whereby they can achieve dominant positions in specific industries, control the setting of prices and and thus can distort fair competition.

---

[139] *ACCC v Universal Music Australia Pty Ltd* [2001] FCA 1800.

[140] *Re: Eastern Express Pty Ltd* (1992) 106 ALR 297.

[141] It was held by Gleeson CJ and Callinan J that 'the essence of power is the absence of constraint. Market power in a supplier is absence of constraint from the conduct of competitors or customers'. This is reflected in the terms of s 46(3). Matters of degree are involved, but when a question of the degree of market power enjoyed by a supplier arises, the statute directs attention to the extent to which the conduct of the firm is constrained by the conduct of its competitors or its customers'. See *Boral Besser Masonry Ltd (now Boral Masonry Ltd) v ACCC* [2003] HCA 5, 121.

[142] In the EU, this also includes those firms that are in nature not state owned enterprises, but are granted exclusive rights from the state to be dominant firms in the market.

2.1.7 'State monopoly' compared to other relevant terms

This section introduces similar terms to 'state monopoly' because of their prefix 'state', which refers to the relationship with the state namely: 'state-related undertaking', 'state monopolies of a commercial character' and 'state-created monopoly'. The purpose is to clarify the concept of 'state monopoly' and distinguish it from other terms in the context.

- **'State-related undertaking'**

In fact, the consideration of economic activities carried out by an undertaking involved with the state (state–related undertaking) is not easy.[143] Not all undertakings that the state is involved with are considered public undertakings. This is important, because only public undertakings involved in economic activities can become state monopolies. In EC law some activities conducted by state–related undertaking are excluded from the scope of Article 90 (curently Article 86). In particular, 'non-economic activities', such as compulsory education and social security, or matters of vital national interests, which are the prerogative of the state (such as security, justice, diplomacy or the registry of births, deaths and marriage) will not be regulated by that Article.[144] This is mentioned in the *EC Communication on Services of General Interests regarding non-application of Article 90* (Article 86 new).[145] This is further made clear by the *Transparency* case (*Commission v Italy*[146]*)*, in which activities of a state undertaking are divided into two kinds: those that are conducted in exercising 'public powers' (activities of governmental and non-economic nature) and those that are conducted when it provides goods and services in the market (carrying out activities of an industrial or commercial nature).[147] EC competition case law contributes to the distinction between 'economic activity' and 'non-economic

[143] Blum and Logue, above n 23, 60.

[144] Ibid 60-61.

[145] Commission of European Communities, *Communication on Services of General Interests regarding non-application of Article 90* (Article 86 new) COM (96) 443 Final, 5.

[146] *Commission v Italy* (C-118/85) [1987] ECR 2599, 7.

[147] Blum and Logue, above n 23, 61.

activity'.[148]

- **State monopolies of a commercial character**

One matter relating to state undertakings and regulated by a separate Article in the *EC Treaty* is that of state monopolies of a commercial character (Article 31, formerly Article 37). The Article applies to any body through which a member state, in law or in fact, either directly or indirectly supervises, determines or appreciably influences imports or exports between member states. These provisions likewise apply to monopolies delegated by the state to others.[149]

Hence, it is inferred that a state monopoly of a commercial character is one which will have all the characteristics of a typical state monopoly. The term 'commercial character' used in Article 31(1) means that the entities in question are undertakings according to competition rules. They are vested with the right to carry out certain economic activities, namely imports, exports and/or distribution of certain products.[150] In short, two factors are needed to consider an undertaking to be a state monopoly of a commercial character: the link with the state (under state control) and the possession of a position that allows it to

[148] In *Eurocontrol*, the Court noted that the undertaking in question had been entrusted to perform the task of strengthening cooperation between contracting states in the field of air navigation and was requested to ensure maximum freedom of all users of airspace consistent with the safety requirements. Therefore, it was vested to impose route charges levied on air space users. The Court held that the activities of imposing and collecting of charges by Eurocontrol must be regarded as a public authority acting in the exercise of its powers. See *LTU v Eurocontrol* [1976] ECR 1541.

By contrast, activity regarded as of a non-economic nature was considered in the *Poucet* case in which the character of non-profit making was the central point. The Court held that 'sickness funds and the organizations involved in the management of the public social security system fulfilled an exclusively social function and their activity was based on the principle of national solidarity and was entirely non-profit making'. The funds or organizations in question did not perform an economic activity, hence they could not be seen as enterprises according to Article 85 and 86 (currently Articles 101 and 102 *TFEU*) . See *Poucet* (C-159-60/91) [1993] ECR 637, 18.

The case of *Federation Francaise des Societes d'Assurances and others v Ministry of Agriculture and Fisheries* demonstrated a non-profit making character. The Court held that a national mutual insurance fund dealing with pension funds for farmers was an undertaking despite fulfilling the criteria of a non-profit making organisation. The reasons were, according to the Court, that the national mutual pension fund for farmers was an optional scheme based on the principle of capitalization; benefit solely depended on the amount of contributions paid by the members and the financial results depended on the financial results of the investments made by the managing organisation. Thus, this case was different from the *Poucet* case, as the funds in question were entrusted with management of certain compulsory social security schemes based on the principle of solidarity. Hence, the said national mutual insurance was considered to be carrying out an economic activity in competition with life insurance companies . *See Federation Francaise des Societes d'Assurances and others v Ministry of Agriculture and Fisherie* (C-244/94) [1995] ECR I-4013, 17.

[149] *EC Treaty* art 31 para 2.

[150] Sierra, above n 3, 80.

control or materially influence imports or exports.[151] The scope of Article 31 is limited to those monopolies that appreciably affect imports or exports. State monopolies in production, hence, are excluded from the meaning of state monopolies of a commercial character.[152]

- **'State-created monopoly'**

Another term involved in the concept of 'state monopoly' is 'state-created monopoly'. This term is used throughout documents of the International Competition Network (ICN),[153] which refers to firms that are dominant or that have market power, due to state-imposed restraints of competition.[154] In most cases these firms were (or are still) owned by the state and the state did not (or still does not) allow for any private competitor. Accordingly, the focus is not on sectors that are/were regarded as 'natural monopolies' and that are now subject to such regulation. Therefore, the ICN report discusses this subject by excluding references to the telecoms, energy, water *and and* railways sectors.[155]

According to this interpretation, state-created monopolies can be divided into two groups: the first one refers to those firms that are currently owned by the state and to those that used to be under state control. The second group consists of those firms that the state does not own or will not own. In line with this interpretation, a state-created monopoly is a government or private company which is entitled to exclusive operation in the market and is defined by the national law.[156] This definition excludes telecoms, energy, water and and railway sectors. Following that meaning, state–created monopolies can be either state companies or private companies granted exlusive rights that allow them to operate exclusively in the market.

However, the term 'state created monopoly' is somewhat different from the commonly accepted understanding in Vietnam. According to the ICN categorisation, 'state created

[151] Ibid 81-82.

[152] Ibid 84.

[153] ICN, *Objectives of Unilateral Conduct Laws,* above n 90.

[154] Ibid 64.

[155] Ibid.

[156] Vladimir Kachalin, 'State-created monopolies' (Presentation at the 6th Conferencence of the International Competition Network (ICN) in Moscow, May 2007).

monopolies' refers particularly to 'natural monopolies'. In Vietnam, since all natural monopoly industries are in the hands of the state, there are few differences between a natural monopoly and a state monopoly. Thus, state monopolies can be both 'natural monopolies' and 'state monopolists'.

2.2 The concept of 'state monopoly' in Vietnam

2.2.1 The concept of 'state monopoly' in Vietnam before and after the Doi Moi (Renewal)

2.2.1.1 Before the Doi Moi era

In the centrally planned economy before Doi Moi, the state played a dominant role in the economy,[157] carrying large responsibilities which dealt with practically all aspects of the economy. The state exercised all of the three economic powers simultaneously: administration, ownership and control.[158] The state, particularly central bodies, held strong responsibilities in regulating all aspects of the economy by deciding on all matters relating to economic activities.[159] It controlled all market forces, while rejecting the role of the market in deciding resource allocation. The state monopolised and administered all foreign trade.[160] It used authoritative methods to decide on the establishment of enterprises;[161] regulated their activities through imposed methods such as plans, projects, orders or administrative decisions; and decided the termination of enterprises, for which

[157] Dennis A Rondinelli and Jennie I Litvack, 'Economic Reform, Social Progess and Institutional Development: A Framework for Assessing Vietnam's Transition' in Dennis A Rondinelli and Jennie I Litvack (eds), *Market Reform in Vietnam Market Reform in Vietnam: Building Institutions for Development* (Quorum Books, 1999).

[158] Sujian Guo, *The Political Economy of Asian Transition from Communism* (Ashgate, 2006) 177.

[159] Adam Fforde and Stefan de Vylder, *From Plan to Market – the Economic Transition in Vietnam* (Westview Press, 1996) 58; Nguyen Nhu Phat, 'The Role of Law during the Formation of a Market-Driven Mechanism in Vietnam' in John Stanley Gillespie (ed), *Commercial Legal Developments in Vietnam: Vietnamese and Foreign Commentaries* (Butterworths, 1997) 31; Borje Ljunggren, *The Challenges of Reform in Indochina* (Harvard University, 1993) as cited by Le Khan and Ashol K Dutt, 'Central Planning and Market Elements in Vietnam's Economy' in Ashok K Dutt et al (eds), *Challenges to Asian Urbanization in the 21st Century* (Kluwer Academic Publishers, 2003). See also Tran Tien Cuong, 'Restructuring of State-Owned Enterprises and Relation between the State and Stae-Owned Enterprises in Vietnam' in John Stanley (ed), *Commercial Legal Developments in Vietnam: Vietnamese and Foreign Commentaries* (Butterworths,1997) 366.

[160] Ljunggren, above n 159, 105; Sujian Guo, above n 158, 31.

[161] There were only two kinds of enterprises allowed to be formed: state-run enterprises and co-operatives.

the only form of dissolution was stipulated.[162]

In these circumstances, the state is actually a monopoly. Thus 'state monopoly' refers to a situation where there is an absolute control of the state over the entire economy and and this is implemented through state owned enterprises. 'State monopolies' as firms or monopolists do not exist because there is only one 'monopoly' – the state. The existence of numerous state run enterprises operating in geographical regions is simply the allocation of economic activities among central and local state enterprises.

2.2.1.2 After Doi Moi

Actually Doi Moi reform was primarily concerned with economic development,[163] and, in a narrow sense, it took place only in the state economic sector (SOEs).[164] The groundwork for the existence of a state monopoly was the 'leading role' of the state sector laid down in the *Constitution 1992* and other key documents of the Communist Party of Vietnam (CPV).[165] The course of SOE reform in Vietnam was marked by a series of turning-point decisions.[166] The first one was the equitisation (securitisation) process

[162] Ministry of Planning and Investment and Central Institute for Economic Management (CIEM), 'Doi moi Quan ly Nha nuoc Doi voi Cac Loai hinh Doanh nghiep o Vietnam Theo Huong Khong Phan biet Thanh phan Kinh te' [Reform of the State Management to the Enterprises towards Non-Discrimination of Economic Sectors in Vietnam] (2006) 15.

[163] John Stanley Gillespie, *Transplanting Commercial Law Reform, Developing a 'Rule of Law' State in Vietnam* (Ashgate, 2006) 64.

[164] Natalie G Lichtenstein, *A survey of Vietnam's Legal Framework in Transition* (1994), 14 <http://www-wds.worldbank.org/servlet/WDSContentServer/WDSP/IB/1994/04/01/000009265_3961006075511/Rendered/PDF/multi0page.pdf >. See also Vu Lien Huong, *The Role of Competition Policy and Approaching Method of Competition Bill of Vietnam* (2003) <www.apeccp.org.tw/doc/APEC-OECD/2003-12/014.pdf> ; Le Danh Vinh, 'Building Competition Law in Vietnam to Meet the Need of Regulating Market Economy and in the light of Trade Liberalization and International Economic Integration' (Paper Presented at ASEAN Conference on Fair Competition Law and Policy in the ASEAN Free Trade Area (AFTA) Bali, March 5-7, 2003) <http://www.jftc.go.jp/eacpf/04/vietnam_p.pdf >.

[165] Article 19 of the *Constitution 1992* declares that '…[T]he State sector shall be consolidated and developed, especially in key branches and areas and play the leading role in the national economy'. The *Strategy for Socio-Economic Development 2001 – 2010* of the Vietnam's Communist Party stresses '…[t]he State economic sector is an important material force and the instrument for the State's orientation and macro-regulation toward the economy; it is to focus investments on socio-economic infrastructures and a number of important industrial establishments.' See Communist Party of Vietnam, *Strategy for Socio-Economic Development 2001 - 2010* (2001) <http://vietnam.unfpa.org/documents/Vietnam_devpstrategy0010.pdf>.

[166] These issues will be discussed further in the next chapter dealing particularly with state monopolies in Vietnam.

begun in 1993.[167] The second one was the establishment of General Corporations under *Decrees No.90* and *No.91*[168] and the last one was the formation of the so-called 'state economic groups'. The SOE reform has consequently led to limiting the degree of state intervention in the economy and the elaboration of state participation in many areas. SOEs holding monopoly positions have been reduced in core sectors that are significant for the economy. There is a new approach to the concept of 'state monopoly' which has been changed from 'state monopoly' to 'state enterprise monopoly'.

This matter can be illustrated by the *Competition Law 2004*. According to Article 2(1), 'enterprises' falling within the scope of the law are those belonging to non-state economic sectors as well as those belonging to the state sector. Within the scope of the second category, state enterprises operating in the 'state monopolized domains' can be understood as 'state monopolies' and and Article 15 also conforms to that approach. Beside this, a change in the definition of 'state-owned enterprise' throughout the development of the regulatory framework concerning SOEs is an important factor in understanding the 'state monopoly' concept in Vietnam.[169] 'State owned enterprises' can exist in many forms, such as sole investment limited liability companies, limited liability companies with two or more members, shareholding companies etc,[170] in which the state owns over fifty (50) per cent of the registered capital.[171]

2.2.2 Definition and features of a state monopoly in Vietnam

Like in other countries, 'monopoly' is always referred to by Vietnamese scholars as a market structure in which a single firm supplies a product without any substitute goods being available and where market access seems to be difficult or even impossible to

[167] The process consists of the transformation of SOEs into joint-stock companies and the sale of part of the shares in the company to private investors. See Truong Dong Loc, *Equitisation and Stock-Market Development: the Case of Vietnam* (PhD in Economics Thesis, University of Groningen, 2006).

[168] *Decisions No. 90/TTg* and *No. 91/TTg* dated on 07/3/1994 on the establishment of some General corporations paved the way for SOEs to focus on key sectors in the economy.

[169] The definition of 'state owned enterprise' in the *State Enterprise Law 1995* is limited to any enterprise that '…[i]s capitalized, set up, organized and managed by the State and carries out business or public utility operations…' See *State Enterprises Law 1995* art 1. In the second *State Enterprises Law 2003* and the unified *Enterprises Law 2005*, 'state-owned enterprise' is broadly defined on the basis of state ownership or the percentage that the state invests in that enterprise.

[170] Central Institute for Economic Management (CIEM), 'Cai cach, Nang cao Hieu qua Suc Canh tranh Cua Doanh nghiep Nha nuoc Trong Qua trinh Hoi nhap Quoc te [Renewing and Enhancing of State-Owned Enterprises' Competitivenes in the International Economic Integration Process] (2006).

[171] *Enterprises Law 2005* art 4(22).

achieve.[172] For example, Dang Vu Huan considers monopoly as an extreme case and the highest form of imperfect competition. It exists in a sector or in the market where there is only one producer or a group of producers, providing a certain product that has no substitute; or the producer(s) in question holds a dominant position, allowing it to influence and exclude most of its competitors. This position also enables it to control the price of its products, by means of increasing or decreasing product prices in order to make the highest of profits. A monopolist can be in the form of a sole seller or a sole buyer or both.[173] This interpretation seems to be the most complete one for describing the characteristics of a monopoly, as it is often defined in economic theory and and is commonly cited in studies on competition law in Vietnam.

However, there is no explicit definition of 'monopoly' in Vietnam's legislation. Hence, a comprehensive definition of 'state monopoly' is difficult to obtain. Several terms linked with 'monopoly' are commonly found, such as 'monopoly enterprise', 'monopoly in price', 'monopolisation in distribution', 'state monopoly fields', etc. Claims for the stringent regulation of state monopoly enterprises have become a hot topic in the media and and the need for a specific law dealing with state monopoly enterprises and their activities has been repeatedly discussed in daily life. In fact, 'state monopoly' is a term that is commonly used in documents of the CPV and the Vietnamese government. It is also found in many of studies by local and foreign researchers when discussing SOE reform and the creation of a fair competitive environment in Vietnam.[174] The term 'state monopoly' also appears in studies of equitization of the SOE process and its impacts,

[172] Nguyen Nhu Phat, 'Bao cao Tong hop De tai "Xay dung The che Canh tranh Thi truong cua Vietnam"' [Overall Report of the Project "Building up a Market Competition Institution in Vietnam"] (2005).

[173] 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) 26.

[174] For example, in the *Strategy for Socio-economic Stabilisation and Development to the Year 2000* adopted by Vietnamese Communist Party in 1991, the concept of 'state monopoly' was briefly mentioned in the statement as below:

> …[t]o create environment and conditions for fair competition, equality and voluntary cooperation among entities of domestic and foreign economic sectors; to gradually abolish state monopoly and privileges in most sectors and industries of the economy'.

See Communist Party of Vietnam, *Strategy for Socio-Economic Stabilization and Development to the year 2000* (1991).

discussions on the rationales for state monopolies in Vietnam,[175] and debates over the establishment of state general corporations and state economic groups, labelling the change from 'state monopoly' to 'enterprise monopoly'.[176]

However, 'state monopoly' is commonly regarded as a 'monopoly firm' and can be defined as one of two kinds of 'monopolist'. The first is a 'natural monopoly', referring to a monopolist that has arisen thanks to technological characteristics and demands for products provided by the firm(s) in the economy. It does not depend on historical factors or the impacts of state policies. The second, a 'state monopoly', is a kind of monopoly created by the state by means of administrative decisions and legislation, in order to meet the demand for the socio-economic development of the country during a specific period of time.[177] Another corresponding term, 'monopoly business', is described as an entity that has been created by the administrative measures of the State and been granted monopoly status.[178] The two definitions are quite broad and do not cover the features of the concept.

In the competition law domain, the term 'monopoly' is not explained in the Law and and the law does not have a specific chapter titled 'anti-monopoly'. Rather, the concept 'monopoly position' introduced in Article 12 defines it as a 'firm holding a monopoly position'.[179] Hence, one can be deemed to be a monopoly firm - holding a monopoly position by this criterion - when no other firms are competing with that firm in a specific domain. 'Monopoly position' is a particular case of the 'dominant position', where no

---

[175] See, for example, Pham Hoang Ha, *Boi canh Kinh te cua Chinh sach va Phap luat Canh tranh* (2005) <www.cuts-international.org/7up2/2ndNRGvietnam2.ppt>; Huan, above n 173; Phan Thi Van Hong, *Doc quyen va Phap luat ve Kiem soat Doc quyen o Vietnam Hien nay* [Monopoly and Law Concerning Monopoly Control in Vietnam] (LLM Thesis, Hanoi Law University, 2005) 35; Le Hoang Tung, 'Competition and Monopoly in Vietnam' (Paper presented at International Workshop on Competition Policy in Seoul, July 30 - August 2, 2001).

[176] See, for example, Vu Huy Tu et al, *Co cau Lai Doanh nghiep Nha nuoc theo Luat Doanh nghiep Nam 2005* [Restructuring State Corporations according to the *Enterprises Law 2005*] (National Political Publishing House, 2007) 25; Hong, above n 173, 37.

[177] Le Hoang Oanh, *Binh luan Khoa hoc Luat Canh tranh* [Critical Comments on the Law on Competition] (National Political Publishing House, 2005) 64.

[178] Le Phu Cuong, *Monopoly Situation in Vietnam* <http://www.competitionlaw.cn/upload/05070113295626.pdf>.

[179] The terms 'monopoly' and 'dominance' are used when regarding an enterprise in its relations to others in a competitive context. For example, the Law uses the terms monopoly firm or firm having a monopoly position and firm having a dominant position.

competitors exist.[180] There can be one or a group of enterprises with a dominant position on the market if its total market share is over the threshold set forth in Article 11(2).[181]

From Vietnam's perspective, a monopoly is formed mostly on the basis of state owned enterprises (SOEs) which have formerly operated in monopolised domains. The term 'monopoly' in Vietnam is therefore often thought of as 'state monopoly' and and enterprises holding monopoly positions are then regarded as state monopoly enterprises. With the transformation of SOEs, the term 'monopoly enterprise' is no longer regarded as applying to a 100 per cent state owned enterprise; rather, it includes those in which the state holds controlling shares i.e. joint stock enterprises. Additionally, since all natural monopoly industries are in the hands of the state, there are not many differences between a natural monopoly and a state monopoly.[182] Hence, Vietnam's monopolies should not be fully regarded as 'natural monopolies'.[183]

- ***Administrative monopoly***

Competition/antitrust laws deal mostly with private monopolies, which have become the main target of competition authorities. In Vietnam, as previously discussed, the term 'state monopoly' refers to those monopolies that have been established by administrative decisions to attain a monopolistic position in the market. In this situation, administrative agencies in Vietnam can support various types of monopolistic activities and constitute a barrier to the formation of an orderly market.[184] Moreover, while state ownership has been separated from state management, the indirect intervention of state management bodies in state enterprises is still common. Engaging in the market as independent

[180] Oanh, above n 177, 64.

[181] Article 11(1) stipulates that: 'enterprises shall be considered to hold the dominant position on the market if they have market shares of 30 per cent or more on the relevant market or are capable of restricting competition considerably'. Article 11(2) stipulates that 'groups of enterprises shall be considered to hold the dominant position on the market if they take concerted action to restrict competition and fall into one of the following cases: (i) two enterprises having total market share of 50 per cent or more on the relevant market; (ii) three enterprises having total market share of 65 per cent or more on the relevant market; and (iii) four enterprises having total market share of 75 per cent or more on the relevant market.

[182] Cuong, *Monopoly Situation,* above n 178.

[183] Bui Nguyen Anh Tuan, 'Co Can Mot Dao luat Rieng ve Doc quyen Nha nuoc?' [Is There the Need for a Separate Law Regulating State Monopoly] (2009) *Thoi bao Kinh te Sai Gon* (Online) <http://www.thesaigontimes.vn/Home/doanhnghiep/phapluat/21427/>.

[184] Le Thuy Tran, *Introduction to Regulation of Competition in South East Asia: A Comparativr Study of Antimonopoly Laws in Vietnam and Indonesia and Their Models* (2007) <http://www.gsid.nagoya-u.ac.jp/bpub/research/public/forum/34/12.pdf>..

entities, state enterprises remain connected with line ministries through implicit directions or the close relationships.

The concept of 'administrative monopoly' refers to the intervention of government authorities by conducting administrative activities which may result in the creation of a monopoly or in strengthening the monopoly position of existing monopolies.[185] This understanding corresponds to the UNTACD definition of regulatory barriers, which refers to acts performed by governmental executive agencies affecting the competitive environment.[186] In this regard, 'administrative monopoly' is one of the sources of 'state monopoly' power.

The Chinese *Anti-Monopoly Law* (*AML*) sets out a separate chapter dealing with abuses of administrative power to eliminate or restrict competition in Chapter V. The mechanism dealing with this issue is particularly provided in Article 51 which stipulates that the superior authority is able to correct an illegal act caused by an administrative authority or an organisation authorised by laws or regulations. In addition, the Chinese *AML* provides that anti-monopoly enforcement authorities are able to offer suggestions to the relevant superior authority. In this regard, Vietnam's competition authority should be able to offer similar suggestions whenever it detects signs of abuse of administrative power to perform acts in violation of competition rules.

In sum, in the context of Vietnam, a state monopoly should firstly be an enterprise falling within the definition of 'enterprise' in the *Enterprises Law 2005*.[187] It has the status of a SOE, distinguishable from a state management body. It is characterised by a close link with the state due to state ownership and and is created by means of administrative orders.

---

[185] In Vietnam, administrative monopoly is not referred to as state monopoly; rather it should be considered as the principal and the most common way to create a state monopoly. If 'state monopoly' refers to a state firm which is created by the state and benefits from state support, 'administrative monopoly' relates to activities of state organs that contribute to the formation of that state monopoly. See Tran Anh Tu, 'Nhan dien Doc quyen Hanh chinh o Vietnam' [Identifying Administrative Monopoly in Vietnam] (2008) 24 *Tap chi Khoa hoc Dai hoc Quoc gia Ha Noi* [Hanoi National University Sciences Journal] 2-4.

[186] According to the UNCTAD definition, regulatory barriers to entry result from acts issued or acts performed by governmental executive authorities, by local self-government bodies and by non-governmental or self-regulatory bodies to which Governments have delegated regulatory powers. They include administrative barriers to entry into a market, exclusive rights, certificates, licences and other permits for starting business operations. See UNCTAD, 'Model Law: the Relationships between a Competition Authority and Regulatory Bodies, including Sectoral Regulators' (TD/B/COM.2/CLP/23, 2001) 3 <http://www.unctad.org/en/docs/c2clp23&c1.en.pdf>.

[187] Article 4(1) of the *Enterprises Law 2005* defines an enterprise as an economic institution that has its own name, assets, stable office and is duly constituted for the purpose of conducting business.

Finally, it is a 'monopolist', meaning that it meets the criteria of a monopoly. In addition, state monopolies are focused on strategic and crucial domains.

Taking these factors into consideration, the next section gives more details about the features of the 'state monopoly' concept.

2.2.2.1 A state monopoly should be a state-owned enterprise

Within the scope of the SOE definition, state monopolies include both those that are under absolute state ownership and those in which the state has dominant ownership (over 50 per cent of capital shares).[188] A list of sectors that must be controlled by a state monopoly is stipulated and modified in various legislations.[189]

On the basis of those legislations, state enterprises have become monopolies in such sectors. Eight of the first pilot state economic groups that have been established recently have become state monopolies in those sectors.[190] In addition to the state monopolies mentioned above, there are some SOEs operating in important sectors that have also become state monopolies. In other words, state monopolies include absolute monopoly enterprises, meaning those that are given a monopoly position to operate in their specific

[188] Article 4(22) of the *Enterprises Law 2005* defines 'state owned enterprises' as enterprises of which 50 per cent of total capital is owned by the state. According to *Decision No. 38/2007/QĐ-TTg* on 20/03/2007, the State holds 100 per cent of registered capital of enterprises operating in the following domains and branches: production and supply of explosive materials; production and supply of toxic chemicals; production and repair of weapons, ammunition and equipment exclusively used for national defence and security; equipment, facilities, technical documents and provision of information confidentiality services with cipher techniques; enterprises assigned to perform special defence and security tasks and enterprises based in important strategic, deep-lying and remote areas where economy and defence are combined under the Prime Minister's decisions; management and exploitation of national and urban railways, airports and big seaports etc. The State holds more than 50 per cent of the total shares of enterprises in producing and supplying public products and services such as the national railway system maintenance, map measuring; enterprises having the role of guaranteeing the essential needs of production development and improving the material and mental life of mountain and remote people; those having the role of ensuring the major balance of the economy and market stabilisation. See <http://www.business.gov.vn/WorkArea/showcontent.aspx?id=4650&LangType=1033>.

[189] The list of sectors under state monopoly was first stipulated in *Decision 58/2002/QD-TTg* on 26/04/2002 and modified later by *Decision No. 155/2004/QĐ-TTg* on 24/08/2004. Finally, *Decision No. 38/2007/QĐ-TTg* on 20/03/2007 in replacement of *Decision No. 155/2004/QĐ-TTg* defined 19 sectors in which the State holds 100 per cent of capital and 27 other sectors in which the State hold over 50 per cent of the total number of shares.

[190] The first eight Economic Groups were: Vietnam Post and Telecommunications (VNPT), Vietnam Coal and Mining Industries Group (Vinacomin), Vietnam National Oil and Gas Group (PetroVietnam), Vietnam Shipbuilding Industry (Vinashin), Vietnam Textile and Garment (Vinatex), Vietnam Rubber Group (VRG), Electricity of Vietnam (EVN) and Finance – Insurance Group (Bao Viet). <http://english.vietnamnet.vn/biz/2008/04/776189/>.

sectors and and oligopolies, meaning a group of state owned enterprises.[191]

Not only have such bench-marking steps proved the comprehensive development of SOE reform towards a market economy, they have contributed to a change in the state monopoly concept. To be considered as a 'state monopoly', one must be a 'state owned enterprise' according to the *Enterprises Law 2005*.

2.2.2.2 Monopoly enterprises are created and controlled by the state

In this sense, SOEs have become monopolies in the areas assigned to them by means of administrative orders. The first state economic groups which have recently been established and and the state general corporations currently operating in strategic sectors, are formed mostly by decisions of the government,[192] and not on the basis of their actual accumulation of capital and assets.[193]

'State control' significantly contributes to the state monopoly concept, but this criterion itself is not sufficient to conclude that a state firm is a state monopoly. Hence, 'state monopoly' is sometimes mistakenly confused with the concept of 'monopoly' by which any firm that has exclusive rights in a particular service or product is considered as monopoly.[194]

According to the forms of firms stipulated in the new *Enterprises Law 2005*,[195] Vietnam's state monopolies can be developed from the following sources:[196]

- Sole investment limited liability companies in which the state is the only owner;
- Limited liability companies with two or more members in which the representative of the state holds more than 50 per cent of the registered capital;

---

[191] Cuong, *Monopoly Situation,* above n 178.

[192] For example, a number of current state corporations, excluding those that have been upgraded to state economic groups, were originally established according to *Decisions No.90 and No.91/TTg* on 07/03/1994 by the Prime Minister.

[193] Cuong, *Monopoly Situation,* above n 178.

[194] For example, in Vietnam there have recently been debates over K+ Company, a state firm, regarding the provision of live sports programs. K+ has been accused of abuse of its monopoly position. The question arose as to whether this firm is a state monopoly and whether it has abused its market dominance.

[195] The *Enterprises Law 2005* applies to all kinds of enterprises operating in Vietnam regardless of ownership, including state-owned enterprises. See *Enterprises Law 2005* art 2(1).

[196] CIEM, above n 170.

- Shareholding companies in which shareholders are the state or state companies or the representative of the state, holding more than 50 per cent of the registered capital;

- State General Corporations which are organized in the form of parent-subsidiary companies in which the parent company holds more than 50 per cent of the registered capital;

- State Corporations in which parent companies must be state companies (companies in which the state holds more than 50 per cent of the registered capital).

2.2.2.3 State monopoly benefits from exclusive rights and preferential treatment

SOEs in Vietnam had enjoyed exclusive rights and preferential treatment for a long time before the SOE reform took place. Since Doi Moi, such advantages have continued to be an important factor in the domination of the state sector in the economy.[197] Vietnam's SOEs continue to operate in an uncompetitive environment, created by different kinds of protection and privileges given to them.[198] While the number of SOEs has been considerably reduced, the remaining ones can utilise previous advantages to achieve dominant or monopoly positions. Exclusive rights and preferential treatment given to the state sector are often criticised in academic works as hindrances to the development of the private sector and the creation of a fair playing field for enterprises of all sectors. The weak development of the private sector in Vietnam is another important factor contributing to the monopoly of state owned enterprises.

[197] Exclusive and preferential treatments can be seen in the form of easier access to land and capital, license granting, the monopoly scope of business, etc.

[198] Vu Quoc Ngu, *A Model of the Behaviour of Vietnamese SOEs during the Reform Period* (2004) <http://dspace.anu.edu.au/handle/1885/40342>.

As observed from empirical studies concerning private sector development in Vietnam,[199] the advantages of SOEs in comparison with private enterprises appear to include land use,[200] credit access,[201] escape from hard budget constraints,[202] and access to government contracts.[203] Besides, vital sectors have been reserved to only SOEs, such as telecommunications, civil aviation, power production and supply, in each sector there has often been only one or a group of SOEs operating.[204]

The most important consequence from these examples is that Vietnam's state owned enterprises have been able to benefit from such advantages in order to achieve sufficient economic strength to enable them to be monopolies. The utilisation of the right to impose monopoly prices of some state general corporations in telecommunication, electricity and petroleum are good examples of this.[205]

---

[199] Asian Development Bank (ADB), *Vietnam: Private Sector Assessment* (2005) <http://www.adb.org/Documents/Reports/PSA/VIE/VIE-PSA.pdf>; Hege Merete Knutsen and Nguyen Cuong Manh, 'Preferential Treatment in a Transition Economy: the Case of the State-Owned Enterprises in the Textile and Garment Industry in Vietnam (2004) 58 *Norsk Geografisk Tidsskrift – Norwegian Journal of Geography* 129 <http://0-www.informaworld.com.alpha2.latrobe.edu.au/openurl?genre=article&issn=0029-1951&volume=58&issue=3&spage=125>; Katariina Hakkala and Ari Kokko, *The State and The Private Sector in Vietnam* (2007), 10 <http://swopec.hhs.se/eijswp/papers/eijswp0236.pdf>.

[200] SOEs could obtain long term land use rights, used to pay less for land use rights and until 1995 could even use land for free. See Knutsen and Manh, above n 199. Besides, they found it much easier to acquire land use rights and change licensed purposes as compared to private enterprises. See Daniel Berthold, *Development of the Private Sector and State-Owned Enterprises in Vietnam* (2006), 7 <http://www.ncku.edu.tw/~cseas/report%20SEA/VIET/viet8%20daniel%20berthold.pdf>.

[201] As Vietnam's banking sector is dominated by state-owned commercial banks, SOEs have been likely to find it easier to obtain bank loans and the allocation of the bulk of available capital. See Berthold, above n 200, 6; Knutsen and Manh, above n 199, 58.

[202] Loss making SOEs do not appear to be subject to such constraints because non-performing loans and cash injections will be systematically eradicated by State owned banks, national Investment Assistance Funds and other sources. See Katariina Hakkala, Olivia Ho-Kyoung Kang and Ari Kokko, *Step by Step: Economic Reform and Renovation in Vietnam before the 9th Party Congress* (2001) <http://www.oecd.org/dataoecd/48/32/35233343.pdf>.

[203] While the private sector has found it difficult to get involved in direct export and export quota licenses, SOEs have been able to attain them easily and directly and have greater access to government contracts. See Katariina Hakkala and Ari Kokko, *The State and The Private Sector in Vietnam* (2007), 10 <http://swopec.hhs.se/eijswp/papers/eijswp0236.pdf>; Berthold, above n 194, 7; Leila Webster and Marcus Taussig, 'Vietnam's Undersized Engine: A Survey of 95 Large Private Manufacturers' *MPDF Private Sector Discussions No. 8* (1999) as cited by Berthold, above n 200, 7.

[204] For example, Vietnam Electricity Corporation used to be the only body to control power generation, transmission and distribution. Before the participation of the second airliner (Pacific Airlines), Vietnam Airlines was the only national flag carrier.

[205] Trang Thi Tuyet et al, *Mot so Giai phap Hoan thien Quan ly Nha nuoc Doi voi Doanh nghiep* [Some Solutions to Enhance State Management for Enterprises] (National Political Publishing House, 2006) 91.

2.2.2.4 A state monopoly holds market power

In Vietnam, there exists a major imbalance between state and non-state sectors in economic power and other resources. As a result, Vietnam's state monopolies clearly possess market power in most sectors and industries of the economy.[206] According to Dang Vu Huan,[207] the market power of state enterprises in Vietnam originates from the following three sources:

(i) A number of SOEs established during the central planning period in the past which have continued to account for a large market share in several sectors of the economy.

(ii) A number of SOEs, benefitting from preferential treatment and state subsidies, which have seized market power in certain sectors.

(iii) State corporations established by means of administrative orders according to *Decisions No. 90 and 91/TTg* on 07/03/1994 and and recently established state economic groups.

As can be seen from the above, market power seized by state monopolies is clearly observable, because state monopolies appear in most of the important areas of Vietnam's economy. The possession of market power allows state monopolies to carry out such activities as imposing monopoly prices and other anti-competitive conduct.

- **Conclusion**

As has been observed in the practice of the EU competition law, the US antitrust law and in other countries, the concept of state monopoly in Vietnam is also not defined explicitly. How it is interpreted and what its elements are can just be inferred by observation, case laws and the analysis of its relevant features. State monopoly should be viewed as a situation in which state enterprises hold a monopolistic position. In this approach, a state monopoly is regarded as an economic entity controlled by the state, which, when achieving sufficient economic strength, is able to conduct monopolistic actions that are not subject to competition rules.

[206] Huan, above n 173, 95.

[207] Ibid.

Based on these criteria, state monopoly companies in Vietnam can be categorised into different groups.[208] In terms of organization, they can be divided into two types: absolute monopolies, which are characterised by the complete monopoly position of a certain industry or products under a state company and group monopolies (oligopolies), which are characterised by the control and influence of a group of state companies operating in the same industry or providing one or more kinds of similar products.[209]

Vietnam's state monopolies can be also categorised into two types. The first type is those which have achieved large market shares. These monopolies have made use of advantages and privilleges granted by the state to continue holding important positions in the economy. The second type is those which possess market power as the result of legal barriers excluding competition in particular areas such as national electricity transmission, production and import of cigarettes and cigars, lotteries and the exporting of crude oil. These protected monopolies are also companies holding key roles or strategic positions in state economic groups.[210] This type of monopoly can also be characterised as 'administrative monopolies' which attain market power by means of administrative decisions. As to the forms in which state monopolies exist: they can be in the form of either large state corporations or groups of state enterprises (also known as state economic groups).

The *Competition Law 2004* stipulates that it applies equally to business organisations and individuals (collectively referred as enterprises) including enterprises producing or supplying products, providing public-utility services, enterprises operating in the state-monopolised sectors and domains and foreign enterprises operating in Vietnam.[211] However, the application of competition law to businesses operating in state-monopolised sectors and domains is problematic. In fact, competition does not exists when the monopoly position of state firms operating in these areas is largely protected by legal barriers.

For historical reasons and through political justification, state monopolies are entrusted to control most of the important industries in Vietnam's economy. Despite the fact that non-state sectors (private and foreign invested sectors) have expanded remarkably, state

[208] Hong, above n 175, 35.

[209] Ibid.

[210] *Decision No. 38/2007/QĐ-TTg* on 20/03/2007 in replacement of *Decision No. 155/2004/QĐ-TTg.*

[211] *Competition Law 2004* art 2(1).

monopolies continue to enjoy much greater advantages in competition. This fact has led to the question of how the Vietnamese government regulates anti-competitive business behaviour committed by state monopolies, while ensuring their importance and heading forward to a fair and competitive environment for all businesses.

Chapter 3

STATE MONOPOLY IN VIETNAM: THEORETICAL FOUNDATION, DEVELOPMENT AND DEBATES

This chapter aims to study the theoretical foundation underpinning state monopolies and their development and to discuss concerns arising from the monopoly situation in Vietnam. The first part discusses the theoretical foundation and rationales for the formation of Vietnam's state monopolies. It then reviews their developmental stages to establish how state monopolies have been developed and to discuss the rationales for their growth. The third part focuses on debates and concerns with respect to state monopolies and the monopoly situation in Vietnam, which is mostly related to state economic groups. The last part gives examples to illustrate the monopoly situation involving state monopolies in electricity, telecommunications and aviation.

3.1 Theoretical approach to the development of state monopolies

This part argues that the emergence of state monopolies in Vietnam has been the product of a number of theoretical approaches. They include the standpoint of the 'leading role' of the state sector, the guidelines for SOE reform and the demand for state monopolies in Vietnam under pressure from international economic integration.

3.1.1 The concept of the 'leading role' of the state economic sector

It is important to note that documents of the Vietnam's Communist Party are often seen as the primary sources, serving as the guidelines for legislative and policy making in Vietnam. Throughout these documents there is strong confirmation that the state sector must be used by the state to direct and to participate indirectly in the economy. In sum, the state sector must play a leading role; hence it should seize the core means of

production and therefore should dominate key industries in the economy.[1]

The details of this approach have been clarified by Vietnamese scholars and the notion of 'leading role' of the state economic sector, which has served as the central concept,[2] has undergone new interpretations. As explained by Tran Kim Hao, 'leading role' means that the state sector must become a 'lever' for economic development, whereby state firms seize essential positions in key industries and branches of the economy. Their functions are to pave the way and to direct and support other sectors and they are a material force (tool) for the state to regulate macroeconomic issues.[3] In another study, it is explained that the state sector should only control core means of production and focus on significant and strategic industries that ensure the harmonious operation of the economy.[4] Finally, state resources are only to be provided for some industries and areas that have the potential to further develop in the future, or that are important for the state to invest in for specific purposes.[5]

Why the 'state sector' should play a decisive role in the economy is another important question. It is often argued that this complies with the nature of the Vietnamese socialist

---

[1] It was clearly indicated in the *Strategy for Socio-economic Development 2001 – 1010* that : '…The State economic sector is an important material force and the instrument for the State's orientation and macro-regulation toward the economy; it is to focus investments on socio-economic infrastructures and a number of important industrial establishments. State enterprises assume key positions in the economy; pioneer in the application of scientific and technological advances; and set examples in productivity, quality and socio-economic efficiency and law compliance'. See Communist Party of Vietnam, *Strategy for Socio-economic Development 2001 – 2010* (presented by the Central Committee, 8th Tenure, to the IX National Congress, 4/2001) <www.cepal.org/iyd/noticias/pais/2/31522/Vietnam_doc_1.pdf>.

[2] See, eg, Tran Kim Hao, To Huy Rua, Nguyen Duc Binh, Tran Quang Nhiep.

[3] Tran Kim Hao, *Mot so Y kien Ve Vai tro Chu dao Cua Kinh te Nha nuoc Trong Nen Kinh te Thi Truong Định huong Xa hoi Chu nghia o Nuoc ta* [Several Comments regarding the Dominant Role of State Economy in the Socialist-Oriented Market Economy of Vietnam] (2006) <http://www.ciem.org.vn/home/vn/upload/info/attach/11633996416870_Vai_tro_KT_NN_HT_TT_TV.doc >.

[4] It is commonly agreed that as it is a powerful tool for the state to intervene effectively in the market, state groups should only concentrate on those areas where they have advantages, while other companies do not, such as in electricity, difficult natural resource exploitation, infrastructure, metallurgy... This concentration is important to guarantee that the base of the national economy will not be dominated by monopoly companies and the term 'leading role' of the state sector must be understood in that way.

[5] Central Institute for Economic Management (CIEM) and Swedish International Development Agency (SIDA), *Tiep tuc Xay dung va Hoan thien The che Kinh te thi truong Dinh huong XHCN o Vietnam* [Continuous Building and Perfecting Institutional Framework for Market Economy with Socialist Orientation in Vietnam] (Science and Technology Publishing House, 2006).

state model.[6] According to Vietnamese scholars, the decisive role of the state economic sector originated from the interests of the state in the transitional period to socialism. The achievement of a 'strong state, wealthy people, a civilized, democratic and equitable society' requires the implementation of a decisive role for the state economic sector.[7] Hence, to keep a 'socialist orientation', it is necessary to place this state sector in a prominent position[8] and it must take control of key positions in the economy in terms of scientific and technological ability,business and production expertise.[9]

3.1.2 State sector reform

Like any other countries in the transitional process from a planned economy to a market economy[10] the reform of state-owned enterprises (SOEs) has become the most important issue and this process has been closely linked to overall economic reform in Vietnam since 1986.[11] It is widely argued that the development of state monopolies is deep-rooted in the motivation of SOE reform and that their monopoly in crucial areas in the economy

[6] As it is stated in the *Strategy for Socio-economic Development 2001 – 2010* of the Communist Party of Vietnam, the SOE sector is entrusted to be a significant tool for the state to manage and direct the economy and business activities. See Communist Party of Vietnam, *Strategy for Socio-economic Development 2001 – 2010* above n 1.

[7] To Huy Rua, 'Nang Cao Vai tro Chu dao Cua Kinh te Nha nuoc Trong Nen Kinh te Thi truong Dinh huong XHCN' [Enhancing the Dominant Role of State Economy in the Socialist-Oriented Market Economy.](2007) 1 (122) *Communist Review* <http://www.tapchicongsan.org.vn/details.asp?Object=17134728&News_ID=22151242>.

[8] Nguyen Duc Binh, 'Xay dung Dang ta that vung manh' [Building our Party to be Genuinely Strong] *Nhan Dan* (Online) (2006) <www.nhandan.org.vn>.

[9] Tran Quang Nhiep, *Fundamental Features of the Socialist Oriented Market Economy in Vietnam* (2007) <netx.u-paris10.fr/actuelmarx/cm5/com/M15_socia_Tran_Quang_Nhiep.rtf>.

[10] Tran Van Tho, *Vietnamese Gradualism in Reforms of the State-Owned Enterprises* (2000) <http://www.f.waseda.jp/tvttran/en/recent*pa*pers/E02States-owned%20entreprises%20in%20Vietnam.doc>.

[11] It is noted that in the early 1990s, a gradual program aiming to reform state-owned enterprises was launched in response to poor economic performance, ineffectiveness, loss of money and low competitiveness, as well as the impacts of the economic crisis during the 1980s. In an attempt to fix the failures of the command economy model, this process was undertaken in parallel with the changing of roles of the state in the economy. See Le Dang Doanh, 'Legal Consequences of State-Owned Enterprise Reform' in Ng Chee Yuen, Nick J Freeman and Frank H Huynh (eds), *State-Owned Enterprise Reform in Vietnam: Lesson from Asia* (Institute of Southeast Asian Studies, 1996).

has originated from the guidelines for SOE reform.[12] In general, it is firmly asserted by Vietnamese government that reform and renovation of the SOE sector, at both macro and micro levels, must assure the dominant role of the state sector.[13] This is the consistent standpoint of Vietnam's government as it has appeared in both documents of the CPV Party Congresses and state legislation.[14]

Notably, the role and position of the state sector are discussed in the context of Vietnam's private sector development. As private firms in Vietnam are newly developed and generally small-scale, it is predictable that the SOE sector will continue to play an important role in contributing to economic development and will not be replaced by other sectors in the near future. There are three areas where only SOEs can perform effectively and this is unchallengeable: the supply of essential public utilities, national defence and security and investment in rural and mountainous areas or wherever there is low economic productivity. It plays an active role as the 'locomotive pulling the whole economy towards sustainable high growth'.[15]

3.1.3 The demand for state monopolies in Vietnam

Explanations given by Vietnam's scholars[16] to support the existence of state monopolies are based on arguments over the role of SOEs. Again, state monopoly is justified by the key role of SOEs in the economy. The state is considered to need them to be the material

---

[12] The way to reform of SOEs is commonly agreed as below:

> State-run enterprises should be fundamentally re-arranged, mainly for the purpose of maintaining control over key areas of the economy and should shift entirely to a market-oriented economic mechanism. Thus, they will play a leading role in the economy by virtue of their effectiveness, rather than by relying on state subsidies and a monopoly position as in the centrally planned product economy.

See Nguyen Thanh Bang and Tran Duc Nguyen, 'The Ownership System and Variuos Forms of Business Organisations in the Multi-Sector Commodity Market' in Per Ronnas and Orijan Sjoberg, *Socio-economic Development in Vietnam: the Agenda for the 1990s* (Swedish International Development Agency, 1991) 194.

[13] Phan Van Tiem and Nguyen Van Thanh, 'Problems and Prospects of State Enterprise Reform, 1996 – 2000' in Ng Chee Yuen, Nick J Freeman and Frank H Huynh, *State-Owned Enterprise Reform in Vietnam: Lessons from Asia* (Institute of Southeast Asian Studies, 1996).

[14] As it was observed, socialist framework must be kept unchanged with a new economic and political model to boost Vietnamese economy. See Joanna Harrington, *Constitutional Revision in Vietnam: Constitution Renovation but No Revolution* (1994) <www.capi.uvic.ca/pubs/oc_papers/harrington.pdf>.

[15] Tiem and Thanh, above n 13.

[16] For example, Dang Vu Huan, Pham Hoang Ha, Le Hoang Tung, Nguyen Trung, Nguyen Thi Loan, Dao Xuan Thuy.

force acting as a tool for guiding and regulating macro-economics.[17]

It is argued that the creation of state monopolies enables the state to control crucial areas of the economy or to guarantee essential public goods needed by the entire people. State monopolies are closely linked to the implementation of socioeconomic, security and defence policies. They allow the state to carry out its preferential policies and to regulate competition according to its wishes, stabilizing the economy and protecting consumers' interests.[18] It is believed that in the existing conditions of Vietnam's economy, state monopolies in some sectors are essential for maintaining a certain balance in the economy, ensuring stability and sustainable economic growth.[19]

The rationales for maintaining state monopolies also arise from the need to mobilise investment capital and resources to develop key industries, especially in science and technology. State monopolies, it is thought, should be maintained in areas that require large investment but need a long time for capital returns. Moreover, the existence of state monopolies seems to be significant in those areas where it is difficult to attract foreign investment.[20] It is believed that state economic activity plays an important role in attracting capital from various economic sectors[21] and contributes to the stabilization of prices of crucial goods; and more recently, it has been significant in the context of the

[17] Dao Xuan Thuy, *Dieu kien va Giai phap Hinh thanh Cac Tap doan Kinh te Tu Cac Tong Cong ty 91* [Conditions and Solutions for the Establishment of Economic Groups on the Basis of the 91 State General Corporations] (National Political Publishing House, 2009) 50; Pham Hoang Ha, *Boi canh Kinh te cua Chinh sach va Phap luat Canh tranh* [Economic Context of Competition Policy and Law] (2005) <www.cuts-international.org/7up2/2ndNRGvietnam2.ppt>.

[18] 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).

[19] Le Hoang Tung, 'Competition and Monopoly in Vietnam' (Paper presented at International Workshop on Competition Policy in Seoul, July 30 - August 2, 2001). This viewpoint has been demonstrated by the active role of state enterprises in dealing with the economic crisis in the world recently. In the meeting with leaders of state corporations and economic groups in July 2007, Prime Minister Nguyen Tan Dung stated that state enterprises had become important tools of the state to regulate the economy, through their attempts in terms of inflation restraint, macroeconomics stabilization, growth maintenance and the guarantee of social security. See Saigon Giai phong Online, 'Cac Tong Cong ty Nha nuoc Co Vai tro Quan trong Gop phan On dinh Xa hoi' [State General Corporations Play an Important Role in Stablizing the Society]<http://www.sggp.org.vn/kinhte/2009/2/180496/>. See also Conclusion of the Prime Minister at the Meeting with State Economic Groups and General Corporations on 20/08/2008.

[20] Phan Thi Van Hong, *Doc quyen va Phap luat ve Kiem soat Doc quyen o Vietnam Hien nay* [Monopoly and Law Concerning Monopoly Control in Vietnam] (LLM Thesis, Hanoi Law University, 2005) 40.

[21] Tung, above n 19.

rising price of fuel in the world.[22]

3.2 Historical development of state monopolies in Vietnam

The development of state monopolies in Vietnam is reviewed in three stages: (i) the formation of the union of state-run enterprises; (ii) the establishment of state general corporations and (iii) the formation of state economic groups. This part shows the influence of socialist ideas and political determination during the early stages of the development of state monopolies. Additionally, it confirms that the formation of state monopolies in Vietnam was undertaken under the guidelines of Vietnam's Communist Party, where the 'leading role' of state sector has remained unchangeable.

3.2.1 Union of state-run enterprises (*Xi nghiep Quoc doanh*)[23]

3.2.1.1 The formation of Unions of state run enterprises

The state economic sector in Vietnam emerged in the late 1950s with the introduction of a Soviet-style centrally planned economy[24] (a so-called Stalinist-derived economic system[25]) in the North and later in the whole country following its reunification. Under the central planning model, the domination of the state sector was a legal principle. As a result, economic legislation was focused only on the existence and operation of state-run enterprises.[26]

Before the comprehensive reform in 1986 (Doi Moi), state-run enterprises were the main

[22] Ibid. For example, when petroleum and gasoline price increased in the year 2000, Petrolimex – a state owned corporation having monopoly on importing gasoline, however, still had to import sufficient quantity of gasoline set forth by the State to ensure stable supply of petroleum and gasoline in the market. This caused a loss of nearly 1.000 billion VND to Petrolimex.

[23] According to Tu dien tieng Viet [the Dictionary of Vietnamese], *Xi nghiep Quoc doanh* is defined as 'an economic organisation established, invested and managed by the state to carry out business activities or to provide public services in order to fulfil socio-economic targets set by the state' [Long trans]. See <http://dictionary.bachkhoatoanthu.gov.vn/default.aspx?param=134BaWQ9ODMyMyZncm91cGlkPTgma2luZD0ma2V5d29yZD0=&page=19>.

[24] The command model affected many aspects of the economy and this was seen in the recognition of economic sectors. As a result, by the 1960s, the legal system did not recognise the private sector at all and only state-run companies and collectives were accepted. See John Stanley Gillespie, *Transplanting Commercial Law Reform, Developing a 'Rule of Law' State in Vietnam* (Ashgate, 2006) 14.

[25] Luke Aloysius McGrath, 'Vietnam's Struggle to Balance Sovereignty, Centralization and Foreign Investment under Doi Moi' (1996) 18 *Fordham International Law Journal* 2095-2138.

[26] Nguyen Nhu Phat, 'The Role of Law during the Formation of a Market-driven mechanism in Vietnam' in John Stanley Gillespie (ed), *Commercial Legal Developments in Vietnam: Vietnamese and Foreign Commentaries* (Butterworths, 1997).

'players',[27] basically operating in an environment without competitors.[28] The state sector developed rapidly to seize the leading role in the economy.[29] State-run enterprises were managed by either the central government – through line ministries – or local governments[30]. The initiative for the development of a centralised and large scale model of state-owned enterprises was first mentioned earlier in government *Decree No. 302/HĐBT* dated 20 December 1978. It aimed to develop a model of state run enterprises with larger economies of scale.[31]

The term 'Union of State-Run Enterprises' *(Lien Hiep Xi nghiep Quoc doanh)*[32] used in this Decree describes an organisation consisting of several enterprises having close

[27] Like in other Communist countries, the co-operative sector, actually not the state sector, was always considered secondary. See Hubert Izdebski, 'Legal Aspects in Economic Reforms in Socialist Countries' (1989) 37 (4) *American Journal of Comparative Law* 730. See also Vu Lien Huong, *Ther Role of Competition Policy and Approaching Method of Competition Bill of Vietnam* (2003) <www.apeccp.org.tw/doc/APEC-OECD/2003-12/014.pdf>; Le Danh Vinh, 'Building Competition Law in Vietnam to Meet the Need of Regulating Market Economy and in the light of Trade Liberalization and International Economic Integration' (Paper presented at ASEAN Conference on Fair Competition Law and Policy in the ASEAN Free Trade Area (AFTA) Bali, March 5-7, 2003) <http://www.jftc.go.jp/eacpf/04/vietnam_p.pdf >.

[28] They were granted full subsidies from the state budget; everything was covered by the state and any losses during their operation were completely covered by the state budget. They were managed through administrative measures exercised by central and local authorities, while they only carried out state assigned tasks. All operations of enterprises were pre-set in plans which were prescribed and approved by the state. The State planning committee, ministries or general departments were authorized with prescribed targets and they then determined particular targets for specific enterprises in various branches. See Sujian Guo, *The Political Economy of Asian Transition from Communism* (Ashgate, 2006) 32; Tran Tien Cuong, 'Restructuring of State-Owned Enterprises and Relation between the State and State-Owned Enterprises in Vietnam' in John Stanley Gillespie (ed), *Commercial Legal Developments in Vietnam: Vietnamese and Foreign Commentaries* (Butterworths, 1997) 385.

[29] Truong Dong Loc, *Equitisation and Stock-Market Development: the Case of Vietnam* (PhD in Economics Thesis, University of Groningen, 2006) 37.

[30] Borje Ljunggren, *The Challenges of Reform in Indochina* (1993) cited by Le Khan and Ashol K. Dutt, 'Central Planning and Market Elements in Vietnam's Economy' in Ashok K Dutt et al (eds), *Challenges to Asian Urbanization in the 21st Century* (Kluwer Academic Publishers, 2003) 105; Adam Fforde and Stefan de Vylder, *From Plan to Market – the Economic Transition in Vietnam* (Westview Press, 1996) 58.

[31] Bui Van Huyen, *Xay dung va Phat trien Tap doan Kinh te o Viet Nam* [Building and Developing Economic Groups in Vietnam] (National Political Publishing House, 2008) 98.

[32] The term 'Union of State-Run Enterprises' [Lien hiep Xi nghiep Quoc doanh] was later defined as 'an organization carrying out economic activities in production and services, whose members are state-run enterprises' [Long trans]. The *Statute of Union of State-Run Enterprises* attached to the *Decree No. 27/HDBT* on 22 March 1989 <http://www.thuvienphapluat.vn/archive/Nghi-dinh/Nghi-dinh-27-HDBT-Dieu-le-Lien-hiep-xi-nghiep-quoc-doanh-vb37732t11.aspx>.

relationships in the same economic and technical areas.[33] Besides, this organisation also acted as a state managerial body. Hence, *Xi nghiep Lien hiep* conducted both business and state management functions.[34]

The performance of unions of state run enterprises had some encouraging achievements. They contributed significantly to the enhancement of production capacity, the maintenance of product quality, fulfilment of assigned tasks and the satisfaction of local consumers and of export demands. More importantly, they led to an approach to new thinking regarding the management of enterprises of greater size and capacity and about the form of industrial behaviour. Successful cases could be found in a number of unions, such as textiles and railways, in which some unions became typical seeds for the development of the next models of state enterprises.[35]

3.2.1.2 The modification of the union of state run enterprises model

However, the union of state-run enterprises model showed critical flaws and enterprise unions turned out to be obstacles to economic development in later periods. Unions were simply vertical combinations of enterprises without an economic basis. They became 'intermediate administrative bodies', creating obstacles to the business activities of their member enterprises. There was also a lack of managerial capability, with outdated thinking among CEOs. Local and provincial unions were then created.[36] As a result, the entire economy was partitioned vertically and thus it failed to mobilise all resources for development

After the 6th CPV Congress in December 1986, the centrally planned mechanism came to an end and was then replaced by a market-oriented economy. Numerous important documents were promulgated to accelerate the SOE reform.[37] Among them was the

[33] This was stipulated in the *Statute of Enterprise Run Union* attached to the *Decree No. 302*. There were several unions consisting of state-run firms operating in the same range of production or provision of goods and services such as food, textile and garments. For example, Nam Dinh Textile during 1980 was a typical one consisting of a number of textile companies. Similarly, from 1989 to 2003, Vietnam Railways was another one which consists of many companies involving in the provision of railways services.

[34] Huyen, above n 31, 98.

[35] Ibid 99.

[36] Ibid.

[37] Mekong Economics, *SOE Reform in Vietnam* (2002) <http://www.mekongeconomics.com/Document/Publications/2002/MKE%20SOE%20Reform%20in%20Vietnam.pdf>.

Decree No. 217/HĐBT on 14/11/1987 concerning the renewal of the planning, economic accounting and socialist business of state enterprises. This Decree began the commercialisation process of state enterprises and marked the most important step in acknowledgement of this change,[38] placing state enterprises on a commercial footing, with increased autonomy and financial responsibility.[39] The role and operation of SOEs were 'drastically changed' after the adoption of this Decision.[40] Autonomy was initially granted to SOEs to formulate and implement their own long-term, medium-term and short-term operating plans, based on socio-economic development guidelines set by the Government.[41]

The next development in this regard was the release of *Decree No. 27/HĐBT* on 22/3/1989, introducing a new Statute for enterprise unions. The autonomy of unions was recognised, bringing new changes.[42] According to this Decree, existing unions were classified into two groups. The first one included those enterprises operating in the same industry (e.g. textile, food processing and chemicals) and voluntarily joining the unions.[43] The second group, in contrast, had a higher level of economic concentration. This group consisted of state companies operating in such specific industries as railways, electricity, aviation, etc.[44] It is notable that unions belonging to this group became key constituents

[38] Vu Quoc Ngu, *The State-Owned Enterprise Reform in Vietnam: Process and Achievements* (2002) <http://www.iseas.edu.sg/vr42002.pdf >.

[39] Brian Van Arkadie and Raymond Mallon, *Vietnam – A Transition Tiger?*(Asia Pacific Press, 2003); Mekong Economics, above n 37.

[40] Nguyen Van Huy and Tran Van Nghia, 'Government Policies and State-Owned Enterprise Reform' in Ng Chee Yuen, Nick J Freeman and Frank H Huynh (eds), *State-Owned Enterprise Reform in Vietnam: Lesson from Asia* (Institute of Southeast Asian Studies, 1996).

[41] See Loc, above n 29; Vu Quoc Ngu, above n 38; Arkadie and Mallon, above n 39; Huy and Nghia, above n 40; Le Viet Thai, Vu Xuan Nguyet Hong, Tran Van Hoa, 'Anti-trust Law and Competition Policy in Vietnam: Macroeconomic Perspective' in Tran Van Hoa (Ed) *Competition Policy and Global Competitiveness in Major Asian Economies* (Edward Elgar Publishing, 2003) 140; Elizabeth St. George and Mary Quilty, 'Reconfiguring Socialist Ideology in Vietnam: The 2006 Tenth National Party Congress and the lead-up to Vietnam's entry into the World Trade Organisation' (Paper presented at the 16th Biennial Conference of the Asian Studies Association of Australia, Wollongong, 26 - 29 June 2006).

[42] The Decree specified 'union of state run enterprises' as a large scale state enterprise which consists of member enterprises having close relations in terms of business branches. See Huyen, above n 31, 98.

[43] In this group, the properties of unions were contributed by those of union members and a Board of Management was formed to include representatives of union members. However, the activities of the unions were implemented by the members themselves. The unions in fact did not have actual rights in making important decisions regarding the business activities of the entire union.

[44] Unlike the first group, such unions were created by means of administrative orders and the union's properties and assets were combined from those of union members. Union membership was to be compulsory and member enterprises would not have a fully independent legal status. See Arkadie and Mallon, above n 39, 132.

from which GCs were later formed.[45]

Decree No. 388/HĐBT of Council of Ministers in 20 November 1991 was another turning point marking the dissolution of the union model.[46] All state enterprises were then required to re-register or close. However, the desire for large economic organizations having a high level of capital consolidation and competitive capacity to integrate into the world market[47] remained as important as before.

In conclusion, the formation of unions of state run enterprises was obviously unsuccessful because no actual changes were made in terms of ownership of state assets and management mechanisms. However, they did form a basic foundation for the establishment of groups of state enterprises and created a remarkable change in the recognition of the role of state enterprises, as well as demands for their reform and acknowledgement of the need for larger and more powerful state enterprises.

3.2.2 State general corporations (GCs) – the second stage towards the formation of state monopolies

3.2.2.1 Two Decisions No. 90 and 91 as the legal basis for state corporations

The next significant step on the pathway to state monopolies was marked by the

[45] Unions of state run enterprises were later regarded as the initial form of state general corporations and state economic groups. See Vu Huy Tu et al, *Co cau Lai Doanh nghiep Nha nuoc Theo Luat Doanh nghiep Nam 2005* [Restructuring State Corporations according to the *Enterprises Law 2005*] (National Political Publishing House, 2007) 17. For example, the Machines and Industrial Equipment Corporation was among the first corporations to be established in accordance with Statute 27. The Machines and Industrial Equipment Corporation (MIE) was established on 12/5/1990 by *Decree No.155/HDBT* of the Council of Ministers. See <www.mie.com.vn>; Other examples are the Vietnam Civil Aviation Corporation, Vietnam General Rubber Corporation (GERUCO), the Vietnam Railway Corporation (VR); following *Decision No. 575/QD/TCCB-LD* dated April 10, 1990 of the Minister of Transport, the General Railway Administration (established in 1955 as a administration department) was reformed to become the Vietnam Railway Union. See <http://www.vr.com.vn/English/history.htm>. It is noted that those corporations were named 'General Corporations' (*Tong Cong ty*), but they were in nature a kind of union of state run enterprises, hence were organised and operated under *Statute 27*. Notably, they were later restructured to form GCs according to the *Decree No.91*.

[46] The Decree was introduced under calls for the consolidation of the state enterprise sector from the late 1990s, when serious problems regarding state enterprises occurred under the effects of the world political situation, tougher budget constraints and increased competition. See Arkadie and Mallon, above n 39, 125-126.

[47] Communist Party of Vietnam, *Documents of the 7th Meeting of Central Committee Section VII* (National Political Publishing House, 1994) 90.

establishment of state general corporations (GC)[48] in the equitisation (securitisation) process of SOEs.[49] The *Decisions No. 90* and *91/TTg*[50] were adopted during this time to consolidate state enterprises in order to rationalise state enterprise supervision and to facilitate the abolition of line ministry and local authority control over state enterprises.[51] The two Decisions also put an end to the vagueness regarding procedures for re-registration of existing unions of enterprises and state enterprises.[52] Particularly, *Decision No. 91* was aimed at experimentally creating numerous large pilot state corporations following the model of business groups. Such pivotal GCs were believed to enable production synergies and the pooling of investments of member enterprises.[53] For these reasons the corporations to be selected were leading companies and corporations in the same economic branches and in the same territorial areas. However, with compulsory criteria set forth in the decision, most of the GCs established by this Decision No. 91 were centrally run enterprises.[54] Additionally, they had to 'occupy important positions in the national economy, satisfy the needs of the domestic market and promise to expand their

[48] This was due to the call for grouping state enterprises into large corporations mentioned in the Political Report of the 7th CPV Party Congress. See Arkadie and Mallon, above n 39, 132.

[49] In May 1990, the government adopted Decision No. 143 aiming to undertake a pilot plan of equitisation for several SOEs, transforming them from state run enterprise *(Xi nghiep Quoc doanh)* to join-stock company *(Cong ty Co phan)* with initially seven SOEs. See *Decision No.143/HDBT* on 10/05/1990 of Council of Ministers on Summarising the Implementation of *Decision No. 217 HDBT* dated 14/11/1987, *Decrees No. 50/HDBT* dated 22/03/1988 and *No.98/HDBT* dated 02/06/1988 and Experimental Undertaking the Renovation of Management over State-run Enterprises. In 1993, the government formally encouraged other SOEs to prepare for the equitisation. The equitisation process consisted of the transformation of SOEs into joint-stock companies and the sale of numbers of shares in the companies to private investors. See Loc, above n 29.

[50] Two Decisions were adopted on 07/3/1994 on the establishment of some GCs. While *Decision No.90* aimed to establish state corporations with at least five voluntary SOE members and a minimum legal capital of VND100 billion, *Decision No.91* aimed to form much larger corporations with at least seven SOE members appointed by the State and a minimum legal capital of VND1,000 billion. General Corporations established by Decision 91 were the ones occupying important positions in the national economy. They had to have at least seven members, 1000 billion VND of legal capital and to be separate entities created by and reporting to the Prime Minister. GCs according to the Decision 90 had to have at least five member companies and 100 billion VND of legal capital and were created by and reported to the provincial People's Committees and various ministries. See United Nations Development Programme (UNDP) Vietnam, *The State as Investor: Equitisation, Privatisation and the Transformation of SOEs in Viet Nam* (206), 15 <http://www.undp.org.vn/undpLive/System/Publications/Publication-Details?contentId=2079&languageId=1&categoryName=&CategoryConditionUse=>; Leila Webster and M Reza Amin, *Equitisation of State Enterprises in Vietnam: Experience to Date* (2008) <http://www.ifc.org/ifcext/mekongpsdf.nsf/AttachmentsByTitle/PSDP+3/$FILE/PSDP-No-3-EN.pdf>.

[51] Arkadie and Mallon, above n 39, 131-132; Mekong Economics, above n 37.

[52] Arkadie and Mallon, above n 39, 132.

[53] UNDP Vietnam, above n 50, 15.

[54] The decision actually did not state clearly whether state general corporations had to be formed from state central or local run enterprises.

business relations abroad'.[55] The term 'economic group' was then used to refer to those consolidated corporations.

With the creation of such GCs, new organisational forms were introduced, including holding company and parent-subsidiary models.[56] However, due to the ambiguity of the term 'economic groups', 18 of the first state corporations established according to *Decision No.91* were not officially called 'state economic groups' *(Tap doan Kinh te Nha nuoc),* but rather they were termed 'State Corporations 91' *(Tong Cong ty 91).*[57] In fact, the low level of capital consolidation, limited competitive capacity and the administrative methods were reasons for the failure of this model, even though they were expected to become 'giants' in the Vietnamese economy.

3.2.2.2 Rationales for the establishment of state general corporations

In general, the establishment of GCs met the need for further SOE reform and the demand for deeper integration into the world economy. First of all, this was an important step in the SOE reform in which state enterprises were to be restructured and consolidated in order to create powerful and capable corporations to act in leading roles in the economy. The formation of GCs was regarded as significant for improving the business performance of state enterprises[58] and for gradually removing the direct intervention of line ministries and local administration.[59] This was also expected to enhance the

[55] Article 1 of the *Decision No. 91/TTg* of the Prime Minister on the Establishment of the Pilot Business Groups.

[56] UNDP Vietnam, above n 50, 15.

[57] Vo Thi Hoai, *Hoan thien Cac Moi Quan he Phap ly Giua Cong ty Me – Cong ty Con Trong Cac Tap doan Kinh te* [Enhancing Legal Relationships between Parent and Subsidiary Companies in the State Economic Groups] (LLM Thesis, Hochiminh City Law University, 2007) 32.

[58] Arguments in support of state corporations focused on the economies of scale arising from larger state business entities, the increased scale needed for domestic enterprises with external competitors in domestic and international markets, the need to free state administrative resources to focus more on managing a reduced number of businesses better and the idea that large state businesses were essential for the state to play a leading role in the industrialization and modernization of the economy. See Arkadie and Mallon, above n 39, 131-132.

[59] Khuc Hoang Giang, *Mot so Van de ve Dia vi Phap ly Cua Tong Cong ty Nha nuoc Trong Nen Kinh te Thi truong o Viet Nam* [Some Issues regarding the Legal Position of State General Corporations in Vietnam's Market Economy] (LLM Thesis, Hochiminh City Law University, 2000) 20.

competitive capacity of the corporations themselves and their member companies.[60]

Secondly, the form of GCs was to facilitate the process of consolidation of capital in state-owned enterprises. GCs were to play an important role in mobilizing and allocating capital. Capital contributed to corporations was to be invested reasonably in effective companies and projects, allowing corporations to concentrate on long-term projects and limiting the situation in which investment was scattered over every company. Being incorporated into a group, a company could supposedly diversify its operations, benefit from gaining more market share, have more flexible business strategies, avoid risk, have the chance to maximize its profits by reducing tax payments and the costs of share issuance and enhance the ability to pay debt service charges.[61] Finally, GCs were to play an important role in the development and application of technology and science investment in all the corporations and in each member company.

3.2.2.3 Achievements and constraints of the state general corporation model

The formation of GCs shows the desire of the Vietnamese government to make SOEs more capable in the context of Vietnam's international economic integration, to fulfil the need for faster trade liberalization[62] and to deal with the participation of transnational corporations. GCs are said to have brought positive effects.[63] Those established in key industries of the economy are believed to have helped in promoting growth, stabilising socioeconomic conditions and ensuring their orientation and regulation by the state.[64]

---

[60] Ibid. According to Giang, long-term development strategies made by state corporations would act as guidance for their subsidiaries, reducing the number of separate and closed operations of each member, reducing considerably the competition situation among them. This is significant because state corporations were formed by companies operating in the same areas.

[61] Le Thi Lanh, *Groups in Vietnam: Situation and Future Development* (2001) <http://www.ueh.edu.vn/tcptkt/english/2001/thang05/wlanh.htm>.

[62] Hisaaki Mitsui, *Vietnam's State Enterprise Reform; What Phase has it Reached?* (1997), 48 <http://www.springerlink.com/content/l047247011j4vwpq/fulltext.pdf>.

[63] Cuong, above n 28, 382; Tu et al, above n 45, 193.

[64] Some corporations are reported to have exercised their intended functions and played a leading role in the economy. See Vu Huy Tu et al, above n 45, 192. Some corporations gained success in mobilising their own resources in association with external ones to carry out further investment, renovating technology, expanding business scales, heightening competitive capacity and exploring domestic while accessing international markets. In key sectors (electricity, coal, petroleum, aviation, railway, etc), GCs showed their importance in stabilizing socioeconomic conditions, balancing foreign exchange, maintaining prices. An example is seen in the case of the Coal Corporation as it could mobilize the potentials of its members, increasing its outputs, applying the same sale prices for both the domestic and overseas market, making a profit one year after it was established. See Cuong, above n 28, 382.

Besides, they contributed remarkably to the state budget and to employment arrangements.[65]

The establishment of GCs, however, did not meet the objective requirements of economic development and did not achieve the expected targets. GCs were generally small-scale, as compared to those in the region and the world. Their business efficiency was still far from what was expected, despite receiving support and investments from the state.[66] The role of GCs in terms of technology support and market creation was limited. Many of them continued to rely on state support. There was also a failure in the attempt to separate business functions from ownership and management functions. In fact, GCs still exercised management functions such as producing sectoral schemes, coordinating international relations and being involved indirectly in price-setting.

This lack of success was explained by the model itself,[67] even though it was believed to be a copy of Japanese and Korean models.[68] The establishment of GCs, in fact, did not clarify comprehensively the ownership issue. Besides, not many actual changes were made regarding organization and management issues, causing a '*new wine in old bottles'* situation.[69] Therefore, conflicts over the exercise of ownership rights were not resolved properly and properties invested in corporations and their members, in nature, belonged to

---

[65] Tu et al, above n 45, 193.

[66] Out of 18 general corporations formed by *Decree No.91*, 13 were believed to be making losses or achieving break-even. See Trang Thi Tuyet et al, *Mot so Giai phap Hoan thien Quan ly Nha nuoc Doi voi Doanh nghiep* [Some Solutions to Enhance State Management for Enterprises] (National Political Publishing House, 2006) 91.

[67] Although it was once believed to be a copy of the Japanese Kereisu and Korean Chaebol models, it possessed differences. See Arkadie and Mallon, above n 39, 132; Dwight H Perkins and Vu Thanh Tu Anh, *Vietnam's Industrial Policy*. *Designing Policies for Sustainable Development* (2008) <www.vdf.org.vn/Doc/2008/VDFConf_Presentation3_PaperEng.pdf >; Jonathan Pincus and Vu Thanh Tu Anh, 'Vietnam feels the Heat' (2008) 171 *Far Eastern Economic Review* <http://www.viet-studies.info/kinhte/VN_feels_heat_FEER.htm>; Harvard Vietnam Program, John F Kennedy School of Government, *Choosing Success: The Lessons of East and Southeast Asia and Vietnam's Future* (2008) <http://www.fetp.edu.vn/Research_casestudy/PolicyPapers/PP001_Choosing_Success_E.pdf>.

[68] According to Brian Van Arcadie, GCs did not either own their member entities or become holding companies as they were not subject to the existing *Company Law*. In fact, they were more administrative in nature, similar to the enterprise groups (*jituan*) in China. See Arkadie and Mallon, above n 39, 132. According to Dwight H. Perkins and Vu Thanh Tu Anh, Japanese and Korean models were independent from the government. They had been developed from private companies and backed up by their government to attain internationally competitive capacity. In a number of cases, like the Korean POSCO, which was primarily a state owned enterprise, they also attained a high degree of independence from government ministries. In contrast, state general corporations appeared to be an import substitution model, enjoying protection from foreign imports and continuing subsidies. See Perkins and Anh, above n 67.

[69] Tu et al, above n 45, 26.

the state. The total capital of corporations was accumulated from the state invested capital into each member.

State general corporations, rather than being created by the internal demand of development of each enterprise, were formed by means of administrative decisions of the state.[70] Their lack of close relations between subsidiaries or between themselves and the general corporation,[71] and their voluntary status and the freedom for making decisions by member companies were ignored or denied.[72] The role of corporations in coordinating the relationship with member companies was limited and based mostly on administrative decisions.[73]

GCs maintained close links with their former line ministries and thus they can be viewed as the successors of formerly subdivided branch ministries.[74] Therefore, general corporations, despite their legal status, seemed to continue operating under the direction of the ministries concerned. In fact, unfortunately, when the format of GCs was upgraded to EGs some years later, those characteristics remained unchanged. The close relationship was illustrated by the management apparatus of the newly formed GCs.[75]

The capital of most GCs was generally limited and the ability to accumulate capital was weak, because they were inherited from state companies which were basically small in scale and limited in capital development. Besides, as most GCs were formed on the basis of core enterprises in specific areas, they were only specialising in these specific ones.[76]

---

[70] Ibid 91.

[71] As argued by Lanh, the formation of such groups can only be reasonable when there is a need for cooperation between companies to meet requirements posed by the development process. See Lanh, above n 61.

[72] Huan, above n 18.

[73] GCs exercised direct functions in the day-to-day management of enterprises. Thus it became another layer of bureaucracy without producing any value added from their member contributions. The loose linkage between corporations and members is explained by the lack of financial connection and unclear definition regarding capital, assets, rights and obligations between them. See Tuyet et al, above n 66, 91. According to the general corporation model, most member companies were legal entities; hence the regulation of capital transfer from one member to another would only be conducted by documents of GCs, thus having little effect. See Tu et al, above n 45, 196.

[74] Mitsui, above n 62, 148.

[75] In particular, the staff of branch ministers concerned were now assigned to become CEOs of those corporations . See Mitsui, above n 62.

[76] For example, specific GCs could be found to be the former Vietnam Electricity Corporation, Vietnam National Chemical Corporation, Vietnam Steel Corporation, Vietnam National Salt Corporation… See Tu et al, above n 45, 196.

GCs were established according to business branches and divided into geographical regions, causing other negative effects.[77] It limited customer's options for products and services and also restrained corporations from participating in other areas.

3.2.3 The formation of state economic groups (EGs) – The third stage in forming state monopolies

3.2.3.1 Further developments in SOE reform towards state economic groups

The next CPV document that had implications for the acceleration of SOE reform was *Resolution 05/NQ-TW* of 24/9/2001.[78] It paved the way for the clarification of the term 'state ownership in state-owned enterprises'.[79] This was reflected in the government's plan to 'rearrange and strengthen those corporations that are vital to the national economy, while merging or dissolving other state corporations'.[80] The desire for a number of 'giants' in the economy was once again confirmed, as there was a plan to establish some specialised economic groups on the basis of existing state corporations. It

[77] For example in Vietnam state firms were formed according to provincial, regional and central divisions, which created market divisions among them. Two Food Corporations were established in the north and the south respectively. The Vietnam Northern Food Corporation (VINAFOOD1) was established by the *Decree 312/TTg* dated 24/5/1995 and later was transformed into a wholly state-owned company in 2009. The Vietnam Southern Food Corporation (VINAFOOD2) was established by the *Decree 979/QĐ-TTg* dated 25/6/2010. The same thing can be seen through Electricity Corporations before the birth of Vietnam Electricity Group (EVN), there were the Power Corporation No.1 in the North, the Power Corporation No.2 in the South and the Power Corporation No.3 in the Central in the 1990s. They became members of Vietnam Electricity Group in 2006.

[78] It was released at the CPV's Third Party Plenum in 24/09/2001. Break-through viewpoints in this resolution were that 'it is not essential for state enterprises "to hold a large share in all branches and sectors and products of the economy" and acceleration of the equitisation process was seen a key to achieving "radical change for improving the efficiency of state enterprises"'. See Arkadie and Mallon, above n 39, 140.

[79] The *Resolution* states that the state could retain 100 per cent ownership in state enterprises involved in the production of certain products and in some public service enterprises operating in particular areas. Besides, the state could now retain a controlling share both in some large state enterprises and in public service enterprises. A specific list of enterprises and areas in which the state held 100 per cent ownership and a controlling share was also included in the Resolution. See Arkadie and Mallon, above n 39, 140. See also Thuy, above n 17.

[80] This was mentioned in the presentation of Deputy Prime Minister Nguyen Tan Dung at the workshop on state enterprise in March 2002. State corporations were to be retained and strengthened in certain areas; selected corporations would be transformed as holding companies while their member companies would be corporatised as limited liability enterprises. The list of areas where state corporations would be concentrated included petroleum exploitation, processing, and wholesaling; the supply and distribution of electricity; the exploitation, processing and supply of coal and other important minerals; metallurgy; heavy manufacturing; cement production; post, telecommunications and electronics; airlines; maritime; railway; chemicals and chemical fertilisers; key consumer good and food industries; pharmaceuticals; construction; wholesale grain trading; banking and insurance.

was argued that state economic groups would be crucial, allowing Vietnamese enterprises to compete in the international sphere in sectors such as petroleum, telecommunications, electricity and construction.[81] This was supported by rationales for enabling state corporations and state economic groups to hold key positions in the economy.[82] Monopoly control was initially stipulated in various CPV Documents.[83]

3.2.3.2 Rationales for the formation of state economic groups (EGs)

As discussed earlier, the idea for EGs began to emerge after the 1990s, for which the *Decrees No.90* and *No.91* were milestones. In general, the rationales for establishing EGs have been: the evitable trend due to prominence of state enterprises in Vietnam, the need to accelerate SOE reform to fix the flaws in the general corporation model and the pace of international economic integration.

When Vietnam moved firmly towards a market economy and opened up to the world market in the early 1990s, SOEs became unable to compete in both domestic and world markets because of the smaller scale of economies of most SOEs compared to international standards and their financial, managerial and organizational fragility.[84] The purpose of SOE reform was to mobilize forces for development, tighten vertical and horizontal linkages among state owned enterprises and facilitate conditions for the formation of strong state enterprises, to keep up with the pace of market opening.

To maintain the pace of further reform of SOEs, the need for EGs was advocated by many scholars.[85] Nguyen Trung, for example, argued that certain products or industries should remain under state control. Since such products or industries are monopolistic in nature, it

---

[81] Arkadie and Mallon, above n 39, 142.

[82] The first pilot ones established were the Vietnam Posts and Telecommunications Group (VNPT) by the *Decision No. 58/2005/TTg* on 23/03/2005 and and the Vietnam National Coal and Mineral Industries Groups (VINACOMIN) by *Decision No. 345/2005/TTg* on 26/12/2005. In 2006 and early 2007 there were eight Economic Groups established in such strategic industries as posts and telecommunication, petroleum, ship building, coal and minerals, electricity, insurance etc. The eight Economic Groups were : Vietnam Post and Telecommunications (VNPT), Vietnam Coal and Mining Industries Group (Vinacomin), Vietnam National Oil and Gas Group (PetroVietnam), the Vietnam Shipbuilding Industry (Vinashin), Vietnam Textile and Garment (Vinatex), Vietnam Rubber Group (VRG), Electricity of Vietnam (EVN) and Finance – Insurance Group (Bao Viet) <http://english.vietnamnet.vn/biz/2008/04/776189/>.

[83] See Comunist Party of Vietnam, *Resolution of the IX CPV Congress* (4/2001); *Resolution of the 3rd Plenum of the IX Section 2001*.

[84] Tho, above n 10, 92; Thuy, above n 17, 82.

[85] See, eg, Nguyen Trung, Do Huy Ha, Ari Kokko and Fredrik Sjoholm, Dao Xuan Thuy, Bui Van Huyen.

would be dangerous if they were under control of private sector for which profit-seeking is the target, because this could distort the market, damaging the general development of the whole economy and lowering the competitive capacity of the country.[86] EGs should deliver three basic functions: to avoid the private monopoly of crucial products for the economy, to enhance national competitive capacity and to assume national defence and security tasks.[87]

Another argument was the necessity of further reform of the state sector in fulfilling the development of socioeconomic conditions in Vietnam, which would address the limitations of the GC model.[88] As Do Huy Ha argued, weakness and deficiency were caused principally by institutional imperfections in the GCs model.[89] There were four major reasons for the upgrading of GCs, namely, the demand for re-organisation of the market in light of the socialist oriented market economy, the need for enhancement of science and technology in state enterprises, the continuing increase of competitive pressure in the course of market openings and the demand for powerful state enterprises in the context of economic globalization.[90]

The proposal for forming state conglomerates was seen as a way to secure the leading role of the state sector. State control over a number of strategic industries with high growth potential was expected to effectively deal with the SOE problems. This would enhance the SOEs' ability to access financial resources and to achieve economies of scale in

[86] As a result, the government in some developed countries, backed by their domestic political and economic forces, decided to establish state owned monopolies concentrating on such crucial industries as coal and power supply, telecommunication, aviation, infrastructure provision e.g. transport, water supply etc. Besides, the significance of security and defence are reasons for state monopoly in such areas as aviation or telecommunication industries. See Nguyen Trung, *Vai Suy nghi ve Tap doan Kinh te Quoc doanh o Nuoc ta* (2008) [Some Thoughts about State Economic Groups in Our Country] <http://www.viet-studies.info/NguyenTrung/NguyenTrung_VeTapDoanKinhTe.htm>; See also Thuy, above n 17, 166.

[87] Trung, above n 86.

[88] Thuy, above n 17, 82. Huyen, above n 31, 12. Do Huy Ha has argued that the formation of EGs is appropriate for dealing with the limitations of state corporation models. Limitations are administrative linkages between state corporations and their member companies, the lack of motivation in maximizing state budget in business, the unclear definition of responsibilities of authority bodies and corporations and between corporations and their members and the narrow scope of business of state corporations. See Do Huy Ha, 'Xay dung Tap doan Kinh te: Giai phap Nang cao Kha nang Canh tranh va Hoi nhap Cua Cac Tong Cong ty Nha nuoc Hien nay' [Building State Economic Groups: Solutions to Enhance Competition and Integration Capability of General State Corporations Today] (2007) *Quan ly Kinh te* [Economic Management] 15-16 <http://www.ciem.org.vn/home/vn/upload/webimage/image/1190686803136_bai_2.pdf>.

[89] Ibid 15.

[90] Ibid.

production and management, making it possible for Vietnamese SOEs to compete equally with foreign multinational corporations.[91] Finally, it was necessary to overcome the poor situation of SOEs in general, to enhance the competitive capacity of SOEs in particular and the economy in general and to ensure successful integration.[92]

The need for the establishment of strong EGs was also supported by the demands of Vietnam's international economic integration. A number of powerful groups involved in the key economic sectors were to serve as a driving force behind the development of the national economy.[93] International economic integration placed SOEs in the playing field, with the participation of foreign firms under common rules in international trade. The treatment applied to SOEs was to be the same as that applied to the others.[94] Activities of state enterprises and access to markets currently reserved for SOEs were to be regulated in light of the enabling environment for private-sector development and this was to be a key complement to the implementation of international agreements.[95]

Consequently, this would create difficulties for inefficient SOEs which had relied heavily on state support. SOEs were facing huge competitive pressure from foreign firms, thus affecting the 'leading role' of this sector.[96] A great concern was thus raised among many SOEs that they would not be able to compete under the new rules.[97] As a result, the idea of creating powerful state conglomerates was strongly advocated. In this context, experts[98] agreed that the formation of EGs was reasonable, especially as the economies of scale and competitive capacity of Vietnam' SOEs and private industries were limited.

[91] : Thuy, above n 17, 163-166; Huyen, above n 31, 42; Ari Kokko and Fredrik Sjoholm, 'Some Alternative Scenarios for the Role of the State in Vietnam' (2000) 13 (2) *Pacific Review* 257 – 277.

[92]Thuy, above n 17, 79-86; Presentation by Deputy Prime Minister Nguyen Tan Dung to a two-day workshop on state enterprise in March 2002 (as reported in Saigon Times Weekly, 9 March 2002) cited by Arkadie and Mallon, above n 39, 142.

[93] Thuy, above n 17, 83; Vietnam Net, 'Building powerful domestic economic groups' <http://english.vietnamnet.vn/biz/2008/05/780953/>; MUTRAP, 'Hoi Nghi So ket Thi diem Mo hinh Tap doan Kinh te Thuoc Bo Cong thuong' [Meeting on the Preliminary Wrap-up Report of the Model of Economic Groups belonging to the Ministry of Industry and Trade](2008) <http://www.mutrap.org.vn/Lists/Posts/Post.aspx?List=5276b79d-4e3a-4c5b-a2ad-c903807cc7ea&ID=40>.

[94] In particular, state subsidies previously given to SOEs will be abolished while most of the earlier methods of supporting local industries i.e. high tariffs, local content requirements… are no longer accepted.

[95] Klaus Rohland Interviewed with Vietnam News Agency, 'State to Tread Fine Line in Boosting Competitiveness' (2006) <http://vietnamnews.vnanet.vn/showarticle.php?num=01COM151206>.

[96] CIEM, above n 5, 104; Thuy, above n 17, 83-84.

[97] Harward Vietnam, *Choosing Success*, above n 67

[98] See, eg, Doan Huu Tue, Dwight H. Perkins and Vu Thanh Tu Anh, Pham Dang Tuat.

EGs, with their strength and great economic potential, their capability to operate in many sectors, could make use of these advantages to compete effectively and sustainably.[99] The establishment of economic groups was seen as a suitable method, commensurate with Vietnam's characteristics in the transitional period.[100] When Vietnam's agreements with the WTO came into effect in January 2007, this became significant.[101]

In sum, the development of EGs was considered as an inevitable trend which was necessary for achieving sufficient capacity in speeding up the economic integration process and for mobilising all resources for economic development. In parallel with this process, monopolistic practices were to be regulated by competition law.[102] The EG establishment was said to be necessary to meet the demand of international economic integration and the desire of Vietnam's government to have some powerful and capable firms to compete with foreign firms.

3.3 Debates and concerns

3.3.1 General corporations and concerns regarding their monopoly situation

As highlighted in *Decision No.91/TTg*, the formation of GCs was not intended to create a monopoly situation.[103] The threat to fair competition was, however, that they could actually strengthen their monopoly position, thus weakening competition.[104] The concentration of the domestic market and/or the existence of trade barriers made it possible for some corporations, also called natural monopolies, to maintain their positions and benefit from them.[105] In such specific sectors as telecommunications, the use of monopoly pricing remained common and was supported partly by state policy, as only a

[99] Thuy, above n 17, 82-83; Tuan Vietnam, 'Dieu hanh Tap doan Kinh te o Vietnam' [Regulating Economic Groups in Vietnam] <http://www.tuanvietnam.net/news/InTin.aspx?alias=tulieusuyngam&msgid=4089>.

[100] Ibid.

[101] Perkins and Anh, above n 67.

[102] Tran Tien Cuong, 'Viet Nam Se Co Nhung Tap doan Kinh te Manh?' [Will Vietnam Have Powerful Economic Groups?] <http://www.mof.gov.vn/Default.aspx?tabid=612&ItemID=20841>.

[103] *Decision No.91/TTg* on 07/03/1994 on Pilot Establishment of Economic Groups art 2.

[104] World Bank, 'Vietnam: Economic Report on Industrialization and Industrial Policy' (Report No. 14645-VN, 1995) 108.

[105] Arkadie and Mallon, above n 39, 132-135.

limited amount of competition in such sectors was allowed.[106] In areas where administrative restrictions on international trade remained, such as the cement and steel sectors, only GCs enjoyed access to external markets and benefited from the import regime.[107]

The unclear division between the ownership and management functions of state corporations was widely criticized as a problem leading to a monopoly situation. State corporations tended to perform their business functions while conducting state management functions, such as producing sectoral and regional development plans, carrying out international relations and deciding prices. By virtue of this ambiguity, some corporations were able to institutionalize such privileges, imposing disadvantages on their competitors, arranging market divisions among member companies or creating price discrimination against competitors and customers.[108]

The existence of GCs diminished or removed competition between member and non-member companies. State corporations also restricted the competitive capacity of their member companies. This was because the business activities of member companies were often enforced under their 'parent' corporation's guidance regarding development and investment directions, imposed targets and geographical arrangements. In some cases, they had to bear in part losses of other inefficient members.[109] In those corporations, member companies seemed to complement each other rather than competing.[110] Another concern was that the coordination of the operations of their member enterprises could exploit possible monopoly positions.[111]

In fact, competition among member firms was to increase, due to the lack of active participation in the management by members or of coordination of their strategies. The main activity of GCs was to examine the performance of the members through financial reports sent to head office a few times a year.[112] The degree of competition was actually

[106] Ibid.

[107] World Bank, above n 104; Arkadie and Mallon, above n 39, 135.

[108] Thuy, above n 17, 82; Hong, above n 20, 36.

[109] Ibid 37.

[110] Thuy, above n 17, 86; Fredrik Sjöholm, *State Owned Enterprises and Equitization in Vietnam* (2006) <http://swopec.hhs.se/eijswp/papers/eijswp0228.pdf>.

[111] Arkadie and Mallon, above n 39, 134.

[112] Mitsui, above n 62, 148.

higher among members in terms of price in some sectors.[113]

Debates were also focused on constraints to competition in infrastructure industries[114] and the exploitation of pricing policy.[115] State corporations holding a 'natural monopoly' in specific industries restricted investment from both the non state sector and foreign investors. Not only did they become the only providers of products and services in specific areas, they could eliminate competition by establishing a closed network covering all phases of business performance that excluded participation of other companies. With a monopoly position, they could impose monopoly prices which were higher than those in neighbouring countries, or than people could readily afford. Holding a monopoly in purchases allowed corporations to impose a low pricing scheme, while those holding a monopoly in sales could impose a high pricing scheme or maintain sale prices.

GCs were able to influence price control because they maintained their relationship with the government.[116] Administrative barriers in the form of legislation became a major obstacle to fair competition and brought a further advantage to them. They could propose to the government the imposition of protective policies against imports or subsidies such as export subsidies and preferential loans for price stabilization.

At present, there have been some improvements due to the presence of new competing enterprises in the same areas, such as telecommunication and aviation since early 1990s[117]. However, the monopoly situation has not improved much because of the inadequate scale of economies of new enterprises and the preference given to state

---

[113] This can be seen in competition among member companies within the Sugar Cane Corporation and in the Construction Corporation. See Sjöholm, above n 110.

[114] Examples of Vietnam Posts and Telecommunication; Vietnam Airlines or Vietnam Electricity Corporations are good demonstrations for this situation. See Hong, above n 20, 37.

[115] Numerous examples can be found in the cases of telecommunications, electricity, cement, steel, petroleum. Price discrimination was applied for numerous products and services and there were other practices abusing the monopoly position, such as constraints in business and refusal to deal, which were employed commonly in insurance, public transportation and the purchase of raw materials.

[116] Le Phu Cuong, *Monopoly Situation in Vietnam* (2003) <http://www.competitionlaw.cn/upload/05070113295626.pdf>.

[117] For example, competition in telecommunication services was open with the participation of new companies such as Saigon Postel Corporation (1995); Viettel Telecom (2004). Similarly, the launch of Pacific Airlines in 1991 was a breakthrough for the removal of Vietnam Airlines' monopoly in aviation area.

enterprises.[118] In general, GCs are said to have a bad effect on competition rather than a positive one.[119]

3.3.2 Concerns regarding the formation of EGs and impacts on the monopoly situation

3.3.2.1 Nature and targets of EGs

It is commonly agreed that state monopolies are necessary but that they should only focus on strategic areas and that the state should be sensitive to the role of EGs.[120] Central among the concerns is the nature of EGs. Like in the case of the GC model, it is believed that Vietnam's EGs were inspired by Asian models.[121] However, despite having some similarities, there are important differences.[122] Vietnamese economic groups were in fact built on an import substitution model characterised by protection from foreign imports

[118] Tu et al, above n 45, 26.

[119] Duong Ngoc Bich, *Xay dung Cac Co so Phap ly Bao dam Quyen Tu do Canh Tranh Cua Cac Doanh nghiep Trong Nen Kinh te Thi truong Tai Viet Nam* [Building Legal Bases to Guarantee the Right to Competition of Enterprises in Vietnam's Market Economy] (LLM Thesis, Hochiminh City Law University) 44-45.

[120] Nguyen Trung is one who urges the state to be careful in its treatment of the role of EGs. This is because of their historically valuable role during development period of the economy. He demonstrates that state monopolies are created and maintained to ensure the development of the entire economy in specific historical circumstances. However, state monopolies, if developed at a certain time, will become an obtacle to later development. The state ownership nature of state monopolies will be hard to overcome. Finally, the lesson learnt from developed country experiences is that state monopolies should only be maintained in those areas providing products that the private sector cannot provide effectively. See Nguyen Trung, 'Mo hinh Tap doan Nha nuoc va Noi lo Vuot Tam Kiem soat' [Model of State Economic Groups and Concerns for Exceeding The State Control] (2008) *Tuan Viet Nam* <http://www.tuanvietnam.net//vn/sukiennonghomnay/4756/index.aspx>.

According to Nguyen Thi Loan, it is not necessary for the state to only rely on the state sector to regulate the economy. Monetary policies, loans and exchange rates can be applied by the state to regulate prices and reduce inflation without administrative intervention. See Doanh nhan 360, 'Kinh te Nha nuoc Phinh to Thanh The Doc quyen [State Economy Inflates to Monopoly] <http://www.doanhnhan360.com/Desktop.aspx/Thi-truong-360/Thi-truong/Kinh_te_nha_nuoc_thanh_the_doc_quyen/>.

[121] It is argued that Vietnam's state economic groups were inspired by the Japanese keiretsu (Mitsubishi, Mitsui, etc.) and the South Korean chaebols (Samsung, Daewoo, Kumho, etc.). See Harward Vietnam, *Choosing Success,* above n 67.

[122]Harward Vietnam, *Choosing Success,* above n 67.

and state subsidies on a continuing basis.[123]

The nature of EGs has created serious concerns regarding their impact on competition.[124] It is argued that no actual changes were made regarding their nature,[125] so that state economic groups have become just another form of state general corporations.[126] Since Vietnam's EGs were created by administrated measures,[127] this has given rise to many theoretical problems. According to Tran Kim Hao, EGs are not built on the basis of the demands of their own development. This problem is likely to have negative effects on the efficiency and sustainability of the newly-established groups.[128] Besides, the close link with line ministries[129] is a matter of concern. The EGs themselves, their member companies and their relationships among themselves were closely connected in ways other than by law.[130] Like GCs, they usually tend to seek support from management

[123] Perkins and Vu Thanh Tu Anh seem to be among experts who seriously criticise the models of state general corporations and state economic groups (called state conglomerates by them). They believe there is a misleading interpretation of the Japanese and Korean models and the creation of state conglomerates is not an ideal strategy to create large internationally competitive enterprises. Few examples are found around the world to show the success of a state conglomerate model which was created on the basis of previous state owned enterprises. The only success is that of Singapore, but Vietnam seems not likely to be able to follow the Singapore model. Moreover, as the result of an import substitution protection policy, such a creation is probably the strategy to preserve a favoured environment for the state sector. The emergence of state conglomerates only furthers the close ties between politicians and business, bringing about the threat of corruption and the influence of enterprises in the decision making process. See Perkins and Tu Anh, above n 67.

[124] See, eg, Dwight H.Perkins and Vu Thanh Tu Anh, Tran Kim Hao, Le Dang Doanh, Dang Vu Huan,

[125] It is pointed out by Perkins and Vu Thanh Tu Anh that COEs (general managers and boards of directors) of state economic groups were positioned by the government. Line ministries have had their representatives to act in supervisory roles over newly formed economic groups. See Perkins and Anh, above n 67.

[126] David Dapice assumes that in the current structure of these conglomerates nothing has changed from the previous GCs. The reason for the concern is that state corporations were not able to improve their performance during the past several years and there was a misreading of experience with state groups elsewhere. The model of state conglomerates did not bring success to the countries that had pursued this model when these decisions were not made by the private corporations themselves and handled according to laws. See Harward Vietnam, *Choosing Success*, above n 67.

[127] Le Dang Doanh, *Cac Tap doan Kinh te Lung doan Nen Kinh te Viet Nam* [State Economic Groups Are Cornering Vietnam's Economy] (2008) <http://www.rfi.fr/actuvi/articles/104/article_753.asp>.

[128] Tran Kim Hao, *Development of Enterprises with Diversified Ownership Formulations and Reforms of State's Economic Management in Vietnam* <http://www.vnep.org.vn/Modules/CMS/Upload/2/Development%20of%20enterprises%20with%20diversified%20ownership%20formulations%20and%20reforms%20of%20State.pdf>.

[129] As observed through the cases of VNPT, EVN or Vietnam Airlines.

[130] Another concern raised is the close ties of state economic groups with state owned banks. Like the case of the Japanese keiretsu and their associated banks, it is believed that state economic groups are able to get more favourable treatments, as the task to help state economic groups seems to be clear to the banks. State economic groups, for that reason, are able to enforce their monopoly positions. See Perkins and Anh, above n 67.

bodies to enjoy benefits from policies and laws, to consolidate their existing position, enhance their monopoly advantage and prevent rivals from participating in the monopoly areas. It is illustrated by the Korean chaebols.[131]

3.3.2.2 The business scope of EGs

It is a fact that some EGs have recently been investing in other than their major areas.[132] This is far from the desire of the Vietnam's Communist Party that the conglomerates should focus on strategic sectors only.[133] EGs argue that, as enterprises, they can invest in whatever areas that can return them a profit.[134] Their investment in these areas, it is argued, could secure them from collapse.[135]

Scholars, however, do not accept these justifications. Le Dang Doanh argues that there is a strong need to supervise the business activities of the EGs. The state, as the owner and investor, must supervise the use of state capital and resources which EGs are using. Besides, the establishment of EGs was designed to create large and powerful enterprises, having sufficient competitive capacity and technology in strategic areas to compete with foreign ones; therefore, EGs must firstly invest in their major areas.[136] According to Pham Chi Lan, by their nature EGs must act as SOEs and operate in their assigned tasks and within the framework of the law, but their role is also distinguished from that of other sectors. It is difficult for the state to manage if these EGs expand their business scope. Finally, EGs have been given a monopolistic position and exclusive rights in order to

[131] At the beginning, *Chaebols* colluded and had close ties with the state management bodies. When *Chaebols* had developed in a degree that exceeded the control of state management bodies, they turned around to influence and compel these bodies to follow their wishes, thus distorted fair competition and entailed harmfulness to normal activities of enterprises and the economy. See Huan, above n 18, 33–34.

[132] For example, the Electricity Corporation is developing their business to provide mobile services with the introduction of its mobile services in 2006, offered by its subsidiary EVN Telecom, or PetroVietnam is investing in stock markets, real estate through its subsidiary PetroVietnam Finance Corporation, starting since 2000.

[133] State conglomerates are expanding rapidly into a wide range of sectors, including real estate, financial services, tourism and even mobile phone distribution. See Harward Vietnam, *Choosing Success*, above n 67.

[134] On the grounds that efficiency in doing business is the foremost concern, EGs argue that if the investment in their major areas is not efficient it should be possible for them to invest in other areas, as long as they are not prohibited by law. Besides, they argue that the state management bodies should focus on their functions as the owners, rather than intervening so strongly in the business activities of EGs. See Viet Nam Net, 'Tap Doan Kinh te Phan doi Siet Dac quyen' [Economic Groups Object to Tightening Their Exclusive Rights] <http://vietnamnet.vn/chinhtri/2008/08/798487/>.

[135] Pincus and Anh, above n 67.

[136] Doanh, *Cac Tap doan Kinh te*, above n 127.

pursue their major goals. Hence, they should not expand their business scope beyond their major areas.[137]

3.3.2.3 The abuse of the monopoly position

There are concerns about the abuse of their dominant position by the EGs. One of the reasons is that some EGs have attained a high degree of organisation, establishing a closed system of members to allocate and perform all phases of their productive process.[138] Their dominance in certain areas has originated from their previous status, when all of them were state firms operating in strategic and monopolistic areas.[139] The wide-ranging coverage of these state groups causes difficulties for other enterprises which wish to compete with them in specific areas.[140] It is reasonable to be concerned about the fact that some areas which the state monopolies (EGs) are assigned to manage and operate, related to infrastructure (state assets), are necessary for other companies to use in order to operate their business. Moreover, EGs are not taking advantage of Vietnam's WTO membership to become internationally competitive in their core businesses or to compete effectively on foreign markets.[141] It is also a problem when EGs attempt to form domestic monopolies and act as a barrier to foreign competition.

These concerns have given rise to the demand for a specific law governing the operation

[137] Pham Chi Lan, 'Tap doan Kinh te: Da Dac quyen Khong the Doi hoi Them Quyen' [Economic Groups Cannot Ask for More than Their Current Privileges] (2008) <http://tuanvietnam.vietnamnet.vn/tap-doan-kinh-te-da-dac-quyen-khong-the-doi-them-quyen>.

[138] In the case of Vietnam Electricity (EVN), there is close coordination among member companies in carrying out the three stages: production (implemented by power plants), transmission (by the National Transmission Company), distribution (by local power companies). Similarly, Vietnam National Post and Telecommunication (VNPT) has attained a close link with its subsidiaries with regard to the operation of back-bone lines, information technology, communications, surveying, consultation and the installation and provision of telecom equipment. See Huyen, above n 31, 155.

[139] For example, VNPT (Vietnam National Posts and Telecommunication) have a stronger position than others operating in the area of post and telecommunications, such as Viettel (the Military Telecom Corporation) and Saigon Postel SPT (Saigon Post and Telecommunications Services Corporation).

[140] Huyen, above n 31, 170.

[141] State conglomerates are seeking investment for quick returns in real estate and the financial sector, rather getting them ready for international economic integration. A recent survey of Vietnam's 200 largest firms by the United Nations Development Program demonstrates this worrying trend. See Harvard Vietnam, *Choosing Success*, above n 67.

of EGs.[142] EGs can use their influence to lobby in the policy and decision making process in order to obtain more advantages and privileges. This is a matter of concern, given that Vietnam still does not have a 'lobby law'.[143] Besides, the effectiveness of the Vietnamese competition authorities[144] is another concern. The Vietnam Competition Council, as well as other relevant bodies, has not been active in undertaking investigations and the settling of monopolistic practices.[145] This means that the operation of competition bodies does not fulfil the expected requirements.[146]

In conclusion, the formation of state monopolies in Vietnam has been a long-term process which has gone hand in hand with SOE reform. During that process, SOEs have been re-organised to bring about a considerable reduction in their number, a substantial limitation to their business scope and improvement in competitive capacity. Nevertheless, a number of powerful state enterprises, including state economic groups and numerous state corporations, have emerged, strongly confirming the leading position of the state sector. It should be noted that Vietnam's state monopolies may be both EGs and CGs because when the first EGs were formed, this did not mean the GC model would come to an end. Hence, both EGs and GCs have been coexisted while some GCs are being considered to be upgraded into new EGs. As remnants of the previous economic mechanism have not been completely removed, a monopoly situation has become a growing question. The transfer from 'state monopoly' to 'enterprise monopoly' has enabled state general

[142] There is currently no mechanism to supervise their operation and to ensure their compliance with other specific laws such as the *Competition Law 2004*, *Law on Natural Resources and Minerals 2005* or *Law on the Protection of Environment 2005*. See Doanh, *Cac Tap doan Kinh te* , above n 127. At the time of writing, a draft of the *Decree on Establishment, Organisation, Operation and Supervision of Economic Groups* is being drawn up. However, there has been no proper definition of 'economic group' or what the criteria are to define an 'economic group'. Besides, there have been concerns about the development of private groups; the legal groundwork for the establishment and operation of economic groups created by the private sector; the competition between state monopolies and private groups in relation to the abuse of dominant positions; and the state management of economic groups in Vietnam.

[143] Doanh, *Cac Tap doan Kinh te* , above n 127.

[144] Vietnam competition authorities include Vietnam Competition Administration Department – VCAD and Vietnam Competition Council – VCC.

[145] Huyen, above n 31, 178.

[146] Formed in 2005, but no monopoly cases had been tried by this body until April 2009. The first anti-monopoly case handled by VCC was about the dispute (described at 3.4.3 below) between VINAPCO, a subsidiary company of Vietnam Airlines providing aviation oil and Jetstar Pacific Airlines, a joint-venture airliner. See Vietnam Competition Council Website <http://www.hoidongcanhtranh.vn/Tin-Tuc-Chi-Tiet&action=viewNews&id=967>.

corporations and economic groups to turn into state monopolies.[147] Besides, there has been a misunderstanding of the concept 'leading role' of the state sector; hence the idea of the state enterprises holding a 'leading role' in the economy has been regarded as their right to maintain a monopoly position.[148] For that reason they have been able to easily maintain their dominant positions in key areas and limit competition. They are being criticised for abusing their monopoly position and conducting restrictive competition practices.

3.4 The State monopoly situation in Vietnam – some selected examples

Designed as a survey, this part demonstrates the state monopoly situation in Vietnam in three typical areas of the economy. It aims to draw an overall picture of the state monopoly situation and to show how this situation impacts on competition in Vietnam. Each is provided with a brief description of the state monopoly concerned and its anti-competitive behaviour is illustrated by relevant details and arguments.

It starts with the monopoly issues raised by the Vietnam Electricity Group (EVN) case. Then it describes the monopoly situation in telecommunications, illustrated by two cases involving Vietnam's state monopolies in this sector, Vietnam National Posts and Telecommunications (VNPT) and the other state firms, Viettel and EVN Telecom. The last one is about the situation in the aviation sector, involving Vietnam Airlines (VNA) and its subsidiaries. The three cases focused on are the competition between VNA and Pacific Airlines (currently Jetstar Pacific), the dispute regarding the provision of ground services by Vietnam Airlines and the first cases brought to trial, concerning aviation fuel supply between a VNA subsidiary, VINAPCO and Pacific Airlines. The section ends with observations and conclusion regarding the state monopoly situation in Vietnam.

---

[147] Tran Thi Thu Hang, *Vietnam's Experience in Formulating Regulations of Abuse of Dominant Position* (2004) <www.jftc.go.jp/eacpf/05/APECTrainingProgramAugust2004/vietnam.hang.pdf>. The production, transmission and distribution of power were previously in the hands of the state and were operated by power companies set up by the state. When the Vietnam Electricity Group was established, it became a state economic enterprise holding a monopoly position in this area. In this case, there was a transformation of monopoly from the state to a specific state enterprise.

[148] Huan, above n 18, 96.

3.4.1 The case of Vietnam Electricity (EVN)

3.4.1.1 The monopoly situation in the electricity sector

The Vietnam Electricity Group (EVN) is currently one of the eight state groups established by the government.[149] The history of EVN dates back to the 1990s. The turning-point in the development of EVN was marked by the separation of state management and conduct of business activities in the power sector by the establishment of power companies at provincial and regional levels. In 1995 the Electricity of Vietnam Corporation (EVN) was established in light of *Decrees No. 90* and No. *91* for the reform of state owned enterprises. It was a merger of all three regional monopoly companies (Power Corporations No. 1, 2 and 3). EVN companies were organised to include generation power plants and distribution power companies set up at the provincial level. The EVN (as an economic group) was established in 2006 as part of an attempt to form large state corporations possessing and doing business in crucial areas of the economy.[150] It is currently a vertical state monopoly in the form of a holding company controlling the generation, transmission and distribution of power.[151] It currently owns and runs those power plants which are 100 per cent under state ownership and possesses shareholdings in some independent power plants. EVN also conducts businesses in the power industry and other related areas, while investing in other services such as telecommunications, information technology, finance and banking. As electricity is seen as one of the important sectors in which the state must hold a monopoly, its monopoly position is guaranteed by a number of legislations.[152] This monopoly is also guaranteed by the

[149] See Vietnam Electricity website <www.evn.com.vn>.

[150] Dien dan Doanh Nghiep, 'Thi diem Thanh lap Tap doan Dien luc Viet Nam' [Experimental Formation of Vietnam's Electricity Group] (2006) <http://dddn.com.vn/37948cat119/Thi-diem-hinh-thanh-Tap-doan-Dien-luc-Viet-Nam.htm>.

[151] Ibid. Vietnam Electricity website www.evn.com.vn; UNTACD, 'Attracting FDI in Electricity' (2009) 94-95 *Investment Policy Review of Vietnam* <http://www.unctad.org/en/docs/iteipc200710_en.pdf>.

[152] According to *Decision No 58/2002/QD-TTg* on Promulgating the Classification Criteria and List of to be-classified State Enterprises and State Corporations of Various Types, the national electricity transmission system and power generation are areas where the state holds a monopoly or is engaged in a large State Corporation. See CUTS, *Promoting Competition Policy & Law in Vietnam: A Civil and Society Perspective* (2006), 27 <http://www.cuts-international.org/7up2/vietnamCAD.pdf>. In 01/2006 a roadmap and conditions for the formation and development of different levels of the electricity market in Vietnam was approved (known as Decree No. 26/2006/QD-TTg). See *Decree No. 26/2006/QD-TTG* dated on 26 January 2006 on Approving the Roadmap and Conditions for Formation and Development of Different Levels of the Electricity Market in Vietnam. See also Fulbright Economics Teaching Program, *'Electricity Power Trading Company (Single Byuer) Case Study'* (2008), 2–3 <http://www.fetp.edu.vn/exed/2008/HaNoi/Docs/Readings/Day%202-2-Single%20Buyer-Case-E.pdf>.

restriction of foreign investment.[153]

EVN currently undertakes all processes in management, generation, transmission and distribution of power).[154] This widespread scope is the root of the monopoly situation in the power sector, since EVN has a monopoly in the production, purchase and distribution of power.[155] While other companies can be involved in the generation of power, they cannot distribute power to customers[156] and must only sell their product to EVN as the only wholesale buyer.[157] The result has been that its monopoly position as the sole distributor has allowed EVN to conduct monopolistic actions, while providing poor service and asking for increases in sale price, as described below.

3.4.1.2 Monopolistic actions of EVN

- *Arbitrary regular reduction of electricity supply*

The electricity supply has often been shut down without warning or concern for the interests of customers and this has recently become common. EVN has been severely

[153] In terms of attracting foreign investment to the power sector, the law is that foreign investors can only invest in power generation in the form of joint ventures with EVN, in which EVN will hold 51 per cent of stock. This does not allow foreign investors to take control of the plants. Vietnam's Government has stipulated that foreign investors can only own up to 30 per cent of listed companies. Therefore, the possibility of participation by foreign investors in this sector is low. It must be noted that the procedure by which an enterprise invests in a generation project is also complicated. This demonstrates that the monopoly situation of EVN is not only an administrative matter, but that its dominant status is also protected by regulatory barriers. The strategy for the development of a power market in Vietnam by 2025 guarantees this monopoly position of EVN.

[154] In reality, EVN companies have generated most of the power output; the rest is produced by a few non-EVN system power companies.

[155] As is stipulated in the roadmap for the development of the power market (*Decree No. 26/2006/QĐ-TTg*), a retail market for power which allows power generators to provide directly to customers by their choice is not to be established until 2022. The distribution of power has therefore also been monopolised by EVN. Additionally, the National Load Dispatch Centre established in 1994 is a member of the former Vietnam Electricity Corporation and now EVN. This body has played an important role in monitoring power generation, transmission and purchase, allowing EVN to control the quantity of purchases from outside EVN sources.

[156] In 2006, Ban Hoang Electricity Plant in the northern province of Cao Bang was completed but it could not sell the electricity it had produced. The reason was that the plant had not reached a purchasing agreement with EVN and this caused the loss of VND8 million ($500) per day, excluding its bank interest. See Vietnam News, 'Lower Electricity Rates Await Market Reforms' (2006) <http://vietnamnews.vnagency.com.vn/showarticle.php?num=01TAS261006>.

[157] Some power producers have said that they could be ready to invest in new power plants and could even generate at a lower price than that of EVN. Other than the prolonged and complicated procedure, the main problem is that they can only sell to EVN. See Tuan Vietnam, 'Benh Cua Doc quyen' [Troubles of Monopoly] (2008) <http://tuanvietnam.net/vn/sukiennonghomnay/5172/index.aspx >.

criticised for this practice, which can be considered as 'monopolistic behaviour'.[158] Power shut-downs become particularly common during the dry season, when hydroelectric plants cannot generate adequate power.[159] The sudden and widespread shutdown of the power supply is objected to strongly by both residents and businesses. This situation has caused problems for customers for which they have never been compensated. Businesses experience losses because of power cuts and the instability of the power supply has adversely affected residents' lives, leading to many complaints about the monopoly position of EVN.[160]

- *Continuous increase in electricity price*

The price of electricity has continuously increased. Besides, the retail price is currently applied differently among various sectors and regions[161]. After 2007 EVN persuaded the government to approve adjustments in the power price on the grounds that the company had faced a shortage of funds.[162] However, based on their calculations, economic experts challenged EVN, claiming it had gained a profit and could not plead the lack of financial resources in order to increase prices.[163] It has therefore been concluded that EVN's

[158] Vietnam Net, 'Monopoly Allows EVN to cut Power Spontaneously' (2008) <http://english.vietnamnet.vn/biz/2008/10/807894/>.

[159] Vietnam Net, 'Where to Buy Electricity? It's the Right of EVN' (2008) <http://english.vietnamnet.vn/biz/2008/05/782818/>; Vietnam Net, 'Cat Dien: Da Den Muc Bao dong' [Power Outage: Alarm Level Reached] (2008) <http://www.vietnamnet.vn/kinhte/2008/04/776685/>.

[160] Vietnam Net, 'Monopoly Allows EVN to cut Power Spontaneously', above n 158.

[161] In some regions such as rural and remote areas, power is provided to customers through several intermediate agents causing higher prices. Some regions even have no power supply.

[162] The price had increased in early 2007 to an average VND862 (5 US cents) per kWh from VND787 per kWh in 2006. On October 6 EVN submitted a plan to the Ministry of Industry and Trade to further increase the average price in 2009 to VND 1,017 per kWh, to VND1.088 per kWh in 2010 and to VND1146 per kWh in 2012. See Marketing4Daily, 'EVN Slammed for Fat Bonus Appeal Despite Loss' (2008) <http://marketing4daily.blogspot.com/2008/10/evn-slammed-for-fat-bonus-appeal.html>; Vietnam News, 'Home power may jump by 36 per cent' (2008) <http://www.vietnamnews.com.vn/showarticle.php?num=02ECO231008>; Vietnam Business Forum, 'EVN Submits Power Price Hike Plan to MoIT' (2008) <http://vibforum.vcci.com.vn/news_detail.asp?news_id=14224>.

[163] According to Prof Dr Nguyen Mai, a senior economist, as 50 per cent of power output comes from hydropower plants and many of EVN's plants have been operational for 20 years, with the current power price EVN is making a profit and could even provide power at lower prices. The production cost could be absolutely reduced, thus reducing the sale price. See Vietnam Net, 'EVN Should Consider Lowering Electricity Prices: Experts' (2008). <http://english.vietnamnet.vn/biz/2008/11/815870/>.

monopoly position is the cause for the high prices.[164] While EVN has complained about its insufficient financial resources, it has invested in several areas such as banking and telecommunications. The inaccuracy of its financial report, according to a recent total audit of EVN in 2008,[165] shows that the justification for increasing prices was not reasonable.[166]

- *Causing a lack of power supply*

The fact that the electricity supply for the next few years will continue to be inadequate is a matter of concern. Several explanations have been given by EVN, such as the rapid expansion of the economy, the increase in customers' demands and the slow development of power plants.[167] Even though EVN is responsible for the lack of electricity supply, it has refused to purchase power from outside resources.[168] Electricity generated by several non-EVN power plants[169] has only been purchased in limited quantities and at a low price imposed by EVN.[170] Some of these producers have not achieved full capacity because of

[164] Vietnam Net, 'Want to Invest in Power? Talk to EVN' (2008) <http://english.vietnamnet.vn/reports/2008/08/798976/>. Experts say that the major problem is the inadequacy of the power supply, a plan for increasing the power price would not change the situation of power shortage and would only help EVN reduce losses. See Vietnam Net, 'Vietnam Will Lack Electricity until Monopoly Removed' (2008). <http://english.vietnamnet.vn/biz/2008/03/774391/>.

[165] According to the State Audit report, EVN did not suffer a loss. The Audit report in 2009 showed that EVN's revenue in 2007 increased by nearly 30 per cent to VND58.2 trillion, including VND50.3 trillion from 58.45 billion kWh of electricity sold to consumers, averaging out at VND860 per kilowatt. Meanwhile, the production cost was VND45.4 trillion, averaging out at VND777 per kilowatt, resulting in a substantial profit for the group. Auditors say EVN financial structure is solid. See Vietnam Net, 'Auditor Says EVN Financial Structure Solid' <http://english.vietnamnet.vn/biz/2008/11/815677/>; Viet Bao, 'Ket qua Kiem toan Tap doan Dien luc Vietnam EVN' (2008) <http://vietbao.vn/Kinh-te/Ket-qua-kiem-toan-Tap-doan-Dien-luc-Viet-Nam-EVN/80102183/92/>. Besides, it was shown that the amount of profit was higher than that announced by EVN. The reason is that nearly VND 600 billion ($35.29mil) worth of turnover it received from the electricity price increases in 2007 was not counted. See Vietnam Net, 'EVN Should Consider Lowering Electricity Prices', above n 163.

[166] Recently, EVN has refused to carry out 13 power projects assigned by the Government, pleading its shortage of capital. However, while repeatedly proclaiming its losses and lack of investment funds, it has recently asked for huge bonuses for its staff, with the total proposal amounting to 1 billion VND.

[167] Figures from EVN have shown that the power demands of the country have grown at an average rate of 15 per cent per year and a high growth rate is expected to be maintained until 2015. See Vietnam News, 'ADB Offers Energy Aid with Plant Loan' (2008). <http://vietnamnews.vnagency.com.vn/showarticle.php?num=03ECO010708>.

[168] Vietnam Net, 'Where to Buy Electricity?', above n 159.

[169] Such as those of Petro Vietnam and Vietnam Coal and Minerals (Vinacomin VCM)

[170] In 5/2008, Petro Vietnam lodged a claim with the Government Office and Ministry of Industry regarding the 'refusal to deal' activity of EVN. Petro Vietnam argued that it had sufficient supply of gas for its power plants in Ca Mau. This supply allowed its Ca Mau 1 plants to generate power with average output capacity of over 720 MW and the highest reached 750 MW. However, the National Load Dispatch Centre, a member

the limited quantities purchased by EVN.[171] Meanwhile any improvement in the power generation system is slow.[172] The low growth rate of power plants is also due to the hesitance of investors, because all power generated can only be sold to the only wholesale buyer and there is no competitive power market.

- *Activities restricting competition*

Another issue is whether EVN has ignored domestic generators and discriminated against them when it purchased additional electricity from outside sources,[173] and whether or not there is a 'refusal to deal' question, since, as the sole purchaser, EVN has the right to choose suppliers from several power generators. In the rejection of buying power from Ca

---

of EVN conducting the purchase of power, only required a limited quantity. For example, on 17 and 18/5, NLDC just required 1/3 of the average output capacity of the Ca Mau 1 Plants (284MW and 220MW), causing a loss for Petro Vietnam. See Vietnam News, above n 167; Saigon Times Online, 'Lai Tiep tuc Cat dien Vi Thieu Nguon' [Cutting Again due to Electricity Shortage] (2008) <http://www.thesaigontimes.vn/Home/thoisu/doisong/6329/>; The same situation occurred at Na Duong and Cao Ngan power plants owned by VINACOMIN (VCM). See Vietnam News, 'Electricity Sector Should be Liberalised' (2005) <http://vietnamnews.vnagency.com.vn/showarticle.php?num=01BUS210605>; VTC News, 'Pha The Doc quyen Dien' [Breaking Monopoly in Electricity Sector] (2008) <http://vtc.vn/kinhdoanh/175945/index.htm>.

[171] Vietnam News, 'PetroVietnam Blames EVN for Plant Losses' (2008) <http://vietnamnews.vnagency.com.vn/showarticle.php?num=02ECO140508>.

[172] EVN has been criticised for the low development of power plants other than EVN's system. From 1996 to 2006 the total output capacity of power was only raised to 8.000 MW and could not achieve the target prescribed in the General Plan for the development of electricity in Vietnam for the period 1996–2000, extended to 2010. Solutions proposed by EVN have been mainly just to cut down and save on power use. See Saigon Times Online, above n 178; Saigon Times Online, 'Giai quyet Thieu Dien Bang Cach Tiet kiem' [Solving Electricity Shortage Simply by Saving] (2008) <http://www.thesaigontimes.vn/Home/thoisu/doisong/5245/>; Vietnam Net, 'EVN Dau tu Da Nganh De Lay Ngan Nuoi Dai' (2008) <http://www.vietnamnet.vn/chinhtri/2008/04/779915/>.

[173] In recent years EVN has continuously argued that due to the inadequacy of power sources it has to purchase power from neighbouring provinces of China. According to EVN, demand for power consumption was to sharply increase in 2008, up to 77 billion kWh, while it would only be able to meet a demand of 53 billion kWh and the remaining 24 billion kWh would need to be purchased from other local power companies as well as from China. The recent debate in 2008 regarding whether the price at which EVN purchased from China was higher than that of Petro Vietnam's power plants provided good evidence for this. Petro Vietnam claimed that EVN did not buy power from its power plants in the South even though the price it offered was lower. Similarly, as the small proportion of its output capacity was purchased by EVN, a foreign investment project named Formosa's plant in Dong Nai province, with a capacity of 150 MW, had to run at half of its capacity. While another offer to sell by a local producer, Hiep Phuoc Power Plant, was refused, instead, EVN started to purchase of power from China. See Vietnam Net, 'EVN Blows off Local Electric Plants, Ignores Shortage' (2007) <http://english.vietnamnet.vn/biz/2007/12/758921/>. Figures given by EVN showed that the price at which EVN purchased from Chinese partners was lower than that of Ca Mau 1 and this was acceptable. The average price of each KWh bought from China was 4.5 cents – excluding transmission, management and loss fees –- while Ca Mau 1 electricity cost 7 cents in January and 8 cents in February. See Vietnam News, 'PetroVietnam Blames EVN', above n 171.

Mau 1 plant, it was shown that EVN did not want to buy electricity and accepted a serious electricity shortage rather than suffering loss. As explained by an EVN officer, as the electricity price offered by Ca Mau 1 was higher than EVN's sources, the more EVN purchased, the bigger the losses it would suffer. However, this explanation seems not to have been accepted by power generators and experts.[174] It is forecast that Vietnam will need a great deal more electricity and power projects in the coming years. This is caused by EVN's monopoly position in distribution and its imposition of a buying price. EVN is claimed to be maintaining its status by preventing other companies from participating in the electricity market. The greatest difficulty is the procedure for investors to invest in power generation while having to satisfy the tough conditions[175] set by EVN.[176]

3.4.2 Monopoly in the telecommunication sector – cases involving Vietnam National Posts and Telecommunications (VNPT)

3.4.2.1 Overview of VNPT

The Vietnam Post and Telecommunications Group (VNPT) was established on January 9, 2006 in the restructuring of the Vietnam Posts and Telecommunications Corporation. Until 1997 the Vietnam Post and Telecommunications Corporation (VNPT) was both a regulator and service provider in the telecom sector. Viet Nam Post and Telecommunications Corporation (currently VNPT) was established on April 24 1995 by *Decree No.249/TTg* of the Prime Minister. In 2006 Vietnam Post and Telecommunication Group (VNPT), one of the eight pilot state economic groups in Vietnam, was established

[174] Vietnam Net, 'Where to Buy Electricity?', above n 159.

[175] EVN requires new participants to satisfy such conditions as that: power plants must operate under EVN power dispatch; investors are responsible for building power networks to connect to the national power system managed by EVN; they must accept the wholesale price offered by EVN with different rates based on seasonal conditions; they must negotiate with EVN regarding the date to bring power plants into operation in accordance with the national and regional schemes for power development, etc.

[176] VN Express, 'Tong Cong ty Dien luc Doc quyen Mua re, Ban dat' (2001) [Monopoly of EVN: Buy Low but Sell High] <http://vnexpress.net/SG/Kinh-doanh/2001/07/3B9B2DE2/>. Another example provides good evidence for that situation. In 1997, Oxbow, a US company, asked for permission to build a 650MW thermo power plant in Quang Ninh province and was supported strongly by such government leaders as the former Prime Minister Phan Van Khai ,and Deputy Prime Minister Nguyen Manh Cam. However, when dealing with EVN regarding the sale price, a very low level was demanded by EVN, at no more than UScent4/kWh. This then caused the abandonment of the US project because it would not make a profit. At that time the Vietnam Coal Corporation would only sell coal to the US investor at VND 400,000/tonne, while the retail price for the kind of coal needed was just VND 280,000/tonne. See Vietnam Net, 'Want to Invest in Power?', above n 164; Tuan Vietnam, 'Benh Cua Doc Quyen' above n 157.

by *Decision 06/2006/QD-TTg* of the Prime Minister.[177] As VNPT is the network infrastructure provider, telecom service providers must interconnect with the VNPT network in order to provide their own telecomm service.[178] Despite the division of regulatory functions and business activities, their role as representative of state capital in VNPT allows the Ministry of Posts and Telecommunications (MPT) to remain involved in the management of VNPT, especially through senior personnel appointments.[179]

VNPT has often been accused of abusing its dominant position. Allegations regarding anti-competitive behaviour by VNPT can be summarised as follows: unfair allocation of network facilities, imposition of high prices for use of network facilities, cross-subsidization, refusal of services, forced use of VNPT services and abuse of technical measures to block competitors' services.[180]

3.4.2.2 The dispute regarding interconnection between VNPT and Viettel

Viettel Corporation (Viettel) is a military-run enterprise belonging to the Ministry of Defence.[181] Together with Saigon Postel (SPT),[182] the emergence of Viettel marked a

[177]VNPT website <http://www.vnpt.com.vn/detail.asp?id=747&dataID=10722>. VNPT is the incumbent operator providing both telecom networks and services in Vietnam. In particular, VNPT is the only company authorised to hold control of the national back-bone system and the largest company providing a wide range of services, including fixed and mobile telephony, satellite TV, Internet, private leased circuit, frame relay and VOIP. See <http://point-topic.com/content/operatorSource/profiles2/vnpt.htm>. In light of the separation of policy and regulatory functions from the operational functions of VNPT, the Ministry of Post and Telematics (currently Ministry of Information and Communications) is responsible as the regulatory body. See CUTS, above n 152, 28.

[178] USAID, *Competition Review of the Vietnamese Telecom Sector* (2005), 17 <http://pdf.usaid.gov/pdf_docs/Pnade784.pdf>; CUTS, above n 152, 28. Article 38 (1) of the *Ordinance on Post and Telecommunication 2002* defines two kinds of enterprise providing telecomm services: network infrastructure providers and telecomm service providers. Network infrastructure providers are State owned enterprises or enterprises in which the State holds controlling shares or special shares, established in accordance with law to set up network infrastructure and to provide telecomm services. Telecomm service providers are Vietnamese enterprises from any economic sector, established in accordance with law to provide telecomm services. This position created a monopoly position prescribed in the *Competition Law 2004*. Article 12 states that an enterprise shall be considered to hold a monopolistic position if there is no enterprise competing for the goods and services dealt in by such enterprise on the relevant market.

[179] CUTS, above n 152, 28.

[180] USAID, above n 178, 31.

[181] See Viettel website <www.viettel.com.vn>.

[182] Saigon Post and Telecommunications Services Corporation (SPT).

turning point in breaking up the monopoly position of VNPT.[183] As a new participant, Viettel launched a series of promotional programs to attract clients to its mobile service at a considerably lower price.[184] However, Viettlel, as any other telecomm service provider, had to interconnect with the VNPT system to provide its services, such as mobiles, data transmission and internet. Besides, it had to connect to six transmitting stations before getting access to VNPT local stations.[185]

In 2004 Viettel and VNPT signed an agreement under which Viettel committed to paying a leasing fee for use of the national back-bone system, while VNPT had to ensure connection to the network.[186] While its mobile phone subscription rate increased remarkably, only less than a half of the connection demands were provided by VNPT.[187]

---

[183] When it first participated in the telecommunication market, Viettel started a competition with the monopoly VNPT by the introduction of a VoIP service at a lower price than that of VNPT. See Viettel website, 'Cuoc Cach mang Viettel' (2009) [Viettel Presence Brings about a Revolution] <http://www.viettel.com.vn/TinTuc/tabid/55/key/ViewArticleDetail/Cat/69/Art/8149/language/vi-VN/18/2/2009.viettel>. In 2004 Viettel joined the mobile market by offering a mobile service and became the fourth mobile provider after two VNPT subsidiaries and S-Fone. See Viettel website <www.viettel.com.vn>.

[184] Soon after it was established, Viettel became an emerging rival in the market, which had been shared between Vinaphone and Mobiphone, both in the VNPT system. Within a short period, Viettel rapidly expanded its market share from 0 to 13 per cent and had a large number of mobile clients, including those who shifted from Vinaphone and Mobiphone to Viettel. To fulfil its ambition to gain more market share, Viettel invested millions of USD to develop its infrastructure. With regard to its mobile network, it was reported that Viettel spent around VND 2 trillion (US$125 million). See Nguyen Viet Hung, 'Presentation on Abuse of Dominant Position' (2005) <http://www.jftc.go.jp/eacpf/05/APECTrainingCourseAugust2005/Group1/Nguyan_adp.pdf> ; Vietnam News, 'Telecom Industry's Hostile Competition' <http://vietnamnews.vnagency.com.vn/showarticle.php?num=01BUS270905>; Viet Bao, 'Viettel Co Nguy co Pha san Neu VNPT Khong Thao Nut Co chai' [Viettel is on the Erge of Bankcruptcy if VNPT Does not Resolve the bottle-neck Issue] (2005) <http://vietbao.vn/Kinh-te/Viettel-co-nguy-co-pha-san-neu-VNPT-khong-thao-nut-co-chai/45159811/87/>.

[185] Viet Bao, 'Ong Doc quyen VNPT Bi To cao' [The Monopolist, VNPT Has Been Denounced] (2005) <http://vietbao.vn/Vi-tinh-Vien-thong/Ong-doc-quyen-VNPT-bi-to-cao/40085719/217/>.

[186] According to this agreement, in case of any congestion problems arising between the two networks, if it wanted to increase connection capacity, Viettel was required to make a request to VNPT two weeks in advance. See Vietnam News, 'Viettel Seeks End to VNPT Connection Dispute' (2005) <http://vietnamnews.vnagency.com.vn/showarticle.php?num=05ECO290605>.

[187] It was also noted that since 2002 VNPT never met its demands for connection capacity. In 2002, it was 38 per cent while it was 25 per cent in 2003 and 2004. In 2005 the demand was even met at only 17 per cent by VNPT. The point raised by Viettel was that connection jams only occurred when connecting from Viettel to VNPT networks and that 80 per cent of of its total calls were from Viettel to VNPT. See Viet Bao, 'Viettel – VNPT: Khau chien Nay Lua' [Viettet – VNPT: Intense Dispute] (2005) <http://vietbao.vn/Kinh-te/Viettel-VNPT-Khau-chien-nay-lua/70015728/87/>.

As a result, it received a wave of complaints about its quality of service from clients.[188] Viettel argued that this resulted from the limited interconnection with the VNPT network and the unwillingness of connection provision by VNPT.[189]

VNPT explained that its reluctance was due to the inadequacy of its ports, which were just enough for the maintenance of its own network and its current subscribers. However, Viettel proved that VNPT could provide more connection ports for them.[190] It was claimed that there was actually discrimination against Viettel, which was faced with difficulties in developing their services so as to compete with those of VNPT. Besides, Viettel also blamed VNPT for causing difficulties for it in developing its client base in the provinces.[191]

The owners of Viettel, the Ministry of Defence, finally filed an official letter to the Prime Minister on June 25, 2005, accusing VNPT of discrimination against Viettel. This letter showed that the demand for Viettel's connections had not been fulfilled for five consecutive years and that this situation was becoming even worse. The letter noted that Viettel would go bankrupt if this problem remained,[192] and requested emergency intervention to stop the situation in order to ensure the interests of about 700,000 Viettel clients.[193]

---

[188] This also caused a decrease in new clients signing up for Viettel, due to the instability with the connections. As of July 2005 there were 700,000 subscribers to Viettel, while new sign-ups dropped to between 2,000-3,000 a day, well below the 6,000 a day in June. See Vietnam News, 'Ministry Tells VNPT, Viettel to Make Up' (2005) <http://vietnamnews.vnagency.com.vn/showarticle.php?num=05ECO050705>.

[189] Viettel claimed that during this time eight requests were made to VNPT to ask for an increase in connection capacity, but VNPT rejected them each time on the grounds that there was a lack of available ports to the central switchboards, along with a lack of funding for new circuit switchboards.

[190] While it was only agreed to use a total of 100 E1 ports, of which only 20 ports were used for its mobile service, other companies were permitted to use more than needed. For example, FPT, another telecommunication provider, could use 200 ports in peak time, which were used for providing internet service only and this company had returned 100 E1 ports to VNPT as redundant. See Viet Bao, 'Mang 098 Nghen Mach: VNPT Can Ly, Dong Y Mo Cua Cho Viettel' [The Network 098 Congested: Running Out of Arguments, VNPT Agrees to Open More Connections] (2005) <http://vietbao.vn/Kinh-te/Mang-098-nghen-mach-VNPT-can-ly-dong-y-mo-cua-cho-Viettel/45160021/87/>.

[191] Since participating in the market, Viettel had developed its system in almost all provinces and it was ready for connection with the system at VNPT provincial branches. However, Viettel complained that it had to negotiate with each province for the interconnection and this took several months, or even a year without success. See Viet Bao, 'Cuoc Doi dau Viettel – VNPT Chua Co Hoi ket' [Confrontation between Viettel and VNPT: Still No End] (2005) <http://vietbao.vn/Kinh-te/Cuoc-dau-Viettel-VNPT-chua-co-hoi-ket/10916147/87/>.

[192] Vietnam News, 'Viettel Seeks End to VNPT Dispute', above n 186.

[193] Viet Bao, 'Viettel Co Nguy co Pha san', above n 184.

3.4.2.3 The dispute between VNPT and EVN Telecom

EVN Telecom, established in 1995, is a self-accounting company belonging to the Vietnam Electricity Group (EVN).[194] EVN Telecom has recently joined the telecom market, offering a number of services.[195] However, as in the Viettel case, EVN has been faced with interconnection conflicts with the network infrastructure provider VNPT.

In 2005 EVN introduced a SMS service allowing its clients to send SMS to other mobile subscribers such as Vinaphone and Mobiphone. However, after one year, while E-Mobile clients could connect to VNPT subscribers, this service only applied among subscribers to E-Com service (a wireless fixed telephone).[196] EVN Telecom complained that the situation was due to the VNPT failure to open connection ports for the E-com SMS service network and blamed VNPT's failure for retarding the development of its service.[197] This case was remarkably similar to a conflict between S-Fone and VNPT regarding SMS interconnection to the VNPT system in 2004.[198]

After asking the Ministry of Posts and Telecommunications (MPT) to request VNPT to open ports for the EVN SMS service and receiving no response from VNPT, EVN Telecom submitted an official letter to MPT to ask for a resolution of this dispute over connection ports between EVN and VNPT.[199] Besides that, it complained that VNPT clients could not use the toll free service (1800 prefix) for any calls to the customer care service of EVN Telecom. This was due to VNPT not connecting its subscribers to the EVN Telecom service and asking EVN Telecom to pay 600 VND per minute for such

---

[194] EVN Telecom website, <http://www.evntelecom.com.vn/main.aspx?MNU=1097&Style=1>.

[195] In particular, services offered by EVN are E-Com (wireless fixed telephone), E-Phone (inner-province mobile calls) and E-Mobile (CDMA-based technology mobile). Since its mobile service (E-Mobile) is considered not to be able to compete with current mobile providers, E-Com has become the prominent service. This service has allowed EVN Telecom to attract around 100,000 clients within only 1 year after joining the telecom market in 2005. See VN Express, 'EVN Telecom – Nan nhan moi cua VNPT' [EVN Telecom - New Victim of VNPT] (2006) <http://www.vnexpress.net/GL/Kinh-doanh/2006/07/3B9EBA01/>.

[196] EVN Telecom received complaints from its clients for not being able to send SMS from wireless fixed-telephone services (E-com) to subscribers of two mobile VNPT service providers, as advertised.

[197] Vietnam News, 'VNPT Gives More Access to EVN Telecom' (2006) <http://vietnamnews.vnagency.com.vn/showarticle.php?num=03BUS120706>.

[198] In 2003, S-Fone, a joint venture between Saigon Postel Corporation and Korea SK telecom, wanted to connect to the VNPT system to launch its messaging service. Its proposal to interconnect was delayed many times by VNPT. VNPT cited many technical problems to explain its delay, while S-Fone complained that this situation was caused because VNPT did not want it to be connected. See USAID, above n 178, 16-17.

[199] Vietnam News, 'VNPT Gives More Access', above n 197.

calls.[200] But even after EVN Telecom finally agreed to this requirement, VNPT still delayed opening the connection for EVN Telecom.[201] In response to these accusations, VNPT pleaded a number of technical problems to explain their behaviour.[202] It claimed that its hesitance was due to its taking care to avoid offering a low quality service.[203]

As EVN claimed, they faced unwilling cooperation by VNPT when negotiating a connection to the VNPT system.[204] As with Viettel, EVN Telecom had to undertake negotiations with VNPT provincial branches. It took EVN Telecom several months to negotiate with each VNPT provincial branch where they wanted to connect two networks.[205] VNPT declared that they would only open a connection for EVN Telecom if a connection jam existed and EVN Telecom could show evidence for the jam.[206] After the direction of MPT regarding the opening of connection ports, the jam situation still existed, because VNPT only opened more ports to EVN Telecom as soon as a connection

[200] VNPT also argued that a toll free 1800 service would be definitely free of charges for customers, but the company that provided that service would have to pay VNPT according to the agreement concluded between the two sides. The charge applied for EVN Telecom would be reasonable if EVN Telecom offered this service to its customers, including those who are VNPT subscribers. See Doi song Phap Luat, 'Ket noi EVN Telecom – VNPT: EVN Telecom Chua Thuc hien Dung Thoa thuan Ket noi' [Connection between EVN Tel and VNPT: EVN Tel Has not Implemented Connection Agreement Correctly] (2006) <http://www.doisongphapluat.com.vn/Story/thuongmaitoancau/2006/7/1035.html>.

[201] Dan Tri, 'EVN Telecom: Nan nhan Ket noi Moi' [EVN Telecom - New Connection Victim] (2006) <http://dantri.com.vn/c76/s76-127856/evn-telecom-nan-nhan-ket-noi-moi.htm>.

[202] For example, in terms of SMS connection between two operators, VNPT explained that there were no specific articles regarding SMS connection from EVN Telecom fixed line telephone to VNPT mobile phone subscribers mentioned in the agreement for connection signed by VNPT and EVN Telecom. VNPT also stressed that it had tried to launch its own similar service, but the result was not as successful as expected.

[203] Doi song Phap Luat, above n 200.

[204] While similar negotiations were undertaken quickly with other providers such as Viettel and Saigon Postel (SPT), it took them nearly 3 years to deal with VNPT, but EVN Telecom's demands were not satisfied adequately. See Viet Bao, 'Dam phan EVN Telecom – VNPT: Moi Ngay Chi Sua Mot Chu' [EVN Telecom - VNPT Negotiation: One Word Corrected per Day] (2006) <http://vietbao.vn/Kinh-te/Dam-phan-EVN-Telecom-VNPT-Moi-ngay-chi-sua-1-chu/45201381/87/>.

[205] Ibid. In the case of the Bac Giang VNPT branch in 2005, the negotiation was unsuccessful as the EVN Telecom negotiation offer was delayed many times. As a result, EVN Telecom could not launch its service there. Until mid-2006 there were still nearly 20 provinces where EVN could not connect to the VNPT system. See Lao dong, 'Mau thuan Ket noi Giua EVN va VNPT: Mot Lan nua Lai Nong' [Connection Conflict between EVN and VNPT: Hot Again] (2006) <http://www1.laodong.com.vn/pls/bld/display$.htnoidung(337,161436)>.

[206] In fact, when the jam situation occurred, instead of opening 200 ports as requested by EVN Telecom, VNPT just opened 8, causing continuing connection jams for EVN Telecom in some provinces. For example, in Thanh Hoa province, after submitting their report with statistical data about the connection jams, in July 2006 there was only one port opened for EVN Telecom, while the number of needed ports as requested was 11. See Lao dong, above n 205; Viet Bao, above n 204.

jam occurred.[207] That caused many difficulties and disadvantages for EVN Telecom in developing their services as a newcomer in the telecommunication market.

3.4.3 State monopoly in the aviation sector – cases involving Vietnam Airlines and its subsidiaries

3.4.3.1 Vietnam Airlines and Pacific Airlines

Because of its sensitive nature, aviation had been an absolute monopoly area before Vietnam started to open its market for civil aviation in the early 1990s. Established in the 1950s, Vietnam Airlines (VNA) is currently the national flag airline. Accounting for 42 percent of Vietnam's international passenger traffic and 85 percent of its domestic passenger traffic,[208] it definitely holds the dominant position in the aviation sector.[209]

Pacific Airlines (PA) was established and started operating in 1991.[210] This was seen as a breakthrough in removing the monopoly of VNA in the aviation sector. However, since PA was created, VNA remained the largest shareholder, accounting for 86.49 per cent of the total market, whilst the rest was shared mostly by VNA subsidiaries.[211] However, until it was acquired by Qantas to form Jetstar Pacific (JPA) in 2008, PA was actually operating under the influence of VNA, which was its major shareholder and also its

---

[207] According to the EVN claim, VNPT cited many reasons to explain the delay in connecting the EVN Telecom system to that of VNPT. Most of them were technical issues such as the limitation of ports and the incapacity of the current systems.Vietnam Net, 'Network Jams in 17 Provinces, EVN Telecom Cries' (2006) <http://english.vietnamnet.vn/biz/2006/09/613901/>.

[208] The U.S. Commercial Service and ITA Trade Development, *Aerospace Exports: Market Research Identifies Solid Prospects* <http://www.ita.doc.gov/exportamerica/NewOpportunities/no_aeroex_1002.html>.

[209] Not only does it have advantages as goods and passenger carrier, it can benefit from its aviation service facilities which are held by its subsidiaries and affiliates. Vietnam Airlines (VNA) is the national flag airline and a member company of Vietnam Airlines Corporation. VNA's parent company consists of the airline and 20 aviation businesses. See also Vietnam Airlines Corporation website <www.vietnamair.com.vn>.

[210] It had been formerly a joint stock airline in which Vietnam Airlines (the National Airline of Vietnam) was a major shareholder before this share was handed over to the State Capital Investment Corporation (SCIC) in 2005. With the purchase of 30 per cent of total shares by Qantas, the Pacific Airlines was renamed Jetstar Pacific and operated as a low cost airline in 2008. Currently, Jetstar Pacific is the second largest airline in Vietnam and a competitor to Vietnam Airlines. See VTV website, 'Ra Mat Hang Hang khong Gia Re Jetstar Pacific' [Low Cost Airline Jetstar Starts to Operate] (2008) <http://www.vtv.vn/VN/TrangChu/TinTuc/CKX/2008/5/24/159028/>; Du Lich Online, 'Jetstar Pacific: Hang Hang khong Gia Re Dau tien Cua Viet Nam' [Jetstar Pacific: the First Low Cost Airline in Vietnam] (2008) <http://www.baodulich.net.vn/Story/vn/tieudiem/theodongsukien/tieudiem/2008/4/1848.html>.

[211] Vietnam Net, 'Tu Pacific Airlines, Can Mot Cuoc Dai phau Sang tao' [From Pacific Airlines Case: Must Have a Creative Reform] (2004) <http://vietnamnet.vn/kinhte/2004/12/359266/>.

competitor,[212] so that there was no real competition between the two rivals.[213] For that reason PA had to operate under plans designed and directed by VNA,[214] and thus faced unfair competition from its major shareholder.[215] Depending on aviation infrastructure,[216] PA was exposed to critical difficulties and discrimination,[217] including unfair competition in terms of a wide-ranging promotional program of discounts or reductions in fares released by VNA.[218] In addition, most international routes had been exploited by Vietnam Airlines.[219]

Recently, an opportunity for market access in this area has been prevented by VNA, as

[212] Ibid. Pacific Airlines was naturally a state owned enterprise. It was created in the form of a joint stock company consisting of 7 shareholders, all of which were state owned enterprises. Hence it was influenced by the methods of conducting business in state owned enterprises.

[213] Viet Bao, 'Can Xoa bo Doc quyen Tren Thi truong Hang khong' [Aviation Monopoly Must be Removed] (2006) <http://vietbao.vn/Kinh-te/Can-xoa-bo-doc-quyen-tren-thi-truong-hang-khong/10955207/87/>.

[214] Vietnam Net, 'Temasek Dau tu Vao Pacific Airlines' [Temasek to Invest in Pacific Airlines] (2005) <http://vietnamnet.vn/kinhte/2005/06/452855/>.

[215] For example, it mostly exploited local routes that Vietnam Airlines did not want to develop and it operated under inconvenient flight schedules.

[216] Aviation infrastructure includes airports, terminals, catering and ground services. Such services are currently under the monopoly of Vietnam Airlines and its subsidiaries.

[217] For example, Pacific Airlines claimed that Vietnam Airlines had rejected the proposal to equip its own buses for carrying passengers and luggage from terminals to aircraft, forcing Pacific Airlines to rent from Vietnam Airlines at a high rate. Pacific Airlines also complained that while both purchased from the aviation oil company (VINAPCO), it could not enjoy extended time for payment as Vietnam Airlines could. See Vietnam News, 'Domestic Airlines Price War Hurts Industry' (2006) <http://vietnamnews.vnagency.com.vn/showarticle.php?num=03BUS020506>.

[218] Pacific Airlines argued that by holding a dominant position, Vietnam Airlines continuously launched mass promotional programs causing losses for Pacific Airlines, a weaker competitor. Pacific Airlines announced it suffered from losses on Hanoi-Ho Chi Minh City flights in 2005 of up to VND60 billion (US$3.77 million) due to the forced reduction in fares led by Vietnam Airlines. Pacific Airlines submitted its complaint to the Ministry of Finance and Vietnam Aviation Administration Department, accusing Vietnam Airlines of breaching *Competition Law* in 2006. It complained that Vietnam Airlines had launched discount fare programs on three major routes exploited by Pacific Airlines (Ha Noi – TP.HCM, Ha Noi – Da Nang and TP.HCM – Taiwan). Notably, Vietnam Airlines reduced its fare by 50 per cent for Ha Noi – Da Nang flights on the same day Pacific Airlines opened its flights on this route. See Vietnam Business Forum, 'Unhealthy Competition Hurting Airline Industry' (2006) <http://vibforum.vcci.com.vn/news_detail.asp?news_id=6535>; VN Express, 'Co Canh tranh Khong Lanh manh Trong Nganh Hang Khong' [Is There a Fair Competition in Aviation Industry?] (2006) <http://vnexpress.net/Vietnam/Kinh-doanh/2006/04/3B9E91DD/>.Vietnam News, 'Domestic Airlines Price War', above n 217.

[219] VN Economy, 'Cuc Hang khong Viet Nam Bi To Lam Kho Jetstar Pacific' (2008) [Vietnam's Aviation Administration Bureau was Accused of Causing Difficulties to Jetstar Pacific] <http://vneconomy.vn/20081124020117887P0C19/cuc-hang-khong-viet-nam-bi-to-lam-kho-jetstar-pacific.htm>.

the request of Jetstar Pacific to implement international flights was rejected in 2008.[220] This is a good example of how the monopoly position of Vietnam Airlines is still maintained by bureaucratic intervention.

3.4.3.2 Disputes regarding ground service provision by Vietnam Airlines

Vietnam Airlines also has its subsidiaries providing ground services at largest airports,[221] including counter check-in services, transport of passengers within airports, VIP lounge service in terminals, etc.

In early 2008, ground service providers (namely Northern and Central Regional Airport Complexes) imposed a new service fee to be applied to all airlines in airports, which was considerably higher than before.[222] The change in fees was imposed without prior consultation with the airlines. The previous fees in fact were higher than those of regional rates.[223] The rocketing increase in service fees caused difficulties to both local and foreign airlines.[224]

In April 2008 ten airlines operating in Vietnam collectively submitted a petition to the

---

[220] Ibid. In 10/2008, a request for flight rights to be implemented by Jetstar Pacific (formerly Pacific Airlines) was rejected. As explained by the Vietnam Civil Aviation Administration, the reason was that Jetstar Pacific did not meet the requirements for management apparatus stipulated by law (the rate of foreigners not being allowed to exceed one-third). This was considered as groundless, contrary to the business licence granted to Jetstar Pacific and was not consistent with current laws. While countries which Jetstar Pacific asked for permission to fly to have many airlines operating in Vietnam, Vietnam Airlines has been the only airline to operate international flights on these routes.

[221] A list of Vietnam Airlines Corporation subsidiary companies providing ground services at regional airports can be found at <www.vietnamair.com.vn>.

[222] Some services fees were raised many times higher than the previous ones, while each airport had its own price list. In particular, at the Noi Bai International Airport the fee for hiring the check-in counter service soared by 6.6 times, from VND 980,000 to VND 6,512,000/flight and at Central Airports, this fee climbed to VND 5,800,000/flight (5,92 times higher). The fee for carrying passengers in airports was increased by 10.6 times from VND 450,000 to VND 4,800,000/flight while at Central Airports, it was up to VND 4,300,000/flight. And the carrying fee for passengers from aircraft to terminal went up to VND 30,000 per person for a distance of just about 100 metres. See VTC News, 'Dich vu Doc quyen San Bay Tang gia 5-10 Lan' [Airport Ground Services Fees to Increase from 5 up to 10 times] (2008) <http://vtc.vn/kinhdoanh/doanhnghiep/177753/index.htm>; VN Chanel.Net, 'Khon don Voi Dich vu Doc quyen San bay' [Troubles Caused by Airport Services](2008) <http://www.vnchannel.net/news/kinh-te/200804/khon-don-voi-doc-quyen-dich-vu-san-bay.70647.html>. In the South, after the new terminal at Tan Son Nhat airport became operational, the Southern Airport Complex raised the service fee for using VIP rooms from $15 to $32 (up by 113 per cent). See Vietnam Net, 'Monopoly Exists, Airport Service Fees Gallop' (2008) <http://english.vietnamnet.vn/travel/2008/04/779832/>.

[223] VTC News, 'Dich vu Doc quyen San Bay Tang gia 5-10 Lan', above n 222.

[224] Ibid. Some airlines, such as Pacific Airline announced they might stop some domestic flights and cancel their plans to open new local routes.

Ministry of Finance, Ministry of Transport and Vietnam Civil Aviation Administration regarding the unilateral raising of service fees.[225] The Ministry of Finance later sent *Dispatch No 4049/BTC-QLG* to the Northern, Central and Southern Regional Airport Complexes and Vietnam Airlines Corporation. The dispatch clearly stipulated that the unilateral raising of the ground service fees without negotiating with clients (airlines) was contrary to the current laws on price control.[226] Airport service providers had the right to define the fee levels of other types of services[227] but they had to negotiate with clients before introducing any changes.[228]

In fact, agreements between ground service providers and airlines were of the nature of an economic contract. Under no circumstances could the providers unilaterally raise services fees without having an agreement with their clients and even a communication could not be acceptable.[229] The situation was criticised as being the consequence of the monopoly situation in providing aviation services. As clients had no other choice of service providers, they had to accept all terms for conditions and fees as released by the providers.

---

[225] VN Economy, 'Doc quyen Dich vu San bay, Hang khong Keu Cuu' [Airport Ground Services Monopoly: Airliners Ask for Help] (2008) <http://vneconomy.vn/60536P0C19/doc-quyen-dich-vu-san-bay-hang-khong-keu-cuu.htm>.

[226] Ibid. VTC News, 'Dich vu Doc quyen San Bay Tang gia 5-10 Lan', above n 222.

[227] According to a Vietnam Civil Administration officer, there are only five types of service for which the ministry needs to build up frame prices and four types of service for which the ministry needs to set fixed prices. See Vietnam Net, 'Monopoly Exists, Airport Service Fees Gallop', above n 222. In the EU competition law, the ECJ in *Aéroports de Paris* held that different prices and fees could be justified based on objective criteria such as the existence of objectively different situations or circumstances capable of justifying any disparity in treatment. See *Aéroports de Paris v Commission* (T-128/98) [2000] ECR II-3929.

[228] VTC News, 'Dich vu Doc quyen San Bay Tang gia', above n 222.

[229] In EC competition law there is the question of whether a dominant firm can decide to terminate supplying products unilaterally or not and whether it would always be considered a breach of Article 102(b) *TFEU* (ex Article 82 *TEC*). This question was analysed by the European Commission in *United Brands* and some other cases, with the finding that a dominant firm can freely choose competition policies and its customers based on certain objective criteria such as technical skills and the independent level of customers. Besides, firms can freely renew or terminate contracts or review their entire distribution system and stop cooperating with their customers, provided that such decisions are reasonably notified in advance. Therefore, the European Commission confirms that a refusal to supply is only considered an anti-competitive abuse if it is given without appropriate reasons or pre-notification. See *United Brands*(C-27/76) [1978] ECR 207 152-160. See also Lennart Ritter and Braun W David, *European Competition Law: A Practitioner's Guide* (2005) 438.

3.4.3.3 The dispute regarding aviation fuel supply between VINAPCO and Pacific Airlines

VINAPCO (Vietnam Air Petrol Company Limited), a VNA subsidiary, functions as a distributor of aviation fuel to all airliners operating in Vietnam.[230] VINAPCO definitely holds a monopoly position in the provision of aviation fuel because it is the only company authorized to import and provide JET A1 oil for aircraft.[231]

In March 2008 a proposal for raising its pumping fee was released by VINAPCO.[232] This proposal was not accepted by PA on the grounds that VINAPCO continued to charge VNA at the old rate.[233] PA argued that this proposal had to apply equally to both carriers and thus the fact that Pacific Airlines had to pay a higher fee than VNA was unacceptable.[234] PA claimed that all domestic airlines had to be treated in the same way, as cited in a government stipulation.[235] It also argued that this unfair treatment would force PA to raise airfares, thus reducing its competitiveness while it was undergoing a

---

[230] See VINAPCO website <www.vinapco.com.vn>.

[231] Article 12 of the *Competition Law 2004* states that an enterprise will be deemed to be in a monopoly market position if there are no other enterprises competing in the relevant market for the goods that it trades or the services it provides.

[232] The proposal stated that the price would change from VND 593,000 (US $37) to VND 750,000 (US $47) per ton. This was explained as being due to the rising costs in the world oil market. As explained by VINAPCO, the latest contract between Vinapco and Pacific Airlines dated on December 31, 2007 stated that the previously agreed price was VND593.000/tonne. However, when this contract was concluded, the world's price was only $76.2/barrel and it had soared up to $110-130/barrel. See also Vietnam Net, 'VINAPCO, 'Pacific Airlines to Start Talks on Fuel Fee' (2008) <http://english.vietnamnet.vn/biz/2008/04/778019/>.

[233] Ibid. In response, VINAPCO stated that the reason why Vietnam Airlines could enjoy lower fees was because it purchased more fuel than Pacific Airlines. Vietnam Airlines purchased 500,000 tonnes of fuel, while the volume was 10-11 times lower for Pacific Airlines. See Vietnam Net, 'MOF: VINAPCO Must Apply Single Air Petrol Sale Price' (2008) <http://english.vietnamnet.vn/biz/2008/04/777964/>.

[234] Other than Vietnam Airlines, VASCO, other domestic airlines did not receive a notification of a fee rise from VINAPCO. See Vietnam Business Forum, 'Doc quyen Cung cap Xang dau Hang khong: Ung xu Nhu The Nao Cho Dung Luat?' (2008) [Monopoly in Aviation Fuel Supply: How to Behave Legally?] <http://news.vibonline.com.vn/Home/ttkt/2008/04/1842.aspx>; Vietnam Investment Review, 'Aviation Sector Firms' Complaints Gain Wings' (2008) <http://www.vir.com.vn/Client/VIR/index.asp?url=content.asp&doc=16155>; Tuoi Tre Online, 'May bay Pacific Airlines : Chet dung Vi Khong Duoc Bom Xang' (2008) [Pacific Airlines' Aircrafts Could not Fly due to No Fuel Supply]. <http://www.tuoitre.com.vn/Tianyon/Index.aspx?ArticleID=250471&ChannelID=3>. It is noted that in the EU competition Law, the ECJ also argued that the application of pricing differences would only be considered as an abuse of a dominant position if a certain tolerance level was exceeded and it became disproportionate and unjustifiable. See *United Brands v Commission* (C-27/76) [1978] ECR 207, 298 227; *Deutsche Bahn v Commission* (T-229/94) [1997] ECR II-1689, 86; *P&I Clubs* [1999] OJ L 125/12 134-136.

[235] Sai Gon Giai Phong, 'Govt Orders VINAPCO to Charge All Carriers Same Fuel Price' (2008) <http://www.saigon-gpdaily.com.vn/Business/2008/4/62626/>.

restructuring process.[236]

In April 2008 VINAPCO unilaterally disrupted fuel supply to PA, causing damage to its finances and reputation.[237] After an urgent official letter by PA was submitted to the Ministry of Transport, the Ministry ordered Vietnam Airlines to instruct VINAPCO to resume supplying fuel to PA and to apply the same price to both airlines.[238] Later, VINAPCO and PA agreed to resume negotiations in mid-April. However, the meeting did not end the dispute, because of the different demands of the two sides. The case was finally submitted to the Competition Administration Department (VCAD).[239]

3.4.3.4 The first anti-monopoly case on trial

The dispute between VINAPCO and Jetstar Pacific Airlines (JPA), the successor of Pacific Airlines (PA), was finally handled by the Vietnam Competition Council (VCC) on 14/4/2009. VCC, after reviewing relevant documents and claims brought by JPA, considered that VINAPCO had abused its monopoly position when it unilaterally stopped pumping aviation oil for PA in April 2008, which caused the delay of many flights run by this Airline.[240] The final decision made by VCC held that VINAPCO's behaviour constituted a breach of Article 14(2) and (3) of the *Competition Law 2004* regarding practices abusing dominant and monopoly positions. A fine of 3.37 billion VND (168,000 USD) was imposed on VINAPCO together with a recommendation to separate

---

[236] Vietnam Net, '30 Flights Delayed Because of No Fuel?' (2008)<http://english.vietnamnet.vn/travel/2008/04/776572/>.

[237] The unprecedented disruption on April 01, 2008 resulted in the delays of 30 domestic flights in 2-3 hours, affecting 5,000 passengers of Pacific Airlines.

[238] Nguoi Lao Dong, 'Doc quyen Niu Canh Hang khong' (2008) [Aviation Sector Hampered due to Monopoly]<http://www.nld.com.vn/220922P0C1014/doc-quyen-niu-canh-hang-khong.htm>. The Ministry of Finance (MOF) also sent a dispatch to Vietnam Airlines Corporation, VINAPCO's parent company, asking it to apply a single petrol sale price. The dispatch stressed that Vinapco must apply one sale price policy to all client air carriers because it was supposed to implement the 10th Communist Party Congress's resolution on removing all discriminatory treatments on different types of ownership. See Vietnam Net, 'VINAPCO Must Apply Single Air Petrol Sale Price' above n 233.

[239] VCAD considered it was a sign of making use of a monopoly position as prohibited by the *Competition Law* and requested that VINAPCO explain its behaviour of not providing petrol. See 'Pacific Airlines-VINAPCO Negotiations Failed, MOF to Chair Negotiating Table'<http://www.vnbusinessnews.com/2008/04/pacific-airlines-vinapco-negotiations.html>; Vietnam Net, above n 241; Vietnam Net, 'Cuc Quan ly Canh tranh Yeu cau VINAPCO Giai trinh' [Vietnam Competition Administration Department Asks VINAPCO to Explain] (2008) <http://vietnamnet.vn/kinhte/2008/04/776744/>.

[240] Vietnam Competition Council Website < http://www.hoidongcanhtranh.vn/Tin-Tuc-Chi-Tiet&action=viewNews&id=967>. See also Vietnam Net, 'VINAPCO Told to Abide by Rule to Ask Airlines to Pay Fuel-Bills' (2009) <http://english.vietnamnet.vn/biz/2009/04/843697/>.

VINAPCO from its parent company (Vietnam Airlines).[241]

The case marked a development in anti-monopoly practice in Vietnam. It shows the determination of the Government to protect a healthy environment for competition and development.[242] The trial also introduced a new way of settling disputes concerning monopoly cases. It would have been more difficult for JPA if it had brought the case to a traditional tribunal (the economic court) like other cases relating to an economic contract between two sides.[243] More importantly, even if JPA had only succeeded in the case itself, the monopoly situation in providing aviation fuel by VINAPCO would have continued to exist, as it would have continued to be the sole provider in the aviation fuel market.[244] Finally, this case will encourage firms to bring monopoly cases to VCC as a protective

[241] Vietnam Competition Council <http://www.hoidongcanhtranh.vn/Tin-Tuc-Chi-Tiet&action=viewNews&id=967>. Vietnam Airlines, VINAPCO's parent company, said that the proposal would only undermine the national flag carrier by breaking apart its technical and service systems, which were running independently. Vietnam Airlines also argued that such an outcome would contradict the Government's policy of supporting the national airline to become the market leader. Vietnam Airlines argued that the monopoly position of VINAPCO was due to historical factors and the scale and real conditions of the market. Regarding the behaviour of VINAPCO when it unilaterally stopped supplying aviation fuel for its customer, Vietnam Airlines believed that it was doing nothing wrong, because, VINAPCO itself was a state owned enterprise and thus it had to act under obligation to conduct business while preserving state capital. It was reasonable for VINAPCO to stop providing services for customers whose payment was overdue, violating the terms of the contract previously signed between the two sides. It also claimed that the proposal for separating VINAPCO from its parent company would not be an effective way to deal with its monopoly, particularly in the country's aviation fuel supply industry. Rather, the government should license more companies to operate in this area. See Saigon Times Online, 'Vietnam Airlines Opposes Jetstar Pacific-Proposed Separation of VINAPCO' (2009) <http://english.thesaigontimes.vn/Home/business/other/4247/>; VTC News, 'Jetstar Len Tieng Ve Phan doi Tach VINAPCO Cua Viet Nam Airlines' [Jetstar Responses to Vietnam Airlines' Objection to Break-up VINAPCO] (2009) <http://www.vtc.vn/kinhdoanh/jetstar-len-tieng-ve-phan-doi-tach-vinapco-cua-viet-nam-airlines/213374/index.htm>; Dan Tri, 'Vu Kien Nhien lieu: Vietnam Airlines va Jetstar Pacific Lien tuc 'Ra Don' [The Fuel Case: Vietnam Airlines and Jetstar Pacific Continuingly Attack Each Other] (2009) <http://dantri.com.vn/c76/s82-321839/vietnam-airlines-va-etstar-pacific-lien-tuc-ra-don.htm>; Vietnam News, 'Airline to Keep Fuel Supplier' (2009) <http://vietnamnews.vnagency.com.vn/showarticle.php?num=04BUS280409>; VN Media, 'Vietnam Airlines Quyet Giu VINAPCO' [Vietnam Airlines to Keep VINAPCO] (2009) <http://www.vnmedia.vn/newsdetail.asp?NewsId=162706&CatId=26>; Vietnam News, 'Airline to Keep Fuel Supplier' (2009) <http://vietnamnews.vnagency.com.vn/showarticle.php?num=04BUS280409>.

[242] Dan Tri, 'Vu kien nhien lieu', above n 241.

[243] Besides, it would also be difficult for JPA to prove the damages from the cancelled flights and calculate the loss of its prestige. See Vietnam Net, 'VINAPCO Told to Abide by Rule to Ask Airlines to Pay Fuel-Bills' (2009) <http://english.vietnamnet.vn/biz/2009/04/843697/>.

[244] Tran Thanh Tung, 'Vu Kien Mo duong Cho Luat Choi ve Canh Tranh') [The Case Paved the Way for Competition Rules to be Applicable], *Saigon Times* (Online) (2009) <http://www.thesaigontimes.vn/Home/kinhdoanh/thuongmai/17945>.

means to ensure fair competition.[245]

3.4.4 Observations

These case studies have illustrated the characteristics of state monopolies in Vietnam. In fact, state owned enterprises continue to hold monopoly and dominant positions in sensitive and crucial areas of the state. Not only were state monopolies formed to conduct business activities, but they also carry out assigned tasks in the economy.[246] The monopoly positions of state monopolies are still consolidated by regulatory frameworks. This results from the confirmation of the leading role of the state sector in the economy even after the opening-up of the market.

The linking of administrative bodies (sectoral regulators) and state enterprises is a concern. It has been reflected in the assignment of staff from those bodies to enterprises, the intervention of regulatory bodies in the settlement process whenever a conflict has arisen and the favourable treatment towards state owned enterprises.

The interrelation between parent and subsidiary companies is another concern. The reform of SOEs has brought about significant changes in terms of corporate governance and structure where the status and legal relationship between parent and subsidiary companies have been governed by corporate law. However, the interrelation among member companies and between them and the holding company may negatively affect competition.

These cases have shown that whenever state monopolies exist in industry in which they control the key features (infrastructure system), causing the dependence of others, the removal of their monopoly position is hard to implement.[247] The settlement of arising

[245] Ibid. Previously, enterprises tended to seek trials by the courts. However, court proceedings are generally quite difficult and time consuming. Asking for a trial by the VCC can help to solve business problems that dispute resolution has not reached.

[246] In the case of EVN, besides doing business in the power sector, it has to perform such social and political tasks as the development of power networks within the country, including rural and remote areas, while taking care of security and defence duties.

[247] For example, in the case of VNPT, even though telecom service providers are given more opportunity to compete with the monopoly, their dependence on interconnection to the back-bone system that VNPT monitors puts them in a potential conflict situation with VNPT. The interconnection with VNPT problem happened with S-Fone, Viettel and EVN successively, which is clear evidence for that situation. In the case of EVN the power grid line is controlled by EVN and independent power generators that want to operate in transmission and distribution must depend on EVN cooperation.

cases will not comprehensively prevent future disputes. In this regard the elimination of a monopoly position through the participation of the private sector or the replacement of monopoly companies by non-profit ones should be considered.

These cases demonstrate that the following practices contravene competition law. They are: pricing monopoly, the hindrance of market access to new competitors and the abuse of dominant positions.[248] Such cases have also demonstrated the fact that the *Competition Law 2004* and enforcement agencies have had little effect.[249]

The competition situation, however, has demonstrated that when a certain monopoly area held by a state monopoly is open to competitors, it leads to positive results.[250] As competition is introduced, the monopoly position held by state corporations is challenged, thus contributing to a healthy competitive environment. By contrast, in those areas where the participation of non-state sectors is still limited or competition has just started, monopolistic behaviour seems to be common. The situation of the aviation and electricity industries provide clear examples of this.

[248] Monopolistic behaviour and abuse of dominant position such as arbitrary power cuts, unilateral rejection of fuel supply and increasing of services fees are anti-competitive practices stipulated in articles 13.2 to 13.5 and 14.3 of the *Competition Law 2004*. The obstruction of market participation in the cases of VNPT and Viettel and EVN Telecom and that of Vietnam Airlines and Pacific Airlines are prohibited under article 13.6 of the *Competition Law 2004*.

[249] The case of EVN Telecom and VNPT, the case between Pacific Airlines and Vietnam Airlines and the case between Pacific Airlines and VINAPCO, involved parties seeking a resolution by submitting to the relevant sector-specific regulators for opinions and judgments. Those disputes were finally settled by administrative intervention, rather than by competition law procedure.

[250] For example, customers benefit from the reduction of prices, the improvement of service quality and a variety of choices that satisfy their demands. The participation of new telecom service providers (Viettel, EVN Telecom…) has caused a real competition and forced VNPT subsidiary companies to reduce the prices and enhance quality.

Chapter 4

OVERVIEW OF ANTI-MONOPOLY PROVISIONS IN VIETNAM'S COMPETITION LAW 2004

This chapter provides an overview of anti-monopoly regulations in Vietnam. It is structured into three parts. The first part reviews the development of competition law in general and anti-monopoly law in particular. It first analyses preconditions and rationales for the adoption of the *Competition Law 2004* (hereinafter referred as the Law). The next part focuses on fundamental issues of competition law, including objectives, coverage and addressees of the Law. The last part is devoted to specific anti-monopoly provisions. It introduces the basic contents of the law, with an overview, definitions, categories of behaviour in restraint of competition and Vietnam's authorities in charge of competition cases and relevant issues.

4.1 The development of competition law in Vietnam

4.1.1 Preconditions for the competition law

This part reviews the development of the competition law in Vietnam. It starts with a background to competition regulation after Doi Moi in 1986. It then discusses preconditions for the formulation of Vietnam's Competition Law, including the demand for such a law, as the country was moving towards a market economy and the occurrence of practices harmful to competition. It also explains why anti-monopoly restrictions could not be adopted when the Law was passed in 2004.

4.1.1.1 Background

In the central planning economy of Vietnam, such concepts as 'competition', 'competition law', 'monopoly', 'anti-monopoly' and 'anti-monopoly law' were relatively strange. This is understandable because these concepts were only introduced to Vietnam after the launch of Doi Moi in 1986. During the time of the central planning economy, 'competition' was understood as 'emulation' (*Thi dua* in Vietnamese) and did not serve as a driving force for development. In fact, there was competition among state-run

enterprises, the only economic entities at that time. A market economy could not exist because the freedom of business was not recognised as a fundamental right and as a result competition did not exist and neither did the 'competition' concept.[1] Hence, there was no need for a competition law.

In the same vein, 'monopoly' was regarded as the state's exclusive control of every aspect of the economy.[2] Hence such concepts as 'anti-monopoly' or 'anti-monopoly law' could not be considered in law and economic scholarship, because this would have been contrary to the mainstream position of the state and political party. Although a monopoly situation existed, there were no underpinnings for an anti-monopoly law to be created.

However, certain dispersed regulations aimed at addressing some forms of unhealthy activity that hindered economic progress did exist in several legislations before Doi Moi and were in place until the *Competition Law* came into effect. These regulations were designed to ensure a healthy competition among state-run enterprises, but not to eliminate any anti-competitive behaviour by these entities. Therefore, before the adoption of the first competition law there were important preconditions for such a law in Vietnam, particularly a demand for a competition law, because of the occurrence of practices that were detrimental to a competitive environment.

4.1.1.2 The demand for a competition law in Vietnam

The demand for a competition law in Vietnam resulted from a number of significant factors that had been reflected in the proliferation of competition laws in the world.[3] It was motivated by the wave of 'neo-liberal economic reforms' introduced since the 1980s, particularly issues raised as a result of privatisation. It was a reflection of the

[1] 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>; 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* [Toward Building up the Law on Unfair Competition and Anti-Monopoly in the Context of Transformation to a Market Economy] (People's Public Security Publisher, 2001).

[2] This is discussed in Chapter 3 regarding state monopoly in Vietnam.

[3] Alice Pham, 'The Development of Competition Law in Vietnam in the Face of Economic Reforms and Global Integration' (2006) 26 *Northwestern Journal of International Law and Business* 549.

predominance of liberal democracies and market-oriented economics that became ideological models in the wake of the collapse of communism.[4] Furthermore, it was impacted by the pace of greater economic integration and encouraged by the endorsement of the vital role of competition law and the adoption of competition laws in various developing countries.[5]

- **There had been growing awareness of the role of competition in the economy and the role of a competition law after Doi Moi**[6]

Initially, competition used to be considered as a negative concept and an element of capitalism.[7] Competition was seen as the cause of economic crisis and turmoil, bankruptcy, unemployment and social evils such as fraud and corruption.[8] There was a common acceptance during the central planning economy that the state played the role of

[4] Paul Cook, 'Competition Policy, Market Power and Collusion in Developing Countries' in Paul Cook (et al, ed) *Leading Issues in Competition, Regulation and Development* (Edward Edgar Publishing, 2004) 39-40.

[5] Pham, above n 3, 549.

[6] Ibid 547; Huan, above n 1, 138; Xuan, above n 1. These viewpoints had been reflected in a number of presentations, reports and working papers of Vietnam's academic scholars, senior officers and drafting member of the Competition Bill at conferences and workshops before the adoption of Competition Law 2004. See Nguyen Minh Chi, *To Build Competition Law in the context of the Transition to Market Economy in Vietnam' – Contribution of Vietnam to OECD Global Forum on Competition* (2002) 11 <http://www.oecd.org/dataoecd/18/32/1832367.pdf>; Hoang Van Phuong, 'Clear identification of competition problems and transparent procedures to deal with competition claims – the keys to competition advocacy in the case of Vietnam' (Paper presented at the 2nd APEC Training Course on Competition Policy, Bangkok, 8-10 August, 2006) <http://www.jftc.go.jp/eacpf/05/APECTrainingCourseAugust2006/Group2/Phuong_Vietnam_.pdf>; Le Hoang Oanh, 'To Build Competition Law in the context of the Transition to Market Economy in Vietnam' (Paper presented at the 1st APEC Training Program on Competition Policy, Bangkok, 6-8 August, 2002) <http://www.jftc.go.jp/eacpf/05/APECTrainingProgram2002/Vietnam1.pdf>; Pham Quynh Mai, 'To Regulate and Promote Competition in State Enterprises in Vietnam' (Paper presented at the 2nd APEC Training Program on Competition Policy, 5-7 August, 2003, Hanoi, Vietnam) <http://www.jftc.go.jp/eacpf/05/APECTrainingProgram2003/PhamQuynhMai.pdf>; Trinh Anh Tuan, 'Competition Environment and the Urgency of Competition Law in Vietnam' (Paper presented at the 3rd APEC Training Program on Competition Policy 1-3, March 2004, Kuala Lumpur, Malaysia) <http://www.jftc.go.jp/eacpf/01/APEC_Policy_Vietnam.pdf>.

[7] Throughout all the documents of Vietnam's Communist Party, 'competition' (or 'free competition' was referred as a means to accumulate capital to achieve capitalism and linked with negative effects in the economy, such as exploitation. See Communist Party of Vietnam, *Complete Works of the CPV* episode 40 (1979) (National Political Publishing House, 2005) 293; Communist Party of Vietnam, *Complete Works of the CPV* episode 40 (1983) (National Political Publishing House, 2006) 908. 'Competition' was also used to characterise the difference between socialist and capitalist modes of doing business. See Communist Party of Vietnam, *Complete Works of the CPV* episode 46 (1985) (National Political Publishing House, 2006) 704–705.

[8] Le Viet Thai, Vu Xuan Nguyet Hong, Tran Van Hoa, 'Anti-trust Law and Competition Policy in Vietnam: Macroeconomic Perspective' in Tran Van Hoa (Ed) *Competition Policy and Global Competitiveness in Major Asian Economies* (Edward Elgar Publishing, 2003) 139.

the only actor, holding both state and economic powers.

After Doi Moi, competition was gradually recognised as one of the fundamental principles and rules of a market economy.[9] Competition was now viewed as 'an objective phenomenon in the market economy and consisted of both positive and negative aspects'.[10] Monopoly would occur as inevitable consequences once if competition could not be ensured.[11] Legal competition was considered as a momentum for economic development, effective improvement and social progress and as serving as an internal driver of the economy.[12] The new thinking about the significance of competition was an important factor contributing to initiatives by Vietnam's government to build the groundwork for market development and set up market rules for investors and enterprises.[13] This changing perception was reflected in a number of core documents of the CPV.[14] More importantly, the negative impacts of monopoly on the business environment were also recognised, notably at the executive and administrative level of

[9] Phat, 'Bao cao Tong hop', above n 1, 2. The concept that competition is a necessary prerequite for a free market economy, despite different approaches to defining what competition actually entails and means is widely accepted among neo-classical economists. See Frederic M Scherer and David R Ross, *Industrial Market Structure and Economic Performance* (Houghton Mifflin, 3rd ed, 1990). See also, Lee McGowan, *The Antitrust Revolution in Europe: Exploring the European Commission's Cartel Policy* (Edward Elgar Publishing, 2010).

[10] Huan, above n 1, 19-20; Phat, 'Bao cao Tong hop', above n 1, 1.

[11] Phat, 'Bao cao Tong hop', above n 1, 11.

[12] OECD, 'Bringing Competition into Regulated Sectors in Vietnam' (Competition Policy Roundtable on Bringing Competition into Regulated Sectors, DAF/COMP/GF/WD (2005)7, 2005) <www.oecd.org/dataoecd/49/29/34285298.pdf>.

[13] Pham, above n 3, 547; Central Institute for Economic Management (CIEM) and Swedish International Development Agency (SIDA), *Tiep tuc Xay dung va Hoan thien The che Kinh te thi truong Dinh huong XHCN o Vietnam* [Continuous Building and Perfecting Institutional Framework for Market Economy with Socialist Orientation in Vietnam] (Science and Technology Publishing House, 2006) 25.

[14] For example, the need to develop a regulatory environment conducive to healthy competition and to establish institutions to resolve commercial disputes in line with the principles of a market economy was mentioned as a part of the comprehensive reform of enterprise initiatives. See *Resolution of the Fourth Plenum of the 8th CPV Party Congress* (December 1997). It was stated in the *Strategy for Socio-economic Stabilisation and Development to the year 2000* of the CPV that the state should create an environment and facilitate the conditions for legal competition among the economic entities of various sectors and gradually eliminate state monopoly and the privileges of state enterprises in many areas and industries of the economy. See *Strategy for the Socio-economic Stabilisation and Development to the year 2000 of the CPV*;

It was asserted in the Report to the 8th CPV Congress Party that the creation of a fair and healthy competitive environment was a requirement of a market economy. See Vietnamese Communist Party, *Documents of the 8th Party Congress* (National Political Publishing House, 1996); In the *Central Party Committee Resolution 05-NQ-TW (24/9/01)*, there was a call for the enactment of a competition law aimed at 'protecting and encouraging enterprises from all economic sectors to compete and cooperate on an equal footing within the common framework of the law'. See Central Party Committee, *Resolution of the Third Plenum of the Ninth Central Party Committee (Resolution No. 05-NQ-TW (24/9/01) on Continuing to Restructure, Reform, Develop and Improve the Efficiency of State Enterprises*.

governance.[15]

There was, subsequently, a recognition of the vital role of competition law in the market. The concept that an effective competition law is 'a concomitant requirement for market based reforms' came to be well-understood.[16] Competition law was believed to be one of the effective tools for the state to regulate wrongful behaviour in the market and as significant for creating a fair and healthy environment for business activities.[17] The enactment of competition law was seen as a common trend among countries with a market economy.[18] Besides, a competition law was seen as important to ensure the legitimate right to do business and an effective implementation of competition law as important to improve the competitive environment.[19]

- **A competition law was seen as important to create a healthy investment environment and necessary to further the ongoing reform towards a market economy**.[20]

It was accepted that a market economy needs competition as a necessary driving force for economic development. It boosts the economic development through the effective allocation of resources, ensuring that resources of capital, land and people are best used.[21] The creation and maintenance of a healthy competitive environment is one of the functions of the state in a market economy. It was also seen that in the market economy the use of administrative regulations, guidelines and orders of the state to interfere in

---

[15] Thai, Hong and Hoa, above n 8, 140-141. For example, it was stated by the Prime Minister that 'if a monopoly exits, business talents cannot be mobilised. Monopoly should be eliminated/regulated to improve business performance, increase the competitiveness of goods and services'. Speech of the Prime Minister Phan Van Khai at the Conference on Assessment of Organisation and Operational Models of 90 and 91 – General Corporations in Hanoi, 1-2 March, 1999.

[16] Pham, above n 3, 548; CIEM and SIDA, above n 13; Le Danh Vinh, 'Building Competition Law in Vietnam to Meet the Need of Regulating Market Economy and in the light of Trade Liberalization and International Economic Integration' (Paper presented at ASEAN Conference on Fair Competition Law and Policy in the ASEAN Free Trade Area (AFTA) Bali, March 5-7, 2003) <http://www.jftc.go.jp/eacpf/04/vietnam_p.pdf>.

[17] Phat, 'Bao cao Tong hop', above n 1, 9-12; Huan, above n 1, 34.

[18] Xuan, above n 1; CIEM and SIDA, above n 13, 28; Phat, 'Bao cao Tong hop', above n 1, 13.

[19] CIEM and SIDA, above n 13, 186.

[20] Oanh, above n 6; Tuan, above n 6; Vu Thanh Tu Anh, *Competition and Privatization in Vietnam: Substitutes or Complements?* (2006) 2 <http://www.grips.ac.jp/vietnam/VDFTokyo/Doc/2ndConf15Jul06/2EcoSession2VTTAnh.pdf>; CUTS, *Competition Scenario in Vietnam* (2005) <http://www.cuts-ccier.org/7Up2/pdf/7Up2_Vietnam.pdf>.

[21] Xuan, above n 1, 4.

business activities of economic sectors is inappropriate,[22] because economic activities, including competition, should be regulated by market principles. That requires the state to build up a competition policy, together with an effective mechanism regulated by a legal framework to control and deal with competition practices. Competition law is a constituent of that legal framework and such a competitive environment would be in line with the viewpoint of Vietnam's government and the VCP.[23]

By 2004, great achievements in terms of economic reform had been made since Doi Moi, including the enactment of hundreds of important laws and regulations concerning economic development and the facilitation of the freedom of business.[24] However, during the preparation of a competition law, many flaws in the regulatory infrastructure system for commercial activities were found.[25] Hence, the adoption of a competition law in Vietnam became necessary to rectify these flaws, in order to create a healthy environment for investment and doing business.[26] There were, in particular, two main problems. First, there was an inadequate establishment of a level playing field by which to ensure equality in business for all economic sectors. Specifically, there remained discrimination between public and private firms and between state and foreign invested sectors. Secondly, there was a prevalence of abuse of economic and administrative power by SOEs.[27] As a result, the necessary conditions for a healthy competitive environment were not fully satisfied and practices harmful to that environment were not regulated. Despite significant efforts by the government to improve the investment environment, investment policy in Vietnam had clearly exposed the discrimination between the domestic and foreign investors. There was a dual law: one on foreign direct investment and one on the promotion of domestic

[22] Truong Quang Hoai Nam, 'Competition Policy and Liberalization of Trade and Investment' (2006) <www.jftc.go.jp/eacpf/06/6_01_03.pdf >.

[23] Huan, above n 1, 34-38.

[24] CIEM and SIDA, above n 13, 79.

[25] This was mentioned in a number of works concerning market reform and the creation of a mechanism for a market economy in Vietnam, which were written before and during the preparation of competition law. For example, there were CIEM and SIDA, above n 13; Brian Van Arkadie and Raymond Mallon, *Vietnam – A Transition Tiger?*(Asia Pacific Press, 2003); Thai, Hong and Hoa, above n 8, 141-145; Huan, above n 1,19-20; Phat, 'Bao cao Tong hop', above n 1.

[26] Huan, above n 1; Phat, 'Bao cao Tong hop', above n 1.

[27] Central Institute for Economic Management (CIEM), 'Some Legal and Institutional Issues regarding Competition Policy and Control of Economic Monopolies' (2002) (Report produced within the framework of the UNDO-supported Project VIE/97/016) cited in Pham, above n 3, 550.

investment.[28] These two laws governing investment activities created unequal treatment in the investment regimes between local and foreign investors. Besides, discrimination could be observed through the dual price system, in land-use rights and taxation and in access to credit.[29]

Secondly, until the adoption of the *Competition Law 2004*, an equal environment for investment was not fully created as expected. Barriers to competition, principally institutional barriers, had become a blockage to the enhancement of a competitive environment. They included barriers to entry and exit of firms in the market;[30] barriers to international trade; barriers to investment, employment and land; barriers to research and development (entrepreneurship and innovation and barriers to the efficient use of this knowledge); barriers to price adjustment, etc.[31] Notably, such barriers were created through a large number of government regulations and decisions, together with the business licensing and registration system brought about by the *Enterprise Law 1999*.[32] The imbalance between SOEs and private firms in the market structure resulted from the high capital accumulation of SOEs in some industries, especially general corporations created under *Decrees No. 90* and *No. 91* and the protection and priorities given to SOEs.[33] This allowed SOEs to gain advantages and enabled them to turn into

[28] The *Foreign Direct Investment Law* was promulgated for the first time in 1987 and continuously amended several times in 1990, 1992, 1996 and 2000. The *Law on Promotion of Domestic Investment* was passed in 1994 and was later amended and replaced by the *Law on Promotion of Domestic Investment of 1998.*

[29] CUTS, *Competition Scenario*, above n 20, 5. 'Dual price system' in this section refers to the difference between the prices apply to domestic firms and those to foreign firms, in which foreign firms paid a higher price than that for Vietnamese firms. This system has been considerably removed in Vietnam after the adoption of the unified *Investment Law* in 2005 and the *Enterprises Law 2005*.

[30] In particular, barriers to market entry were not removed while market exit conditions were not fully created. In particular, there remained administrative obstacles in business establishment and registration, despite the fact that the objective of the *Enterprise Law 1999* was to lift almost all administrative barriers and create a new atmosphere for the business community. These obstacles were due to the delay of issuing necessary legal documents guiding the implementation, as well as the delay of implementing the Law; the maintenance of the licensing system and old procedures of business registration. In terms of market exit, the *Bankruptcy Law of 1993* was not implemented effectively due to complicated and unclear administrative procedures. See Thai, Hong and Hoa, above n 8, 141-145; CIEM, above n 27.

[31] CUTS, *Competition Scenario,* above n 20, 7.

[32] Ibid 7-8. Enterprises had to meet business conditions issued by government agencies by fulfilling a number of licensing, certification, approval and decision procedures and a prolonged and complicated registration procedure. After the *Enterprise Law 1999* came into effect, about 200 types of business licences were abolished, but the same number of new business licences was created.

[33] Huan, above n 1, 95-97.

monopolists, thus making it possible for them to abuse their monopoly positions.[34]

- **In the move towards a market economy, the need to regulate market behaviour of state-owned enterprises (SOEs) had become necessary.**

As discussed in the previous chapter, until the early 2000s Vietnam's SOEs controlled most of the capital of the whole country[35] and held dominance in most of the strategic sectors. As discussed earlier, in the process of SOE reform, to pursue the desire for large and powerful state corporations, some SOEs had transformed quickly into state monopolies in various key areas of the economy. This raised competition concerns among the business community and required control over the SOEs' activities because the abuse of their monopoly positions had become common,[36] such as the imposition of high charges in water, electricity and telecommunications companies. The regulation of SOEs/state monopolies was also important to encourage the participation of private firms in the areas which were previously in the state sector. The opening to these basic facilities controlled by state monopolies was a good example. If the market behaviour of SOEs could be regulated properly, it would facilitate the development of the private sector and thus an actual competitive environment would be achieved.[37]

In the mid-1990s a legal framework for the establishment of large state corporations was created,[38] but there was a lack of provisions regulating their market behaviour and a lack of official institutions to supervise their activities.[39] Hence anti-competitive behaviour conducted by SOEs which impeded competition was not properly addressed. For example, there was a lack of provisions to prevent collusion among state firms to divide the market and set high prices, or to address local authorities from supporting their own

[34] This has been demonstrated in the previous chapter with the case studies of state monopolies in Vietnam.

[35] This is demonstrated by Table 4.3 in CUTS, *Competition Scenario*, above n 20.

[36] Oanh, above n 6.

[37] CIEM and SIDA, above n 13.

[38] Among them were the *State Enterprises Law* on 20/04/1995 and the *Decree 39/CP dated 27/6/1995*, *Decisions No. 90 and 91/TTg on 07/03/1994*.

[39] Thai, Hong and Hoa, above n 8, 155.

firms or blockading access to the local market of other firms[40] or to supervise collusion among firms belonging to a state corporation to conduct bid rigging.[41] As it was a constitutional principle that the state sector should hold the leading role in the economy, the Vietnamese government had concentrated on formulating a legal basis for the organization and operation of large state corporations, while it should have focused on creating legislation and mechanisms for supervising and regulating their activities.[42]

- **In the course of international economic integration, the adoption of a competition law could meet both domestic and international demands**

The desire for Vietnam's international economic integration was marked by the launch of the Doi Moi Policy (Renewal) in 1986,[43] and was reinforced under the pressure for deeper transformation towards a market economy.[44] Proactive and deeper integration into the world economy was considered to be a required momentum to advance the transformation towards a market economy and contributed to the VCP's strategy for economic

[40] For example, in 2003 the Ministry of Construction (MoC) issued a Dispatch (*Dispatch 1124/BXD-KHTK* on 01/7/2003) to ask all enterprises belonging to the Ministry of Industry and the Ministry of Industry and others working in the same industries to give priority to purchasing and utilising products produced/supplied by enterprises belonging to the Ministry of Construction. Notably, this Dispatch also prohibited all private construction and consultancy firms from recommending the use of any type of materials or equipment supplied by other private producers in common construction projects. There was a list enclosed with the Dispatch which recommended the use of the products produced, or to be marketed, by the MoC. This Dispatch clearly created discrimination between state and private players and also discrimination between domestic and foreign products. Similarly, there were some cases where local authorities issued regulations under which local restaurants could only sell locally produced beers, for example in Khanh Hoa Province.

[41] For example, there was a case of bid rigging in the Van Lam-Son Hai II Road Construction project in 2002. Four companies participated in the bidding process and 'Company 98' was the winner. It was later found that all the four participants in the bid belonged to 'Company 98'. The participation of the other three companies in the bid was just to create a fake competition as they offered prices that were higher than the price of the bid package and accepted being losers so that Company 98 could win that bid. This was obviously a case of bid rigging which is strictly prohibited by competition law in many countries. However, this case could not be regulated by relevant competition rules.

[42] Nguyen Nhu Phat, 'Phap luat Canh tranh o Viet Nam Hien nay [Current Provisions on Competition in Vietnam] Material at the Training Course on Competition Law organised by Vietnam Industry and Commerce Chamber (2008) 21.

[43] Communist Party of Vietnam, *Document of the 6th National Congress Party* (1986).

[44] The CPV was aware of the necessity of accelerating its building of a market economy groundwork for keeping up with changes in the international sphere. See Communist Party of Vietnam, *Strategy for Socio-Economic Development 2001-2010* Released at National Party Congress of CPV in April 2001 (2001); Vietnam's international economic integration was followed by the accession to ASEAN, AFTA in 1995; APEC in 1998 and the Vietnam – US BTA in 2001. In January 1995, Vietnam applied for WTO membership and on 11 January 2007 it became the 150th member of the World Trade Organization (WTO).

development.[45] The successful bid for WTO membership in 2007 was a good demonstration of this.[46] A competition law was important to arrange all the necessary legal tools in the process of international economic integration, besides supporting a healthy competitive environment in Vietnam.[47]

A competition law was in fact compulsory for Vietnam to further integrate into the regional and the world economy.[48] Ensuring a competitive environment and building up competition law were domestic concerns, but they had also become global matters.[49] The adoption of a competition law was necessary to fulfil the country's future obligations under international treaties and to implement commitments within international institutions.[50]. First of all, multilateral treaties often obligate members to adopt competition laws as a means to implementing these treaties.[51] Secondly, the enactment of competition law is among the obligations required by international organisations of

[45] Joint Donor Report to the Vietnam Consultative Group Meeting, 'Aiming High – Vietnam Development Report 2007' (2006) 49 <http://siteresources.worldbank.org/INTVIETNAM/Resources/aiminghigh_english.pdf>.

[46] The accession to the WTO would bring Vietnam more opportunities to expand its markets; the avoidance of discrimination in international trade; a level playing field in terms of goods and services exports; access to international financial resources and modern technology; and the acceleration of institutional and business environment improvements towards openness and transparency. See Vladimir Mazyrin, 'Vietnam's International Commitments upon Entry into the WTO: Limits to its Sovereignty?' in Stepanie Balme and Mark Sidel (eds), *Vietnam's New Order: International Perspectives on the State and Reform in Vietnam* (Palgrave Macmillan, 2006); Ministry of Trade, 'Overall Report on Some Issues Have to be Dealt with in Implementation Commitments of Vietnam - US Bilateral Trade Agreement and Vietnam's Process of Accession to the WTO' (2004).

[47] Tuan, above n 6; Vinh, above n 16.

[48] CUTS, *Competition Scenario*, above n 20; Tuan, above n 6; Oanh, above n 6.

[49] Huan, above n 1, 51.

[50] Hoang Phuoc Hiep, 'Legal reform in Vietnam-Opportunities and Challenges in the Wake of Joining and International Experiences in Handling Legal Issues' (Speech at the International Workshop on 'WTO's Accession and Legal reform in Vietnam', 2005) 3 <http://siteresources.worldbank.org/INTRANETTRADE/Resources/WBI-Training/288464-1139428366112/Session3HoangPhuocHiep_LegalReformInVietnam.pdf>.

[51] For example, Article 10bis of the *Paris Convention 1883 on the Protection of Industrial Property* (Vietnam had membership since 8 March 1949) stipulates the obligation of members to adopt laws and regulations to ensure effective protection against unfair competition.

countries seeking membership, such as the World Trade Organisation (WTO).[52] Under WTO rules, provisions concerning trade liberalization must go in parallel with provisions for ensuring fair competition. Provisions of the WTO concerning competition are embodied in diverse Agreements within the WTO framework and can be categorized into three groups: (i) provisions for maintaining fair competition; (ii) provisions laying down obligations for the prohibition of anti-competitive behaviour and (iii) provisions encouraging the restriction of anti-competitive behaviour. A country is deemed to breach WTO law if it fails to comply with these obligations, or does not take any necessary actions to ensure the effectiveness of these provisions, or fails to adopt appropriate measures to eliminate anti-competitive practices.[53] Third, some important international institutions such as OECD and UNCTAD have initiated efforts to define principles of competition law, to design a model of competition law,[54] to provide technical support for

[52] For example there are numerous provisions within the WTO framework concerning competition. Article 8 of the TRIPS (*Agreement on Trade-related Aspects of Intellectual Property Rights*) stipulates that members in formulating or amending their laws and regulations must adopt appropriate measures to prevent the abuse of intellectual property rights by rights holders or the resort to practices which unreasonably restrain trade or adversely affect the international transfer of technology.

Under Article 40(1) of the *TRIPS*, members must specify in their legislation licensing practices or conditions that may in particular cases constitute an abuse of intellectual property rights having an adverse effect on competition in the relevant market and must adopt appropriate measures to prevent or control such practices.

Art.XVII of *GATT* (*General Agreement on Tariffs and Trade*) (State Trading Enterprises) establishes that these enterprises must operate in a non-discriminatory manner in their sales or purchases of imports and exports;

Art.VIII of *GATS* (*General Agreement on Trade in Services* (Monopolies and Exclusive service suppliers) provides that monopoly suppliers of services must respect the principle of Most Favoured Nation and as well as each WTO Member's specific sectoral commitments in services and must not abuse their monopoly position. Annex of GATS on telecommunications (section 5) obligates member countries to provide access to and use of public telecommunications transport networks and services for any service supplier of any other Member on reasonable and non-discriminatory terms and conditions. Member countries are obligated, under section 2 of the WTO Reference Paper on basic telecommunications, to ensure the interconnection of suppliers (including foreign suppliers) to any technically feasible point in the network provided by major suppliers under non-discriminatory terms and conditions, in a timely fashion and at reasonable and transparent cost-oriented rates.

Under *Safeguards Agreement* (Article 11.1(b) and 11.3), a member shall not seek, take or maintain any voluntary export restraints, orderly marketing arrangements or any other similar measures on the export or the import side and shall not encourage or support the adoption or maintenance by public and private enterprises of non-governmental measures equivalent to the above measures.

[53] See Nguyen Thanh Tu, 'Phap luat Canh tranh trong WTO va Kinh nghiem cho Vietnam' [Competition Law under WTO – Experiences for Vietnam] in (2007) 91 *Legislative Studies* [Nghien cuu Lap phap] <http://www.nclp.org.vn/nha_nuoc_va_phap_luat/phap-luat-canh-tranh-trong-wto-va-kinh-nghiem-cho-viet-nam>.

[54] For example, UNCTAD, *Model Law on Competition* (TD/RBP/CONF.5/7/Rev.3, United Nations, 2007) <http://www.unctad.org/en/docs/tdrbpconf5d7rev3_en.pdf >.

countries in adopting their competition law[55] and to set up multilateral agreements to deal with cross-border issues arising among countries.[56]

Secondly, there was the need for control of restrictive competition practices that might occur when the market was opened.[57] The openness of a market can entail certain harmful consequences, such as restrictive business practices, abuse of dominant position and unfair competition.[58] It brings more opportunities for foreign companies to compete with domestic enterprises. All competition measures including unfair ones and restrictive business measures are frequently employed to attract customers and expand their position in the domestic market. Trade liberalisation can make it possible for foreign enterprises to impose distortions like price fixing and dumping and can thus impede fair competition in the market. Hence, after Vietnam started integrating into the world economy in 1990s, there was the need for supervision of the growing business activities of foreign and trans-national firms operating in Vietnam.

Also since 1990s, there were greater concerns about the possibility of economic concentration cases (mergers and acquisitions - M&As) conducted by foreign firms to gain dominant positions in Vietnam's market. Such behaviour would enable transnational corporations to a take-over of market share of Vietnam's firms, enabling them to fix and

[55] Every year UNCTAD hosts the Intergovernmental Group of Experts Meeting on Competition Law and Policy for consultations on competition issues of common concern to member States and exchange of experiences and best practices, including Voluntary Peer Reviews of competition policy, law and enforcement. UNCTAD is also engaged in technical cooperation with countries seeking capacity-building and technical assistance in formulating and/or effectively enforcing their competition law.

[56] Among its objectives, OECD work on competition law and policy actively encourages decision-makers in government to tackle anti-competitive practices and regulations and promotes market-oriented reform throughout the world. See OECD, *Directorate for Financial and Enterprise Affair* <http://www.oecd.org/department/0,3355,en_2649_34685_1_1_1_1_1,00.htm>; See also Huan, above n 1, 50-51.

[57] Pham, above n 3, 550-551; Nguyen Nhu Phat, 'Phap Luat Canh tranh cua Vietnam Hien nay' [Competition Law in Vietnam] in Hanoi Law Univerisity, *Giao trinh Luat Thuong Mai – Tap 1* [Textbook on Commercial Law – Expisode 1] (People's Public Security Publishing House, 2007).

[58] Nam, above n 22; Vinh, above n 16.

manipulate prices.[59] Foreign firms in search of a dominant position in the domestic market tend to use strategies such as mergers or acquisitions of local ones and thus a competition law was also crucial to control mergers and acquisitions as well as maintain national interest sectors against acquisition by foreign firms.[60] A competition law regulating economic concentration was needed to control the formation of large firms that could dominate the market and to enable the state to supervise economic concentration activities.[61]

Finally, there was the need to ensure fair competition, which was necessary to protect domestic firms from the pressures of the opening of the market. As the development of small and medium sized enterprises was important for the country in pursuing its industrial based policy, while meeting the implementation of the trade and investment liberalisation process, competition law and policy were important for the state to continue playing an important role in preventing market failure as well as enabling small and medium sized enterprises to compete equally with other businesses in the regional economy.[62]

---

[59] For example, the acquisition of Vietnamese joint-ventures by Coca-Cola. When Coca-Cola entered Vietnam's beverage market (through its Indochina Branch) in 1995 there were three different joint-ventures between Coca-Cola and Vietnam's partners, namely: Coca-Coca Ngoc Hoi in the North (a joint-venture with Vinafimex in 1995); Coca-Coca Non Nuoc in the Central (a joint-venture with Da Nang Beverage Company in 1998) and Coca-Cola Chuong Duong in the South (a joint-venture with Chuong Duong Beverage Company in 1995). There Coca-Cola joint-ventures carried out business in Vietnam's market and launched a lot of costly promotional and marking campaigns which intentionally caused them losses. As a result, Vietnam's partners in these joint-ventures had to sell their shares and these three joint-ventures became wholly-owned companies (Coca-Cola Chuong Duong in 1998 and the other two in 1999). Finally, these Coca-Cola owned companies were merged into a single company called Coca-Cola Vietnam in 2001. See Vietnam Brand Website, 'Lich su Thuong hieu Coca-Cola' [History of Coca-Cola Brand] <http://www.vnbrand.net/Phong-su-thuong-hieu/lich-su-thuong-hieu-coca-cola.html>; Viet Bao, 'Sap nhap Ba Doanh Nghiep Coca-Cola Vietnam' [Merging three Coca-Cola Vietnam companies] <http://vietbao.vn/Kinh-te/Sap-nhap-3-doanh-nghiep-Cocacola-Viet-Nam/10725308/87/>.This case raised the concern at that time regarding M&A strategies of foreign firms to gain market share in Vietnam by establishing joint-ventures with Vietnam's partners and later acquiring the shares in these joint-ventures after intentionally making losses. That concern was serious because there were no provisions to supervise the merger/acquisition process, or mechanism for assessing M&A cases as well as evaluating the effects on competition that might arise from M&A cases.

[60] Vinh, above n 16.

[61] Cuc Quan ly Canh tranh (VCAD), *Bao cao Tap trung Kinh te tai Vietnam: Hien trang va Du bao* [Report on Economic Concentration in Vietnam: Status and Forecast] (2009) <http://www.vca.gov.vn/Modules/CMS/Upload/31/2009_3_20/bao%20cao%20tap%20trung%20kinh%20te.pdf>.

[62] Lawan Thanadsillapakul, *The Harmonisation of ASEAN Competition Laws and Policy and Economic Integration* (2004) 5 <www.jftc.go.jp/eacpf/04/thailand_lawan.pdf >; Hiep, above n 50, 8.

- **The adoption of a competition law was due to the occurrence of practices harmful to competition**

Until 2004 practices which distorted fair competition and infringed customers' rights had been widely occurring. Such practices could only be addressed by relevant provisions embodied in various laws, such as commercial or civil contract law.[63] Besides, there emerged a number of market behaviour in restraint of competition that had escaped legal punishment by the State and continued to harm the society as well as the entire economy due to the absence of a competition law.[64] These were basically in the forms of agreements restricting competition, abuse of market dominance and activities leading to economic concentration. These were the practical factors, then, leading to the introduction of the *Competition Law 2004*, including the necessity for monopoly control. The following are particular cases.

- *Unfair competition practices*

Until the adoption of the *Competition Law 2004*, unfair practices which are often seen in developed market economies had been present in Vietnam and were employed by firms with sophisticated measures.[65]

Some of these practices which had been commonly occurring were the utilisation of misleading information to attract customers,[66] the making of fake copies of the products of famous companies, mostly of foreign ones,[67] the use of false advertising for the

[63] Provisions regarding competition in numerous laws will be reviewed in the next section of this chapter.

[64] CUTS, *A Report on Competition Scenario in Vietnam* (2005) 94 <http://www.cuts-international.org/7up2/Country_Report_Vietnam.doc>.

[65] Nguyen Nhu Phat and Nguyen Thi Hien, 'Canh tranh va Xay dung Phap luat Canh tranh o Vietnam' [Competition and Building up a Competition Law in Vietnam] in Tran Dinh Hao and Nguyen Nhu Phat (eds), *Canh tranh va Xay dung Phap luat Canh tranh o Vietnam* [Competition and Building up a Competition Law in Vietnam] (People' Public Security Publishing House, 2001) 103; Phat, above n 1.

[66] There occurred the use of instructions containing information causing confusion about trade names, business mottos, business logos, packaging, geographical indications, etc. to mislead customers about goods or services for the purpose of competition.

[67] There were a number of cases where brand names of famous products were imitated, such as CAMAY, PALMOLIVE, ZETS, COLGATE (cosmetics), OMO (detergent) or DECOLGEN (pharmaceutical), etc.

purpose of unfair competition,[68] the launch of sale promotions for the purpose of unfair competition,[69] the performance of discrediting activities against other firms;[70] constraining others in business,[71] and the infringement of the business secrets of other firms.[72] The existing provisions in commercial, enterprise, civil laws, etc. appeared not to be sufficient to prevent these kinds of activities.[73]

- *Practices in restraint of competition*

Practices in restraint of competition are committed by firms participating in the market that distort competition and finally the impede market structure and the benefits of the entire society.[74] These practices flourished since the participation of foreign companies in Vietnam's market.[75] Most were committed by foreign firms or joint-ventures. However, such practices were also committed by state firms with the aim of excluding rivals and to

[68] False advertising includes such activities as comparing goods and services directly with those of the same kind of other enterprises; imitating other advertising products to mislead customers; issuing false or misleading information to customers regarding prices, quantities, quality, utilities, designs, categories, packaging, usage, duration of warranty etc. For instance, Unilever Vietnam advertised in 2005 that its anti-dandruff product called CLEAR was certified by ELIDA Institute (Paris) to be able to eliminate dandruff within seven times of shampooing. However, this did not happen much in real life, causing complaints by many customers in Vietnam. See CUTS, *Competition in Vietnam: A Toolkit* (CUTS International, 2007) 67.

[69] For example, firms might launch a sale promotion with fraudulent prize offers or sales promotions which are dishonest or cause confusion about goods and services. There was a case in 2005 when Anh Tu Co. Ltd, a company specialising in hardware and electronics, announced its 'special' promotional programme starting on 20th January 2005. Under this programme, any customer who made a new purchase at any Anh Tu distributing outlet would be given a coupon which would be rewarded with a CDMA Morotola C131 mobile phone. The programme also required the customer to subscribe to a *Free 1* post-paid service package offered by S-Fone, with a subscription charge of VND200,000 per package. It brought Anh Tu approximately VND 640 millions and a total of 3,200 customers. All of the customers were cheated by this promotional programme because Anh Tu did not tell them that from the 11th to the 30th of January, S-Fone – the CDMA network service provider, would give such mobile phones to any new user of the *Free 1* package free of the VND200,000 subscription charge. See CUTS, *A Report on Competition Scenario*, above n 64, 88-89.

[70] Firms can discredit their competitors by performing acts of directly or indirectly issuing untruthful information badly affecting the latter's reputation, financial status and business activities. There were also promotional programmes with large awards for lucky winners, but with no winners reported. See CUTS, *Competition Scenario,* above n 20, 21.

[71] For example, threatening or forcing customers or business partners of other enterprises not to enter transactions or to stop transactions with such enterprises.

[72] For example, a firm can try to illegally access and collect information about the business secrets of its rivals; disclose or use business secrets without the permission of the owners.

[73] Phat, 'Bao cao Tong hop', above n 1.

[74] Ibid.

[75] Huan, above n 1, 34-38.

maintain their market dominance.[76] Agreements in restraint of competition, abuse of market dominance and economic concentration were common.

There occurred collusions among firms to block existing and potential rivals from participating in the existing markets, or to fix prices aiming to exclude other competitors,[77] or to restrict output.[78] Practices to gain market dominance were committed in a number of ways and often conducted by transnational corporations (TNC) to gain market share. They were in the forms of promotional marketing and dumping and usually backed by their international branding expertise, such as the case of Coca Cola and Pepsi

[76] For example, there had been agreements between Bao Viet (a state-owned Insurance company) with Provincial Departments of Education, or even with the Ministry of Training and Education, which required every primary and secondary school to buy life insurance from Bao Viet only. In Kien Giang Province, Kien Giang's Life Insurance Company even suggested to the Kien Giang's Party Committee by official letter, that all officials, including the retired, should not deal with foreign insurance companies. This behaviour was subsequently employed in many provinces.

[77] For example, until early 2000, taxi service in Hochiminh City was provided by 14 companies in the Taxi Association of Hochiminh City, which charged VND 12,000 for the first two kilometres. Sao Viet, a new taxi company entered the taxi market giving a shock to this Association by lowering taxi charges for the first two kilometres down to VND 10,000 (later it was even VND8,000) and VND 5,000 (later VND 4,500) for each subsequent kilometre. The new price scheme set by Sao Viet led to collusion among the 14 members of the Taxi Association which fixed the charge at VND 12,000 for the first two kilometres and VND 5,000 for each subsequent kilometre. This threatened the entry of the new taxi company in this service and thus hindered customers from enjoying lower prices. In the absence of a competition law this action could not be regulated. Similar cases of price fixing were found in a number of agreements on setting the lending and borrowing interest rates of the state-owned commercial banks, which accounted for 75 per cent of market share in the financial markets. These agreements aimed to maintain their market power in the reaction against the participation of joint-stock commercial, joint-ventures and branches of foreign banks in Vietnam. See CUTS, *Competition Scenario,* above n 20, 22-23.

[78] Vietnam Floating Glass Company (VFG) was a joint-venture between the Japanese Bridge Building Company (accounted for 70 percent of total contributing investment) and the Vietnam Glassware and Construction Ceramic Corporation (30 per cent). By 2002, with a 60 per cent market share in the relevant market, VFG was obviously a dominant company. In 2003 VFG decided to break over 1 million m2 of finished glass, arguing that 'the supply was exceeding the demand'. However, as the Vietnamese Glassware and Construction Ceramic Corporation estimated, based on the current growth rate of construction, Vietnam was running short of construction glass. Thus this decision was accused of restricting output which aimed at maintaining the dominance in the market of VFG, thus constituting anti-competitive behaviour. This practice was not punished due to the absence of a competition law.

Similarly, in 2003 eight Southern sugar producing companies, after a meeting requested by the General Director of Bien Hoa Sugar Joint Stock Company, decided to stop selling sugar from 1 June 2003. This decision was justified as a means of reacting to difficulties arising from increased competition and the excessive participation in the market of new sugar mills. This agreement, however, caused an increase in sugar prices in early June 2003. Under competition law, this agreement might have been caught as a prohibited agreement to restrict output. See CUTS, *A Report on Competition Scenario,* above n 64, 96.

Cola against Saigon Tribeco.[79] Notably, after foreclosing local firms and gaining dominance in Vietnam's market, these TNCs increased sale prices to recoup previous costs and exploit their dominance.[80]

Firms also took advantage of their financial and technology expertise to conduct practices to limit the application of new technologies, to fix the quantity of production and to manipulate and maintain the prices of certain important goods such as pharmaceuticals, construction materials and agricultural products.[81]

The abuse of market dominance also emerged in other forms that were not previously defined in the law. These included exclusive rights to sell or buy at prices that were higher or lower than production costs and the imposition of unreasonable conditions in business transactions such as tying, by which the dominant firm forced its customers to

[79] The imposition of predatory prices aimed at eliminating competitors is demonstrated by the application of dumping prices in the form of lowering selling prices and promotion conducted by Coca-Cola and Pepsi against Saigon Tribeco and Mekofood. Tribeco and Mekofood were Vietnamese companies in Ho Chi Minh City producing soft drinks and their soft drink products (similar to those of Coca-Cola and Pepsi) used to be quite popular before the year 2000. There were aggressive advertising and promotion campaigns by both companies, which offered customers more quantity at lower prices. In particular, Coca-Cola introduced its new Coke bottle with capacity increased from 207ml to 300ml, while kept the price unchanged at VND 1,500. Similarly, the new Pepsi Cola 500 mil bottle was sold at VND 1,600. At that time, a 207mil Tribeco bottle was VND 2,100 and a 200ml Festi Mekofood bottle was sold at VND 2,200. These dumping campaigns closed down Tribeco and Mekofood because they could not lower their sale prices as did the two foreign giants. This was obviously a predatory practice aimed at excluding the competitors and achieving market dominance, a practice which is often strictly prohibited in competition laws of many countries.

In addition, a promotional strategy was also employed to serve the purpose. For example, in 1996 Coca-Cola Ngoc Hoi, a Vietnamese branch of Coca-Cola, launched a promotional programme in which any customer who bought 3 Coca-Cola or Sprite packs would get a 1 pack bonus or who bought 5 boxes would get a 1 box bonus. See Nguyen Nhu Phat and Nguyen Ngoc Son, *Phan tich va Luan giai Cac Quy dinh Cua Luat Canh tranh ve Hanh vi Lam dung Vi tri Thong linh Thi truong, Vi tri Doc quyen de Han che Canh tranh* [Analysing and Interpreting Provisions of the Competition Law concerning Abuse of Dominant/Monopoly Positions to Restrict Competition] (Judicial Publishing House, 2006). Similar merger case that demonstrate for this strategy were also seen in the merger of Unilever Vietnam (between Joint-ventures Unilever Vietnam and Lever Haso) in 1999. See VCAD, *Bao cao Tap trung Kinh te*, above n 61.

[80] For example, the selling price of a Coca-Cola box was increased nearly three times from VND 17,000 to VND 46,000 in 1998, after it had gained market dominance in Vietnam's soft drink market. See Phat and Son, *Phan tich va Luan giai,* above n 79.

[81] Doan Van Truong, *Ban Pha gia va Bien phap, Chinh sach Ban Pha gia* [Dumping and Methods, Policies of Dumping] (Statistics Publishing House, 1998) 117 – 121. Examples of anti-competitive practices can also be seen from the above case of the Vietnam Floating Glass Company (VFG). Other examples of anti-competitive practices in Vietnam before the adoption of the *Competition Law 2004* can be found in CUTS, *Competition in Vietnam: A Toolkit*, above n 68, 24-25, 34, 39, 41.

buy other products along with the desired product,[82] forced selling and buying,[83] or refusal to deal.[84] Besides, there were cases where transnational corporations, through strategic mergers and acquisitions of local businesses by means of forming joint ventures or buying shares, took over Vietnamese firms, attained market domination and excluded rivals from the market.[85]

It was also noted that the restructuring of the SOEs could not enhance their effectiveness in doing business, but rather that it resulted in the possibility of conducting actions in restraint of competition by newly formed state monopolies.[86] The conflict between a state

[82] There were two cases where tying measures were employed. The first one was in 2002, when there was a high demand for the motorcycle labelled 'Wave @'. Motorcycle retailers expected their customers to buy the motorcycle with a helmet. The second one was in mid-March 2004, when an internet provider in Hochiminh City (Informatics and Telecom Company - NetSoft) imposed a condition that forced all its internet agents in Hochiminh City to register for selling pre-paid internet cards in addition to other services that they wished to register. Besides, another condition tied with the contract was that the revenue for selling such cards must reach at least VND 400.000 per month. These were typical examples of tying behaviour that could not be regulated by law. Source Thanh Nien Newspaper published May 2004. See also Trinh Thi Thanh Thuy et al, 'Scientific Background for Determining the Degree of Competitive Restrictive Agreements and Exemption Criteria in the Competition Law', (Conference Report of Ministry of Trade, Research Project 2003-78-009) (2004).

[83] There was a dispute concerning exclusive dealing imposed on Cay Dua Restaurant in Hochiminh City by Vietnam Beer Joint – Venture (producer of Tiger, Heineken and Bivina brands). There was an appeal that this joint-venture, at that time was dominating Vietnam's beer market, aimed at preventing Laser Beer, the first Vietnamese brand of bottled draught beer (produced by Tan Hiep Phat Corp.), from entering the market. Tan Hiep Phat claimed that its new product, Laser beer, could not access retail shops, distribution agencies and bars etc due to pressure from this joint-venture. It was found that the joint-ventures had signed an exclusive dealing contract with distribution agencies, retail shops and bars which prevented any other beer brands (San Miguel, Carlsberg, Foster, BGI, Budweiser etc.) from being sold, exhibited, introduced, or marketed, … or even allowing their marketing staff to work on these business sites. These distributors and shops could only serve products of Vietnam Beer JV (Tiger, Heineken and Bivina). In return, the joint-venture would sponsor an amount between VND50mn (US$3174) and some VND100mn (US$6349) per annum to these shops and distributors. As Tan Hiep Phat complained, this strategy had enabled these beer brands to effectively prevent any promotional campaigns of Laser anywhere in Vietnam.

In 2003, Cay Dua Restaurant was sued by the joint-venture for its 'impeachment of economic contract' as it sold Laser beer and allowed Laser marketing staff to enter its business site. The decision of the Ho Chi Minh City People's Court held that the restaurant in question violated the exclusive contract between them and Vietnam Beer JV and they must not advertise, or sell Laser or allow Laser marketing staff on their site. This was an anti-competitive practice aimed at preventing access to the distribution channels of new comers. As a result, the newcomer could not develop their brands and eventually was forced to leave the market. However appropriate competition rules prohibiting exclusive dealing could not be applied because at that time the *Competition Law 2004* had not come into effect. Source; Tuoi Tre Newspaper published on April 7, 8 2004 and May 19 2004.

[84] The cases mentioned in the previous chapter concerning interconnections with VNPT network between VNPT and S-Phone and between VNPT and Viettel were good examples.

[85] For example, the acquisition of Coca-Cola of Vietnamese joint-ventures mentioned earlier.

[86] See chapter 3 regarding the formation of state general corporations in Vietnam.

monopoly in telecommunication (VNPT) and a joint-venture in this area in 2003[87] was the first case leading to a call for the adoption of a competition law to deal with monopolistic behaviour by state monopolies in Vietnam. As described in chapter 3, in 2003 S-Fone, a joint venture between Saigon Postel Corporation and Korea SK Telecom, wanted to connect to the VNPT system to launch its messaging service but its proposal to interconnect was delayed many times by VNPT, citing many technical problems. This explanation was rejected by S-Fone.

- **There was a demand for a unified competition law to synchronise competition provisions provided in a handful of separate laws.**

Until 2004 there was the lack of a unified competition law which would apply to both unfair competition and anti-competitive behaviour.[88] A number of provisions found in several legislations were regulating unfair competitive behaviour by firms, but few of them were concerned with particular forms of anti-competitive behaviour in the relevant fields. The fact that the market behaviour of firms had been regulated under separate sets of laws led to limitations. These were the lack of unity among the different regulations and of collaboration among state bodies about particular matters; the lack of definition and details about unfair/anti-competitive behaviour; the overlapping in these laws and the lack of a unified and capable authority to deal with competition cases.[89] A competition law was required to satisfy the need to harmonise competition legislation and to ensure the recognition of the predominance of competition law among other laws governing business activities.[90]

In this context the adoption of the *Competition Law 2004* was a remarkable turning-point, because it set up a legal framework for a healthier and fairer competitive environment, providing measures to deal with both anti-competitive behaviour and unfair competition activities.

---

[87] USAID, *Competition Review of the Vietnamese Telecom Sector* (2005), 16-17 <http://pdf.usaid.gov/pdf_docs/Pnade784.pdf>.

[88] Phat, 'Bao cao Tong hop', above n 1, 36.

[89] Huan, above n 1, 139-140.

[90] Standing Committee of the National Assembly,'Bao cao Giai trinh Va Tiep thu Chinh ly Du thao Luat Canh tranh Trinh Quoc hoi Thong qua' [Report on Explanations, Acknowledgements and Amendments of the Draft of the *Competition Law* Submitting to the National Assembly for Approval] (2004); Phat, 'Phap Luat Canh tranh cua Vietnam Hien nay', above n 57.

- **Was there a demand for a separate anti-monopoly law?**

With the formation of a market mechanism in Vietnam, the growing awareness about monopolies and the mounting demand for the control of monopolistic behaviour, significant pre-conditions for the birth of an anti-monopoly law in Vietnam were obviously created.[91] However, in the wake of the adoption of the competition law, the necessity for such a separate law regulating monopoly behaviour (an anti-monopoly law)[92] was not so urgent. This could also be justified by the following two reasons.

First of all, it is understandable that as a market economy had just been introduced, building up institutional legislation for it was given priority. This explains the continuous promulgation, amendment and supplementation of a wide range of legislation to meet the demands of a market economy in Vietnam, such as civil law, business law, commercial law, contract law, investment law and law for the settlement of economic, commercial disputes.[93] Besides, at the outset of a market oriented economy, competition and monopoly issues were relatively new in Vietnam, so that the regulation of monopolistic behaviour by means of a competition law might have needed a cautious and tentative approach.[94] Understandably, the detailed formulation of competition law was not taken seriously into consideration at this stage and an anti-monopoly law, often regarded as a part of competition law, was not yet included.

---

[91] Phat, 'Bao cao Tong hop', above n 1, 1; Huan, above n 1, 116-117; CUTS, *A Report on Competition Scenario*, above n 64, 96.

[92] According to Vietnamese scholars, there should be differentiation between two concepts 'anti-competition practice' and 'unfair competition practice', although both practices have negative effects on competition and impede activities of firms on the market. The separation between these two sets of competition law depends on the characteristics and natures of each practice, the degree to which market is likely impacted by these practices and the methods that the state applies to deal with them. A competition law often consists of two constituents: the law on anti-competitive practices or anti-monopoly law and the unfair competition law. A competition law may be adopted which includes both sets of provision addressing anti-competitive practices and unfair competition practices. However, a law on anti-competitive practices (anti-monopoly law) may be enacted separately from an unfair competition law. See Phat, 'Bao cao Tong hop', above n 1, Phat, 'Phap luat Canh tranh o Vietnam Hien nay', above n 42; Huan, above n 1; Phat and Khanh, *Tien toi Xay dung Phap luat Ve Canh tranh va Chong Doc quyen*, above n 1; Le Danh Vinh, Hoang Xuan Bac, Nguyen Ngoc Son, *Giao trinh Luat Canh tranh* [Textbook on Competition Law] (Hochiminh City National University, 2010); Pham Van Loi et al, 'De tai Nghien cuu "Phap luat Chong Canh tranh Khong Lanh manh o Vietnam: Mot so Van de Ly luan va Thuc tien"') [Report of the Project "Law on Unfair Competition in Vietnam: Some Theoretical and Practical Issues] (2005); MUTRAP, *Hanh vi Han che Canh tranh: Mot so Vu viec Dien hinh cua Chau Au* [Practices in Restraint of Competition: Some Typical Cases Law of the EU Competition Law] (2009); Bui Nguyen Khanh, 'Phap luat Chong Canh tranh Khong Lanh manh Tai Vietnam va Mot so Van de Thuc tien) [Unfair Competition Law in Vietnam and Some Practical Issues] (2006). See further discussion at sub-section 4.2.2 of this chapter.

[93] Phat, 'Bao cao Tong hop', above n 1, 1.

[94] Huan, above n 1, 116-117; CUTS, *A Report on Competition Scenario*, above n 64, 137.

Secondly, as inherited from the previous central planning economy, there was a common perception among leaders and economic manager elites that the exclusivities and privileges of the state sector must be kept untouchable.[95] In this context the concepts of the role and significance of competition in a market mechanism could not easily to be accepted straight away. Thus antitrust policies and legislation to encourage and protect competition were not nurtured.

As a result a separate anti-monopoly law was mentioned during the preparation of competition law drafts but it was not strongly advocated. Finally, the Law combined regulations addressing both anti-monopoly and unfair competitive behaviour.

4.1.2 Competition legislation before the enactment of the *Competition Law 2004*

The significance of the Doi Moi policy and the following changes in terms of economic thinking were the recognition of the private sector, the reconstruction and equitisation of SOEs, the liberalisation of both internal and external trade regimes, the encouragement of foreign investment and the confirmation of freedom to do business inscribed in the *Constitution 1992* and numerous other laws.[96] In parallel with this process, a massive legislation transformation was undertaken to set up a regulatory system based on universally applicable legislative norms and macroeconomic principles.[97]

Prior to the *Competition Law 2004*, competition provisions were embodied in a number of legislations. Even though most of them were concerned with unfair competition behaviour, some provisions, in principle, could be applied to deal with anti-competitive behaviour.[98] Many of them were issued after the adoption of the *Constitution 1992* to recognise and ensure market economy principles,[99] while they expressed state attitudes towards acts in restraint of competition. After the *Competition Law 2004* came into effect, some of them remained in place. Such provisions can be found in a number of laws

[95] Joanna Harrington, *Constitutional Revision in Vietnam: Constitution Renovation but No Revolution* (1994) <www.capi.uvic.ca/pubs/oc_papers/harrington.pdf>.

[96] The right of freedom to do business is recognised in Article 57 of the Constitution of 1992, amended in 2001 and numerous laws such as the *Civil Law*, *Investment Law and Enterprises Law*. See Pham, above n 3, 549.

[97] Pham, above n 3, 548.

[98] See further in this chapter at sub-section 4.2.2.

[99] For example, Article 15, 22, 28 of the *Constitution 1992*.

regulating aspects of the economy such as commercial law,[100] pricing,[101] tendering,[102] intellectual property[103] and securities.[104] In addition, important legislation concerning the

[100] One of the important laws passed after the *Constitution 1992* was the *Commercial Law 1997*, which defined a number of detrimental acts to fair competition. The *Commercial Law 1997* provided provisions aimed to: (i) protect consumers, including prohibitions on increasing or reducing prices to harm producers and consumers, deceiving or misleading customers, using deceptive advertisements or conducting unlawful commercial promotions; (ii) prevent unhealthy competitive acts, including speculation for market control, dumping of goods, defamation, obstructing, enticing, bribing or threatening customers and infringing industrial property rights.

[101] Pricing is an area of law that was under regulation soon after the *Constitution 1992*. The foremost one, *Decree No. 137/HDBT* issued in 1992, set out the legal basis for the state management of pricing and a mechanism for the state management bodies to control monopoly prices. In 2002, the *Ordinance on Prices* promulgated on 26/4/2002 marked another step in this direction. This Ordinance was given guidance for its implementation by *Decree No. 170/2003/ND-CP*. Highlighted in both legislations were provisions concerning the control of monopoly prices by the state (Article 19) and a list of assets, goods and services for which prices must be decided by the state (Article 7(1)). The Ordinance also prohibited dumping as an illegal pricing activity (Article 22) and contained provisions on handling of violations related to dumping (Article 26). Another important content was the prohibition of the conduct of coordinating with other production or business organizations and individuals in order to enter into price monopoly co-operation (Article 28). However, it is observed that many of provisions of the *Ordinance on Prices 2002* referred primarily to unfair competition acts in pricing and did not aim to address conducts concerning pricing as forms of anti-competitive behaviour such as collusion for price fixing, dumping or imposition of predatory prices and the intention to exclude rivals.

[102] Provisions on tendering were specified in the *Commercial Law 1997*, followed by the *Regulation on Bidding* issued together with *Decree No. 88/1999/ND-CP* of the Government on 01/9/1999 (this Regulation was later amended and supplemented by the *Regulation on Bidding* issued together with *Decree 14/2000/ND-CP* of the Government on 05/5/2000).This was important to set out the legal basis for bidding activities and to address violations of bidding. The *Law on Tendering* was adopted on 19/11/2005 and came into effect from the April, 01 2006. Together with the *Competition Law*, this law formed a legal framework to deal with anti-competitive actions in the field of tendering. The Law provides a number of important provisions namely: requirements for ensuring competition in tendering activities (Article 11(1)), prohibited conducts in tendering (Article 12(3), (6), (12), (13), (14)), regulations with regard to open tendering (Article 18 (2)) and limited tendering (Article 19(2)), competitive quotation in procurement of goods (Article 22(2)) and particular requirements for selecting contractors in certain special tendering cases that cannot use the normal forms of selection of contractors (Article 24). The Law also includes provisions for dealing with breaches of tendering law (Article 75).

[103] Before the adoption of the *Competition Law 2004*, there were several provisions concerning aspects of intellectual property relating to competition, such as technology transfer. Laws concerning technology transfer contained provisions aimed at controlling anti-competitive behaviour in this domain. For example, according to Article 13 of the *Decree No. 45/1998/ND-CP* dated 01/7/1998 providing details in technology transfer, particular acts were considered as acts of restraint of competition and could not be included in technology transfer contracts such as to force the licensee to buy or receive from the licensor, or a third party stipulated by the licensor, raw materials, parts, manufacturing equipment, means of transportation, intermediate products, industrial property rights and employees with low levels of technical skills; to force the licensee to accept some limitations relating to quantity of products, price fixing, buyers and agents of licensees; to restrict the local market, export market, quantity and types of exported products of the licensee, etc. (Article 13). In addition, *Decree No. 16/2000/ND-CP* provided some administrative sanctions against violations of *Decree No. 45/1998/ND-CP* in the field of technology transfer concerning competition law (*Decree No. 16/2000/ND-CP* on 10/5/2000 art 7(1)(c)).

organisation and activities of enterprises and of investment were adopted during this time, containing competition provisions. The law in this area was concerned with the legal status of market participants, including the determination of monopoly positions and with the adjustment of behaviour related to market structure (economic concentration activities). Such provisions could be found in legislations governing state enterprises,[105] non-state enterprises,[106] and foreign investment.[107]

---

[104] A number of acquisition activities conducted through the stock market had been regulated by *Decree No. 144/2003/ND-CP* before the *Competition Law 2004* came into effect. *Decree No. 144* contained provisions on state control over acquisition activities in the stock market which might lead to adverse effects on competition. For example, Article 36 (1) of *Decree No. 144*, the required the notification of the State Securities Commission, the Securities Trading Center, the Stock Exchange and the listed organization in cases where an institution or individual undertaking, or together with other affiliated persons, undertook transactions that made their shareholding position reach 5 per cent, 10 per cent, 15 per cent, or 20 per cent of a listed organization's equity and where there was any change of these levels. Besides, a number of acts relating to unfair competition were prohibited, such as using inside information to buy or sell securities for oneself or for a third party; disclosing, providing inside information to, or advising a third party to buy or sell securities based on inside information (*Decree No. 144/2003* Art 103 (1)); undertaking securities transactions without transferring the ownership attached to those securities; conspiring with others to buy or sell securities to thereby create a false supply of and demand for securities; buying, selling or enticing others to continuously buy or sell securities in order to manipulate securities prices (*Decree No. 144/2003* art 104); and selling securities they did not own at the time of transactions (*Decree No. 144/2003* art 106). In addition, violations in the field of securities were handled by *Decree No. 161/2004.ND-CP* on 07/9/2004 in Articles 10 and 11.

[105] Legislation in this regard mostly supported SOE reform. A number of laws concerning state-owned enterprises paved the way for the formation of state monopolies. Some of the important legislations provided a legal basis for the re-organisation of state enterprises, including: the restructuring of state enterprises into state corporations, the application of a parent – subsidiary model and state business groups (*State-owned Enterprises Law 1995*; *Ordinance No.39/CP* on 27/06/1995*; Decisions 90/91* on 7/3/1994*; Decree No.153/2004/ND-CP* on 09/8/2004); measures to reorganize state enterprises without changing ownership such as a merger, consolidation with another state enterprise (*Decree No. 180/2004/ND-CP* on 28/10/2004) and provisions on transferring, selling, contracting or leasing SOEs (*Decree No. 103/199/ND-CP* on 10/9/1999 and *Decree No. 49/2002/ND-CP* on 24/4/2002). Most of the legislations focused on the re-organisation of SOEs and measures were not considered as supporting forms of economic concentration and the impacts on competition were not properly identified.

[106] Since Doi Moi a series of legislations concerning the non-state economic sector were also introduced, laying a legal framework for business activities and market behaviour. Some of them mentioned economic concentration activities among private firms, but they were not considered from a competition law perspective. In fact, they were regarded as the recognition of the basic rights of business freedom of enterprises. For example, the *Company Law 1990* and *Law on Cooperatives 1997* contained provisions on company mergers, transfer of shares of members of limited liability and joint stock companies or mergers of cooperatives. See *Company Law 1990* and *Cooperatives Law* art 44. The *Enterprise Law 1999* provided more comprehensive and detailed regulations that created a legal framework for the implementation of economic concentration. However, effects on competition and the control of economic concentration were not mentioned.

Before the adoption of the *Competition Law 2004* a legal framework recognising and ensuring the right of freedom to do business in all sectors had been set up on a continuous basis. However, the absence of a set of unified regulations regulating competition could show that the regulation of market activities by a competition law was not taken seriously into consideration. As a result, many forms of anti-competitive behaviour were not regulated properly by a competition law.

Anti-monopoly law in particular and competition law in general, were only passed after the legal framework for the regulation of market behaviour had basically been set up. This created the situation that several provisions existed in different legislations. The problem arose as the *Competition Law 2004* came to effect that there might be conflicts in selecting the applicable law and that there could be inconsistency in the application of relevant provisions to a particular behaviour.[108] There were two basic causes for this situation. Firstly, as a remnant of the former mechanism, state monopolies easily evolved, while an anti-monopoly concept had never existed. It must be understood that the awareness of competition and acceptance of competition principles cannot be achieved in a short time. Secondly, it is understandable that when the state cannot identify the boundary between regulation over the market activities and the pursuit of its political determination and when the interaction between state competition policy and other policies concerning equality and socio-economic development cannot be defined clearly, the existence of a state monopoly in many areas remains inevitable.[109]

It was not until the late 1990s that movement for the preparation of a competition law in

---

[107] The *Foreign Investment Law* was promulgated for the first time in 1987 and amended several times in 1990, 1992, 1996 and 2000. The Law recognised fundamental forms of economic concentration in which foreign firms were partners, including joint-ventures, transfer of capital contribution, consolidation and merger among foreign invested firms. It is noted that the law governing foreign investment appeared stricter towards these economic entities, as compared with domestic firms and concentrated on the control of investment activities of this sector, rather than on the regulation of behaviour in restraint of competition committed in this domain. It was not until 2005 when the unified law on investment was promulgated (the *Unified Law on Investment* was adopted on 29/11/2005), that provisions regulating investment were concerned with competition law issues. For example, Article 25 of the *Law on Investment 2005* provides that 'the conditions for merger and acquisition of companies and branches shall be regulated by this Law, the law on competition and other provisions of the relevant laws'. Similarly, the new *Law on Enterprises* adopted in 2005 has provisions relating to control of economic concentration that correspond to provisions in competition law (Article 152(3)).

[108] To solve this problem, Article 5(1) of the *Competition Law 2004* stipulates that 'where there is any disparity between the provisions of this Law and those of other laws on competition restriction acts or unfair competition acts, the provisions of this Law shall apply'.

[109] Phat, 'Bao cao Tong hop', above n 1, 40.

Vietnam started, together with talks and discussions for introducing such a law with the technical assistance of international institutions such as the United Nations Development Programme (UNDP), the World Bank (WB) and the International Monetary Fund (IMF).[110] After several years of drafting, begun in 2000,[111] with 9 drafts, the *Competition Law* was finally adopted in 2004.[112] It was the outcome of the working process of the Drafting Committee, with reference to other countries' competition laws, contributions from international experts and contributions from business.[113]

4.2 Objectives, coverage and structure of the Law

4.2.1 Objectives of the Law

This section discusses the objectives of Vietnam's competition law. It begins with an overview of the general objectives of a competition law as provided in competition jurisdictions. It then establishes how they are provided in the *Competition Law 2004*. It is also concerned with Vietnam's approach regarding the objectives of anti-monopoly law.

4.2.1.1 General objectives of competition law

Objectives of competition law and competition policy vary across countries and the interpretations for the inclusion of competition law objectives are diverse. What the major objectives are, how many of them are identified as the most important ones and the way they will be reflected in the law, depend a great deal on the perspective of each country, on the situation from which the competition law is evolved and also on legislative tactics. It must also be noted that the objectives of competition law are not always the same as the

[110] Pham, above n 3, 550.

[111] Cao Xuan Hien, *Competition Law and Policy in Vietnam* (2007) <http://www.jftc.go.jp/eacpf/06/6_04_04.pdf>.

[112] The *Competition Law* (Law 27-2004-QH11) was approved by Vietnam's National Assembly at its November 2004 Session and came into force on 1 July 2005

[113]All the drafts were made with reference to competition laws and experiences of several countries and model laws on competition of various international organisations, such as the UNTACD Model Law on Competition of 2000. See National Assembly Website, 'Du an Luat Canh tranh va Nhung Van de Dat ra' [The Draft of Competition Law: Some Emerging Issues] (2004) <http://www.na.gov.vn/htx/Vietnamese/C1461/default.asp?Newid=4891#2XVo7iWBlrtZ>.

objectives of competition policy.[114]

Despite this, it is generally observed that the promotion of customer welfare and the maximisation of economic efficiency are the most basic objectives of competition law[115] or 'the core competition objectives'.[116] In order to achieve the first objective, the government must address any anti-competitive market structures and practices of firms that impede competition, by means of applying a competition law and/or using pro-competitive regulation, in appropriate cases. Besides, the government must reduce or eliminate measures that pose unnecessary obstacles to trade and competition. The second objective is to adhere to more specific economic goals, which guide and may be referred to specifically in policy implementation.[117] These two goals appear to constitute the

---

[114] Competition policy has broader meanings and is regarded as a broader set of measures pursued by Governments aiming to enhance the contestability of their markets. Competition policy covers all aspects of government actions that affect the conditions under which firms compete in a particular market. Competition policy consists of a wide-range of components, including trade policy, investment regulations, intellectual property rights, regulations on service providers and product distributors, bankruptcy laws, subsidies and other state aids, deregulation and privatisation programmes and procurement practices. Competition policy seeks to achieve objectives such as to achieve or preserve pluralism, de-centralisation of economic decision-making, to prevent abuses of economic power, to promote small business, fairness and equity and other socio-political values. See Mohamed Lahouel and Keith Maskus, 'Competition Policy and Intellectual Property Rights in Developing Countries: Interests in Unilateral Initiatives and a WTO Agreement' (Paper presented at a WTO/World Ban k Conference in the WTO Secretariat, Geneva Switzerland, 20-21 September 1999 <http://siteresources.worldbank.org/DEC/Resources/84797-1251813753820/6415739-1251814020192/maskus.pdf >; Nnamdi Dimgba, *Introduction to Competition Law: a sine qua non to a Liberalised Economy* (2006), 7 <http://www.globalcompetitionforum.org/regions/africa/Nigeria/INTRODUCTION%20TO%20COMPETITION%20LAW.pdf>; Organisation for Economic Co-operation and Development (OECD), 'The Objectives of Competition and Policy – Note by the Secretariat' (Global Forum on competition, CCNM/GF/COMP(2003)3, 2003), 2 <http://www.oecd.org/dataoecd/57/39/2486329.pdf>.

[115] For example, Areeda and Hovekamp wrote:

> Today it seems clear that the general goal of the antitrust laws is to promote 'competition' as the economist understands that term. Thus we say that the principal objective of antitrust policy is to maximize consumer welfare by encouraging firms to behave competitively, while yet permitting them to take advantage of every available economy that comes from internal or jointly created production efficiencies, or from innovation producing new processes or new or improved products.

See Phillip E Areeda and Herbert Hovekamp, *Antitrust Law: An Analysis of Antitrust Principles and Their Application* (Aspen, 2nd ed, 2000). This viewpoint is also confirmed in the US Antitrust law where the goals are given only as promotion of consumer welfare and the organization of the free market. See also ICN, *Report on the Objectives of Unilateral Conduct Laws, Assessment of Dominance/Substantial Market Power and State-Created Monopolies* (2007), 31 <http://www.icn-moscow.org/get_file.php?id=100>.

[116] According to Background Note on the Fundamental Principles of Competition Policy, the most basic goals of competition policy are to promote and maintain healthy inter-firm rivalry in markets and the promotion of customer welfare, which is often considered with reference to more specific goals, See *The Fundamental Principles of Competition Policy*, WTO Doc WT/WGTCP/W/127 (1999) 5 <http://docsonline.wto.org/imrd/directdoc.asp?DDFDocuments/t/WT/WGTCP/W127.doc>.

[117] World Trade Organisation, *The Fundamental Principles of Competition Policy*, (WTO Doc

fundamental principles of competition policy in many jurisdictions in that they serve as guideposts for officials in the application of diverse aspects of their respective laws and policies.[118]

Most countries have mentioned the above fundamental objectives, demonstrated in many ways,[119] but competition law may contain more objectives than just these basic ones.[120] However, further objectives may co-exist or be interrelated where multiple objectives are consistent with one another, or one particular objective may help to achieve another

---

WT/WGTCP/W/127, 1999) 5 <http://docsonline.wto.org/imrd/directdoc.asp?DDFDocuments/t/WT/WGTCP/W127.doc>.

[118] The goals of efficiency and consumer welfare have been repeatedly emphasized in discussions within the Working Group, for example, WT/WGTCP/M/2, para 7 and WT/WGTCP/M/3, 4. The goals of efficiency and consumer welfare are also emphasized in UNCTAD, *The United Nations Set of Principles and Rules on Competition* (TD/RBP/CONF/10Rev2, 2000), part A (Objectives) 'The set of Multilaterally Agreed Equitable Principles and Rules for the Control of Restrictive Business Practices' <http://www.unctad.org/en/docs/tdrbpconf10r2.en.pdf>.

[119] For example, the objectives of the *Canadian Competition Acts of 1986* are 'to maintain and encourage competition in Canada in order to promote the efficiency and adaptability of the Canadian economy, in order to expand opportunities for Canadian participation in world markets, while at the same time recognizing the role of foreign competition in Canada, in order to ensure that the small and medium-sized enterprises have an equitable opportunity to participate in the Canadian economy and in order to provide consumers with competitive prices and product choices'. In Sweden, the objectives are stated in Section 1 of the *Competition Acts of 1993* as 'to eliminate and counteract obstacles to effective competition in the field of production of and trade in goods, services and other products'.

In the US, according to *Northern Pacific Railway Co. v United States*) 356 US 1 (1958) antitrust law is regarded as 'a comprehensive charter of economic liberty aimed at preserving free and unfettered competition as the rule of trade. It rests on the premise that the unrestrained interaction of competitive forces will yield the best allocation of our economic resources, the lowest prices, the highest quality and the greatest material progress, while at the same time providing an environment conducive to the preservation of our democratic political and social institutions'. See UNCTAD, 'Model Law on Competition: Draft Commentaries to Possible Elements for Articles of a Model Law or Law' (TD/RBP/CONF.5/7, 2000), 11 <http://www.unctad.org/en/docs/tdrbpconf5d7.en.pdf>.

[120] There are a number of objectives, including the promotion of consumer welfare, the maximisation of efficiency, the guarantee of economic freedom and the guarantee of a level playing field for small and medium-sized enterprises. These objectives have created a 'grey zone between public interest objectives and core competition objectives'. See OECD, 'The Objectives of Competition and Policy' above n 113, 3-4. Besides, there are the promotion of fairness and equality; the promotion of consumer choice; the achievement of market integration; the facilitation of privatisation and market liberation; and the promotion of competitiveness in international markets. See ICN, *Objectives of Unilateral Conduct Laws*, above n 115, 5.

one.[121] Some countries consider just the two basic objectives of the competition law, namely the promotion of the competitive principle and the protection of consumer welfare, based on the viewpoint that these two objectives are consistent with each other and will determine other objectives.[122]

It is also noted that there are a number of non-competition objectives that may have an impact on the implementation of competition policy. Non-competition objectives can be regarded as public interest objectives,[123] and may be regarded as the other objectives of competition law,[124] which are reflected in the application of competition law. In some cases, non-competition concerns may be taken into account when deciding on specific competition cases.[125] This may be done by means of public interest tests, whereby competition authorities may accept exceptions to the application of the competition law, or give authorisation to override it.[126]

---

[121] For example, in Australia, the objective of protecting smaller and more vulnerable firms from larger rival firms that engage in conduct designed to lessen competition has helped to achieve another goal of promoting competition. In Turkey, the fundamental objective of its unilateral conduct rules is the protection of competition itself and therefore the protection of the competitive process. A sound competitive process is expected to generate the following complementary objectives: enhance efficiency (both allocative and dynamic) and increase consumer welfare by improving quality and reducing prices of goods; and protect small enterprises by eliminating barriers to entry. See ICN, *Objectives of Unilateral Conduct Laws,* above n 115, 21.

[122] ICN, *Objectives of Unilateral Conduct Laws,* above n 115, 21-22.

[123] OECD, *Objectives of Competition and Policy,* above n 114, 3.

[124] Ibid. Public interest objectives may include the promotion of employment, regional development, national champions (or the pursuit of an export-led economy or external competitiveness), national ownership, economic stability, anti-inflation policies, social progress or welfare, poverty alleviation, the spread of ownership stakes of historically disadvantaged persons, security interests and the 'national' interest. In addition, the objective of market integration within the European Union which is included in a number of domestic competition laws in Europe can be seen as an example of public interest objectives. See further discussion in chapter 5, sub-section 5.3.2.

[125] This is where public interests can be used as the basis for consideration whether an anti-competitive merger or restrictive trade practice may continue to proceed, or a pro-competitive merger or trade practice may be blocked or remedied. This is reflected 'either in an elimination of, or less frequent or more restricted use of, legal tests or political over-rides in domestic competition laws'. See OECD, *Objectives of Competition and Policy,* above n 114, 3.

[126] For example, in Australia, the ACCC (Australian Competition and Consumer Commission) when deciding whether or not to grant authorisation to a merger case, may conduct tests to see if the benefits to the public outweigh its anti-competitive detriments and non-competition influences may be considered. This authorisation is carried out through notification requirement. See further Commonwealth of Australia, Independent Committee of Inquiry, 'Review of the Competition Provisions of the *Trade Practices Act*' by Dawson D, Segal J and Rendall C (2003) (the Dawson Report). Similarly, in Switzerland practices of dominant firms may be exceptionally authorised by the Federal Council (Swiss Government) after the competition authority, on the basis of public interest grounds, has found that the practices are anti-competitive. See ICN, *Objectives of Unilateral Conduct Laws,* above n 115, 31.

4.2.1.2 Objective of Vietnam's Competition law

Unlike in many other countries, Vietnam's *Competition Law 2004* (the Law) does not have a clause stating objectives.[127] This can be explained by two reasons. First, it is Vietnam's traditional legislative tactic, as the objectives of a law may usually be found in a number of subsequent articles and may also be inferred from the preamble of that law. Second, the absence of clear objectives in the Law might avoid a conflict with arguments in favour of the maintenance of SOEs in the economy.

However, the recognition of the objectives of Vietnam's competition law can be deduced from a description of the conduct falling into its scope of regulation,[128] because 'the overall goal of the law is to protect the interests of the State and of enterprises and consumers; and to promote socio-economic development'.[129] Due to the lack of a specific clause, objectives are not inferred in a consistent way: sometimes they may include the scope of regulation, such as the consideration of prohibition of anti-competitive behaviour, or it may be the prevention of unfair competitive acts, as one of the objectives of the law.

---

[127] For example, the objective of China's *Anti-Monopoly Law* is 'to safeguard the healthy development of the socialist market economy, encourage and protect fair market competition, prohibit unfair competition, safeguard the legal rights and interests of managers, to prohibit monopolistic conducts, safeguard the order of market competition, protect the legitimate rights and interests of consumers and public interests and ensure the healthy development of the socialist market economy'.

In the Japanese *Antimonopoly Act 1947* (last amended 2005), it is stated that the objectives of the Act are 'to promote fair and free competition, to stimulate the creative initiative of entrepreneurs, to encourage business activities, to heighten the level of employment and actual national income and thereby to promote the democratic and wholesome development of the national economy as well as to assure the interests of general consumers'.

In the Korean Republic, the objectives of competition law as stated in the *Monopoly Regulation and Fair Trade Act* are 'to promote fair and free competition, to thereby encourage creative enterprising activities, to protect consumers and to strive for balanced development of the national economy'.

In Australia, section 2 of the *Competition and Consumer Act 2010* (Cth) (formerly the *Trade Practices Act 1974* (*Cth*)) provides that the goal of the *Act* is 'to enhance the welfare of Australians through the promotion of competition and fair trading and provision for consumer protection'.

[128] The *Competition Law 2004* is concerned with both anti-competitive behaviour and unfair competition practices and can be also divided into four areas of anti-competitive conducts, namely agreement in restraint of competition, the abuse of dominant market position and monopoly position, economic concentration and unfair competition.

[129] OECD, 'The Relationship between Competition Authorities and Sectoral Regulators: Contribution from Vietnam' (Global Forum on competition, DAF/COMP/GF/WD (2005)8, 2005) <http://www.oecd.org/dataoecd/49/29/34285298.pdf>.

The objectives of Vietnam's competition law can also be inferred from Article 4(2): 'Competition must be implemented on the principles of honesty, non-infringement upon the interests of the State, public interests, legitimate rights and interests of enterprises, consumers and compliance with the provisions of this Law'.[130]

However, it is not clear from this Article whether it represents the core objectives of competition law as they are often stated across jurisdictions, what the major objectives are, or how these objectives will be reflected through provisions of the law. The protection of the 'state interests' may lead to an ambiguity about the actual target of the law. The concept 'state interest' seems to be so broad that it does not help to clarify the viewpoint of Vietnam's political party in building a fair competitive environment without discrimination among business entities of all economic sectors, while eliminating the interference of the state in the market. 'Interests of the state' can be inferred as the guarantee of a healthy competitive environment being the utmost goal of the state economic policy, but it may also include the interests of the state sector itself. While the former seems to be reasonable, the latter may cause a conflict with the determination to create a level playing field for all business entities, because it includes SOEs within the purview of competition law.

It is also noted that the Law provides regulations for both anti-competitive behaviour and unfair competition practices. Hence the objectives of the law should be considered in two different ways. The objective of the regulations concerning anti-competitive behaviour appears to be protection of the process of competition, rather than the interests of competitors.[131] The objective with regard to unfair competitive practices is largely the protection of consumers, which ensures that they can make free and informed choices from amongst the goods and services offered in the market.[132]

Last, but not least, the objectives of the Law reflect directly the viewpoint of Vietnam's Communist party. There are statements regarding the aim to create a sound competition environment for all kinds of business and manufacturing; to exercise the state's monopoly

[130] *Competition Law 2004* art 4(2).

[131] The prohibition of these types of behaviour shows the intention of the government to ensure order in the market and guarantee that goods and services are produced and the price of those goods and services is determined by the market.

[132] USVTC, *Competition Law Update* (2006) <http://www.usvtc.org/updates/legal/PhillipsFox/CompetitionLawUpdate-July2006.pdf >.

in some sectors which are vital to the country's security and welfare; to limit business monopolies and prevent the situation of abusive monopolies maintaining exclusive rights and monopolizing the market'.[133]

It can generally be concluded that the interests of the state and of enterprises and consumers cover the basic principles of the core objectives of the *Competition Law*, namely the promotion of customer welfare and protection of firms from anti-competitive acts and unfair competition practices. These two objectives are found in a number of provisions, some of which are intertwined with each other, namely: (i) creating and promoting a fair competitive environment,[134] and (ii) promoting socio-economic development[135] and protecting consumer interests.

[133] See Communist Party of Vietnam, *Strategy for the Socio-economic Stabilisation and Development to the year 2000 of the CPV;* Communist Party of Vietnam, *Resolution of the Fourth Plenum of the Eighth CPV Party Congress* (December 1997); Communist Party of Vietnam, *Strategy for Socio-economic Development 2001 – 2010* (presented by the Central Committee, 8th Tenure, to the IX National Congress, 4/2001). See also Central Institute for Economic Management (CIEM) and Swedish International Development Agency (SIDA), *Tiep tuc Xay dung va Hoan thien The che Kinh te thi truong Dinh huong XHCN o Vietnam* [Continuous Building and Perfecting Institutional Framework for Market Economy with Socialist Orientation in Vietnam] (Science and Technology Publishing House, 2006).

[134] The Law applies to all business organisations and individuals. The terms 'enterprise' refers collectively to all enterprises of all economic sectors, including state-owned enterprises, particularly enterprises producing, supplying products, providing public-utility services, enterprises operating in the state-monopolized sectors and domains, foreign enterprises and professional associations operating in Vietnam (Article 2); Enterprises enjoy freedom of competition within the legal framework. The state protects the lawful right to business competition (Article 4). State management agencies are prohibited from performing a number of particular acts to prevent competition on the market (Article 6); The Law lays out measures for the state control of enterprises operating in the state monopolized domains, enterprises producing, supplying public-utility products and services (Article 15). The Law stipulates prohibition of anti-competitive agreements, the abuse of dominant or monopoly positions and measures for the control of economic concentration (*Competition Law 2004* ch 2) and prohibitions of unfair competition acts (*Competition Law 2004* ch 3).

[135] The Law provides exemptions with regard to anti-competitive agreements, particularly those agreements aimed at enhancing the competitiveness of small- and medium-sized enterprises; enhancing the competitiveness of Vietnamese enterprises in the international market (Article 10). The threshold for determining an anti-competitive act is 30 per cent of market share in the relevant market, which is aimed at preventing agreements that can affect the business environment and consumer interests (Article 9(2) and at the prevention of creating a dominant firm on the market by means of economic concentration. Other exemptions are the inapplicability of prohibitions in economic control cases where enterprises, after implementing economic concentration, are still of small or medium size as prescribed by law (Article 18); exemptions in the prohibitions of economic concentration in the case where one or more of the participants in economic concentration is/are in danger of dissolution or bankruptcy and the economic concentration has an effect of expanding exports or contributing to socio-economic development and technical and technological advances (Article 19(1), (2)).

- **Objectives of an anti-monopoly law**

The question of whether *Competition Law 2004* was designed to deal with monopoly is debatable. From the economic perspective, monopoly itself is not all negative; rather it can entail some pro-competitive effects.[136] Therefore, a competition law does not necessarily aim to eliminate all monopoly and monopolistic firms. It often defines what a monopoly is; practices that lead to monopolies; practices of enterprise(s) in abuse of a monopoly position; and how to deal with problems caused by monopolisation.

Similarly, it does not mean that any possession of market power or holding a dominant position can constitute an abuse.[137] Anti-monopoly law does not discipline the establishment of large and powerful firms; it only punishes the misuses that result in substantial injuries to competition. A free market economy encourages competitors to strive for a superior position through innovation, greater efficiency or other legitimate competitive behaviour. If successful market participants who achieve a dominant or monopoly position were punished by the law, their attempts to pursue innovation and attain economic growth and conduct legitimate competition would be stifled. An anti-monopoly law prohibits activities in the market of a firm holding a dominant or monopoly position which have no legitimate business justification.[138]

Chapter II of the Law (Articles from 8 to 38) deals particularly with anti-monopoly matters. The term 'Control' (*Kiem soat* in Vietnamese) is used similarly to that in the German law.[139] 'Competition restriction acts' are defined as 'acts performed by enterprises to reduce, distort and prevent competition on the market, including acts of competition restricting agreement, abusing the dominant position on the market, abusing the monopoly position and economic concentration'.[140]

---

[136] For example, monopoly can be a motivation for firms to accumulate capital and/or invest to develop technology and human resources. Monopoly can be a factor contributing to the establishment of leading industries within a country. See Huan, above n 1, 31-32.

[137] Stephen H Harris, 'The Making of an Antitrust Law: the Pending Anti-Monopoly Law of the People's Republic of China' *(*2006-7) 7 (1) *Chinese Journal of International Law* 199.

[138] Blumenthal, *Presentation to State Council Legislative Affairs Office Regarding the Anti-Monopoly Law of the People's Republic of China* (May 24, 2005).

[139] Phat, 'Phap luat Canh tranh o Viet Nam', above n 42, 21.

[140] *Competition Law 2004* art 3(3).

4.2.2 The coverage of the Law

Unlike in some countries where the legal frameworks for competition may be embodied in separate legislations,[141] the Law combines two broad categories linked together.[142] The adoption of a single law including anti-monopoly provisions is explained in that it corresponds to the particular context of Vietnam and also results from the techniques of making law. In fact, provisions of the Law are similar to those of other countries, notwithstanding that they can be embodied in a single or numerous laws.[143] It is also argued that the adoption of a single law rather than separate laws regulating harmful practices to competition (e.g. anti-competition and unfair competition practices) depends on the economic development and economic conditions at each stage and the policies of the government in certain countries.[144]

It is clear that both categories (anti-competitive practices and unfair competition) are concerned with competition and the need for a fair and healthy environment for business activities. However, restrictive competition practices are principally concerned with the role of the state, because such practices are harmful to the interests of the economy as a whole and need state intervention. An anti-competitive practice can affect a number of firms participating in the market as well as the interests of the state and customers in a broader sense, such as through price fixing, agreements for dividing of the market, etc. Therefore the approach to dealing with such kinds of practices is likely to be a public procedure and to require administrative measures. By contrast, unfair competition is harmful to the interests of individuals and to certain firms, so that dealing with such kinds

[141] For example, the US has at least 6 Acts regulating competition law, while Germany has two laws. China had its *Law on Anti-Unfair Competition Law in 1993* and it adopted the Anti-monopoly Law in 2007, which came into effect on 01 August 2008.

[142] That the *Competition Law 2004* was adopted brought to an end the debates on whether Vietnam should have one competition law regulating both restrictive competition practices and unfair competition.

[143] Phat, 'Phap luat Canh tranh o Viet Nam', above n 42, 15.

[144] Developed countries, of which the US is a good example, often have several laws regulating competition adopted in parallel with the development of their economy, the needs for making and adjusting competition law and the political will at certain stages. By contrast, developing countries and those in transition seem to have one law regulating comprehensively all matters of competition as they have learnt from the experiences of developed countries. See Phat, 'Bao cao Tong hop', above n 1, 33.

of practices requires a judicial procedure.[145]

In this vein, when the Law was in the drafting process, issues were raised about several possible titles for the law. The first suggestion was the 'Law on Competition and Anti-Monopoly' (*Luat Canh tranh va Chong Doc quyen*), which mentioned two regulating aspects of the law, the former referring to anti-unfair competition practices and the latter to anti-monopoly practices. The second proposal was the 'Law on Competition' (*Luat Canh Tranh*) and the last one was the 'Law on Competition and Control of Monopoly' (*Luat Canh tranh va Kiem soat Doc quyen*) in which the term 'control' (*Kiem soat*) made a clear distinction between fighting against monopoly practices and state management of monopolies. In the end, the law was simply named the Competition Law (*Luat Canh tranh).*[146]

The coverage of both categorises of the Law also raises the question of the relationship between the Law and other relevant legislation, since Vietnam has both competition law and complicated sector regulations.[147] Even though Article 5 gives prevalence to the Law when there is a contradiction between the Law and another one in the same matters,[148] competition authority still find it difficult to settle the case when there is a conflict between the Law and another law which may be of higher ranking in the hierarchy of legislation[149]. The competition authority in the consideration and handling of a particular case also takes time to decide which law can be applied whenever there is a violation of

[145] Phat, 'Bao cao Tong hop', above n 1; Phat, 'Phap luat Canh tranh o Viet Nam', above n 42, 16; VN Express, 'De nghi Doi Luat Canh tranh Thanh Luat Chong Doc quyen' [Propose to Change Title of the Law from the Competition Law to Anti-monopoly Law] (2004) <http://www.vnexpress.net/gl/kinh-doanh/2004/04/3b9d1671/>.

[146] National Assembly Website 'Du an Luat Canh Tranh va Nhung Van de Dat ra' [the Draft of Competition Law and Emerging Issues] (2004) <http://www.na.gov.vn/htx/Vietnamese/C1461/default.asp?Newid=4891>.

[147] OECD, 'The Relationship between Competition Authorities and Sectoral Regulators', above n 129, 8.

[148] According to Article 5, provisions of the Law will apply where there is any disparity between the provisions of this Law and those of other laws on competition restriction acts or unfair competition acts. This provision is important to deal with the question of 'choice of law' where the Law is prevalent in relation to other relevant laws.

[149] For example, individuals and organisations have the right to freely and voluntarily make commitments (*Civil Code 2005* art 7). However, there are no provisions of the *Civil Code* that prohibit the making of anti-competition agreements, such as agreements to divide consumer markets or sources of supply of goods and services or price fixing while such kinds of agreements are expressly prohibited by the *Competition Law*. See OECD, 'The Relationship between Competition Authorities and Sectoral Regulators', above n 129, 8.

provisions laid down in both the Law and in specific legislation.[150]

4.2.3 The addressees of the Law

4.2.3.1 Enterprises

The focus in this section is on the addressees of the Law. According to Article 2, the Law applies to business organizations and individuals (hereinafter referred to collectively as enterprises) and professional associations operating in Vietnam.[151] The Law also extends its application scope to state administrative authorities, prohibiting them to intervene in the business activities of enterprises.

The term 'enterprises' in Article 2 refers to all kinds of entities operating under the *Enterprises Law*. 'Enterprise' includes: (i) domestic private enterprises; (ii) SOEs; (iii) foreign invested enterprises (joint venture enterprises and 100 per cent foreign owned enterprises) and overseas enterprises operating in Vietnam (foreign commercial presence in Vietnam).[152]

According to Article 2, 'enterprises operating in the State-monopolized sectors and domains' shall be regulated by provisions of the law.[153] This can be understood to mean that not only does the Law apply to state monopolies, but it applies in a broader meaning to enterprises which operate in the state monopolised sectors and domains.[154] In previous drafts it was an issue whether enterprises producing or supplying of essential products, providing public-utility services or operating in the state-monopolized sectors and domains,[155] could be subject to the Law. As explained by the Drafting Committee, such enterprises are assigned particular tasks by the state to produce and supply products and to provide public utility services or operate in state-monopolized sectors and domains. However, they can also conduct activities in order to make profits outside their specific

[150] For example practices in terms of price fixing are both prohibited by the *Competition Law 2004* and the *Ordinance on Price 2002*.

[151] *Competition Law 2004* art 2.

[152] Types of enterprises are provided in the *Enterprises Law 2005*.

[153] *Competition Law 2004* art 2.

[154] These are economic groups, which were formerly general corporations combined from numerous SOEs operating in key industries. They fall within the scope of the Law and can be treated as enterprises holding dominant positions or monopoly positions.

[155] During the drafting process there was particular concern about those enterprises operating in providing such goods and services in security and defence.

tasks. Hence the Law should apply to them if an abuse of their position occurred or their operation was beyond their business scope of assigned business.[156] The inclusion of such enterprises in the Law was seen as essential to comply with the definition of 'enterprise' in the *Enterprises Law 2005* and to ensure the principle of equality among enterprises of all economic sectors.[157]

The term 'individual' in Article 2(1) is regarded, consistent with the *Commercial Law 2005*, as referring to one who conducts commercial activities (i) in an independent and regular manner and (ii) having business registration.[158] It is not clear whether 'vendors' can be covered by the Law. This point is different from the EC competition law, in which any person deemed to carry on an economic activity falls within the term of 'undertaking'.[159] The term 'single undertaking' in EC competition law is regarded as a parent company and its dependent subsidiaries as being without real autonomy. Subsequently, agreements between them are considered as internal allocations of function and role within the undertaking in question. Therefore they are excluded from the prohibitions stipulated in Article 101(1) *TFEU* (ex Article 81 *TEC*).[160] The *Chinese Anti-monopoly Law* uses the term 'undertakings', instead of 'enterprises'.[161]

Moreover, the Law does not mention other entities, such as representative offices, branches of foreign companies and banks, law offices, etc.

4.2.3.2 Trade and professional associations

Trade associations can promote the competiveness of an industry by carrying out many legitimate positive functions.[162] They include activities aimed at developing internal relationships among their members under their auspices; external relationships with other

---

[156] Standing Committee of the National Assembly, above n 90.

[157] Besides, another concern was whether the law should explicitly name the enterprises in Article 2, or just simply define enterprises belonging to all economic sectors. .

[158] *Competition Law 2004* art 6.

[159] Lu Dong Tung, *Comparison of EC and Vietnamese Competition Laws: Anti-competitive Agreements* (Master of European Affairs Law Thesis, Lund University, 2005) 43.

[160] Ibid.

[161] People's Daily Online, 'Chinese *Anti-Monopoly Law*' (2008) <http://english.peopledaily.com.cn/90001/90776/90785/6466809.html>.

[162] Organisation for Economic and Cooperation Development (OECD), *A Framework for the Design and Implementation of Competition Law and Policy* (WB and OECD, 2004) 35.

competitors; setting up and maintaining a relationship with the government. Trade associations can also serve as a forum for cartel activities.[163] It is more critical when such coordination occurs in trade associations or some other vehicles that have a relatively large number of players in the market.[164] Anti-competitive agreements can be discussed and agreed at association meetings. They can involve lobbying the government or taking anti-competitive actions on behalf of their members and thus distorting fair competition. Therefore the activities of trades and professionals are subject to regulation by the competition law of a number of countries.

In Vietnam, before the *Competition Law 2004* was implemented, agreements among company members of state general corporations and among members of trade and professional associations were legal, due principally to the lack of provisions regulating such agreements. In the former case, agreements among state general corporation members originated from the nature of these corporations.[165] In the latter case, the establishment and organisation of trade and professional associations had not been officially regulated by any legislation.[166]

The reason the Law applies to trade and professional associations is explained by the fact that they were showing increasing influence over economic life in Vietnam.[167] The term 'professional associations' is regarded as meaning trade and industry associations. Their members, enterprises, seemed to act mutually in order to follow the rules of conduct set

[163] For example, decisions regarding the prices of taxi or transportation associations can be viewed as anti-competitive practices, aimed at restricting or eliminating other competitors.

[164] Alison Jones and Brenda Sufrin, *EC Competition Law – Text, Cases and Materials* (Oxford University Press, 3rd ed, 2008) 171.

[165] Because most of them were reconstructed from mergers or the consolidation of state enterprises, the influence of their members was considerable through the guidance of the GCs. Besides, the division between state ownership and state management had not been properly implemented. Consequently the tough intervention of line ministries by means of directions or permissions for agreements within corporations was quite common. Such practices involved agreements for supplying or purchasing materials, goods or products among company member themselves.

[166] Currently a *Law on Associations* is in the drafting process. In fact, some of the associations have had strong impacts on the business conduct of members. In many cases internal policies or agreements among associations in terms of price fixing and division of the market had become common before the *Competition Law* came into effect. In some other cases, some associations took advantage of their position to lobby state management bodies in support of their own interests, regardless of those of the society. See Le Viet Thai, 'Hanh vi Thoa thuan Han che Canh tranh' [Agreements in Restraint of Competition]' Working Paper on Competition Law (2005) 21- 29.

[167] Le Thuy Tran, *Introduction to Regulation of Competition in South East Asia: A Comparativr Study of Antimonopoly Laws in Vietnam and Indonesia and Their Models* (2007) <http://www.gsid.nagoya-u.ac.jp/bpub/research/public/forum/34/12.pdf>.

by the associations. Since the Law has come to effect any agreements between 'industry associations' and other enterprises or those conducted among them, should be supervised to see if there are any anti-competition agreements. However, the Law is unclear as to whether internal decisions in the form of recommendations, decisions or regulations can be seen as restrictive to competition.

With regard to the phrase 'overseas enterprises operating in Vietnam', it has not yet been clarified what kinds of overseas enterprises operating in Vietnam are covered by the law. It is not clear whether it refers to offshore foreign entities investing onshore FIEs, or onshore foreign commercial presence in Vietnam.[168]

The Law does not lay down any exemptions for the activities of individuals and organisations conducted under the decisions of Government as was the case in the Draft of 2001.[169] This removal of provisions represents an improvement in Vietnam's approach to the regulation of activities of state monopolistic firms and the control of monopolies, because the phrase 'organisations' may include SOEs. The exclusion of such individuals and organisations from the scope of application contradicted the spirit of the concept of enterprise and the principle of equality before the law which must be applied to enterprises of all economic sectors.

4.2.3.3 'Administrative monopoly'

Article 6 of the Law prohibits some acts of state management agencies that are restrictive of competition.[170] In particular, state management agencies are not allowed to conduct the following activities in competition process:

- To force enterprises, organizations or individuals to buy, sell goods, provide services to enterprises which are designated by these agencies, except for goods and services in the State-monopolized domains or in emergency cases prescribed by law;

[168] USVTC, above n 132.

[169] Article 3 of the Draft of 2001 states that 'This Law shall not apply to practices of individuals and organisations under the decisions of Government, of local governments within its tasks and duties for national and/or public interests'. See Peter J Loyd, 'Competition Law in APEC Economies and in Vietnam' in Tran Van Hoa (ed) *Competition Policy and Global Competitiveness in Major Asian Economies* (Edward Elgar Publishing, 2003) 43.

[170] *Competition Law 2004* art 6.

- To discriminate between enterprises;

- To force professional associations or enterprises to align with one another with a view to precluding, restricting or preventing other enterprises from competing on the market;

- Other acts that prevent lawful business activities of enterprises.

However, competition restrictive acts, according to Article 3(3), are defined as 'acts performed by enterprises'. This leads to an ambiguity, because it may exclude acts performed by state authorities that can cause monopolisation and restrictions to competition.[171] It shows the inconsistency within the provisions of the Law and excludes the control of 'administrative monopolies'.

4.2.4 Structure of the Law

The Law consists of 6 Chapters and 123 Articles. In particular:

- Chapter I (Articles 1-7) has general provisions, namely: scope; subjects of application; interpretation of terms; the application of the law and its relationship with other relevant laws and international treaties; prohibited acts; and responsibilities of state management bodies.

- Chapter II (Articles 8-38) stipulates the control of restrictive competition practices. This chapter is divided into 4 sections. Sections 1, 2 and 3 deal respectively with anti-competitive agreements, abuse of a dominant or monopoly position in the market and economic concentration issues. Section 4 deals with the procedure for execution or exemption of cases.

- Chapter III (Article 39-48) deals with unfair competition acts.

- Chapter IV (Article 49-55) stipulates the organisation, operation and duties of a competition managing committee and competition council.

- Chapter V (Article 56-121) stipulates the investigation and handling of competition cases.

[171] Phat, 'Phap luat Canh tranh o Viet Nam', above n 42, 21.

- Chapter VI provides for the implementation of the Law.

In implementing the Law, the following legislations were issued by the Government:

+ *Decree 110-2005-ND-CP of the Government* dated 24 August 2005 on Supervision of Multi-Level Selling;

+ *Decree 116-2005-ND-CP of the Government* dated 15 September 2005 on Detailed Provisions for Implementation of the Law on Competition;

+ *Decree 120-2005-ND-CP of the Government* dated 30 September 2005 on Dealing with Breaches in the Competition Sector;

+ *Decree 06-2006-ND-CP of the Government* dated 9 January 2006 on Functions, Duties, Powers and Organizational Structure of Competition Administration Department;

+ *Decree 05-2006-ND-CP of the Government* dated 9 January 2006 on Functions, Duties, Powers and Organizational Structure of Competition Council;

+ *Decision 843-2006-QD-TTg of the Government* dated 12 June 2006 on Membership of Competition Council.

4.3 Anti-monopoly provisions in the *Competition Law 2004*

This part discusses anti-monopoly provisions found in the *Competition Law 2004* to set a background for the subsequent study. It begins with an overview of anti-monopoly law in Vietnam and then presents basic concepts, including definitions such as 'market power', 'relevant market' and 'market share', which are key concepts of any anti-monopoly law. The next section introduces briefly anti-competitive behaviour that will be discussed as substantive parts in the next chapters. The last section describes Vietnam's competition authorities in charge of anti-monopoly issues.

4.3.1 Overview

In general, anti-monopoly activities can be regarded as those combating anti-competitive practices and anti-monopoly laws are adopted to deal with those practices that impact directly on the interests of the state, society and the economy as a whole. In fact, the term

'anti-monopoly' varies from country to country and is affected by each country's characteristics and it reflects the context from which the laws were launched.[172] Even though the Competition Law does not use the term 'anti-monopoly', the set of provisions regulating monopoly in Vietnam are in accordance with the common principles throughout the world.

Observably, Vietnam's *Competition Law 2004* was based on the competition provisions in the *EC Treaty*.[173] Anti-monopoly provisions consist of three pillars: (i) the prohibition of restrictive arrangements; (ii) the supervision of firms having dominant or monopoly positions in the market place; (iii) the control of economic concentration. Instead of 'anti-monopoly' or 'antitrust', the term 'anti restrictive competition practices' is employed in Chapter II of the Law. The distinction of three restrictive competition practices is aimed at preventing the abuse of dominant or monopoly positions[174] and at preventing situations that can lead to market dominance and even monopolisation.[175]Articles 8, 9, 13, 14 and 18 of the Law expressly prohibit practices that are restrictive of competition. In Vietnam's context, the monopoly situation is mostly concerned with state monopolisation.[176] For that reason it needs to be seriously taken into account whether such provisions are designed to deal with state monopolies or whether they are designed to anticipate a monopoly situation created with the participation of multinational firms. Regarding the state monopolised sectors, in Article 15, the Law stipulates state intervention to maintain stability in the price market. This demonstrates the distinction made between the control of abuses of market dominance and the control of the state over crucial domains.[177]

---

[172] For example, the term 'Antitrust' is used the US laws; 'Anti-cartel' is preferred by Germany, while Japan introduces the term 'Anti-private monopoly'. See Chen Lijie, 'The Current State and Problems of Anti-Monopoly Legislation in the People's Republic of China' (2004) 3 (2) *Washington Global Studies Law Review* 307. Besides, the newest law of China uses the term 'Anti-monopoly Law'.

[173] USVTC, above n 132, 6.

[174] This is provided in sections on agreements in restraint of competition and abuse of dominant or monopoly positions.

[175] This is provided in section regarding control of economic concentration.

[176] There is the fact that each state conglomerate is involved in a specific area that can be, in practice, difficult to be fulfilled by others. For example, there are certain corporations such as in telecommunication, mineral exploitation, ship building, energy, petroleum, etc.

[177] Pham, above n 3, 555.

4.3.2 Basic concepts

4.3.2.1 The definition of 'market power'

The term 'market power' is not mentioned in the Law. However, anti-monopoly provisions in the Law indicate that the aim is to supervise and control the formulation of market power of a firm or a group of firms. 'Market power' reflects the general understanding of the concept around the world as referring to the capacity to control prices and other elements of the market e.g. supply, demand, quantity, the number of competitors.[178] In order to obtain market power, firms often employ one of the three common strategies: (i) undertaking negotiations with other firms to act together to achieve market power. These are restrictive competition agreements; (ii) preventing other competitors, as applied by firms having market power, by restricting others from entering the market and maintaining their market power. This is the abuse of dominant or monopoly positions; (iii) merging or consolidating with other firms. This is called economic concentration. The state needs to take such strategies seriously into account, because making excessive use of them can lead to inefficiency in the allocation of resources and negatively affect the activities of industries and economic interests.[179]

4.3.2.2 Relevant market and market share

- **Relevant market**

As is the common approach in the competition law of most countries, the term 'relevant market' is defined to include 'relevant market of products' and 'relevant geographical market'. According to Article 3(1) the term 'relevant market' consists of both these elements. On the one hand, 'relevant market of products' means a market of goods or services which are interchangeable in terms of characteristics, purposes and prices.[180] 'Relevant market of products' is further defined by *Decree No.116/2005/ND-CP* on

[178] Ministry of Trade the Canada Policy Implementation Assistance Project (PIAP), *Ky yeu Hoi thao* '*Co quan Canh Tranh – Kinh nghiem Quoc te Va Lua chon Cho Viet Nam*' [Proceedings of the Workshop 'Competition Authority – International Experiences and Options for Vietnam'] (2003) 11.

[179] Truong Quang Hoai Nam, 'Tom tat Nhung Noi dung Chinh Cua Luat Canh tranh' [Summaries of Some Key Contents of the Competition Law 2004] in Ministry of Trade the Canada Policy Implementation Assistance Project (PIAP), *'Ky yeu Hoi thao* '*Co quan Canh Tranh – Kinh nghiem Quoc te Va Lua chon Cho Viet Nam'* [Proceedings of the Workshop 'Competition Authority – International Experiences and Options for Vietnam'] (2003) 11.

[180] *Decree No. 116/2005/ND-CP* dated on 15/09/2005 (hereinafter referred as the Decree).

15/09/2005 providing detailed regulations for implementation of the Law.[181] On the other hand, 'relevant geographical market' means a specific geographical area in which goods or services exist which are interchangeable under similar conditions of competition and which are considerably differentiated from neighbouring areas.

In short, the concept of a relevant market laid down in the Law is similar to that of other countries and corresponds to the suggestions in the UNCTAD Model Law on Competition.[182]

- **Market share**

In considering anti-competition cases, among the elements that define market power of an enterprise market share is probably the one that can be assessed relatively easily. The market share of a firm varies according to the definition of the relevant market. Generally, the greater the market share of a firm, the more likely it is to exercise market power.[183] There is also a reciprocal link between relevant market and market share. If the relevant market in a particular case is defined narrowly, the share of a company in that market may be higher.[184] Giving prevalence to the market share criterion in the consideration of anti-monopoly cases was possible for Vietnam at the time when the Law had just come into effect and the capacity of competition inspectors was still limited.

'Market share' is defined in Article 3(5) as follows:

> An enterprise's market share of a certain kind of goods or service means the percentage between sale turnover of this enterprise and aggregate turnover of all enterprises dealing in such kind of goods or services in the relevant market, or the percentage between purchase turnover of this enterprise and aggregate purchase turnover of all enterprises dealing in such kind of goods or services in the relevant market on a monthly, quarterly or yearly basis.

---

[181] According to Article 4 of the Decree, the characteristics of goods or services can be determined by the following features: physical, chemical or technical features; side effects on the user; ability to assimilate. The purpose of goods or services can be determined on the basis of the prime principal use of such goods or services while the price of goods or services will be the price recorded in the retail sales invoice in accordance with law. The determination of whether goods or services are capable of being substituted for each other is then clarified clearly in section 5 of Article 4. See *Decree No. 116/2005/ND-CP* art 4.

[182] UNCTAD, 'Model Law on Competition', above n 119, 16-18.

[183] OECD, *A Framework,* above n 162, 71.

[184] CUTS, *Competition in Vietnam: A Toolkit*, above n 68, 11.

The issue of market share is set down in anti-monopoly provisions, explicitly in those considering the market dominance of a firm.[185] When two or more enterprises are involved in agreements that restrict competition, the concept 'combined market share' is applied, in which combined market share is regarded as the aggregate market share in the relevant market of enterprises participating in the competition restriction agreement or in economic concentration. When considering whether a group of enterprises is holding a dominant position, or which form of economic consideration is prohibited, the criterion of 'combined market share' is used.[186]

4.3.3 Anti-competitive practices

As in other competition jurisdictions, the Law stipulates three anti-competitive practices. According to Article 3(3), anti-competitive practices mean 'practices of enterprises which will reduce, distort or hinder competition in the market, including practices being agreements in restraint of competition, abuse of dominant market position, abuse of monopoly position and economic concentration'.[187] As the details will be subject to analysis in the next chapters, this part simply aims to give a general overview.

4.3.3.1 Agreements in restraint of competition

Among other acts involving monopoly, anti-competitive agreements are the most harmful, so that they are of great concern to competition authorities.[188] Forms of anti-competitive agreements are identified in Article 8 of the Law and Section 3 of Chapter II of the *Decree No. 116/2005/ND-CP* on 15/9/2005. Provisions regarding anti-competitive agreements are identical to those of Article 101(1) *TFEU* .[189] The Law does not provide a clear definition of what 'agreement' is, but from the above Article 3(1) it can be understood that an anti-competitive agreement is performed by enterprises to reduce, distort and prevent competition on the market'.[190]

In general, anti-competitive agreements prohibited by the *Competition Law 2004* include

[185] *Competition Law 2004* arts 9(2), 11, 18.

[186] Ibid art 3(6).

[187] Ibid art 3(3).

[188] Lijie, above n 172.

[189] USVTC, above n 132.

[190] *Competition Law 2004* art 3(3).

4 basic groups as recommended in the UNCTAD Model Law on Competition. Article 8 prohibits agreements related to monopoly price fixing, distributing outlets, sources of supply of goods and the provision of services, bid rigging, the prevention of market access to competitors and other practices in restraint of competition.[191] Although the Law does not separate anti-competitive agreements into vertical and horizontal ones, such a classification can be seen through the provision of Article 8.[192] As in the European competition law, the prohibition entails both 'absolute prohibition' under the *per se* rule[193] and 'conditional prohibition'.[194]

4.3.3.2 Abuse of market dominance

- **Market dominance**

In section II, two types of enterprises or groups of enterprises are defined by the law,

[191] Article 8: *Agreements in restraint of competition*

> Agreements in restraint of competition shall comprise:
>
> 1. Agreements either directly or indirectly fixing the price of goods and services;
>
> 2. Agreements to share consumer markets or sources of supply of goods and services;
>
> 3. Agreements to restrain or control the quantity or volume of goods and services produced, purchased or sold;
>
> 4. Agreements to restrain technical or technological developments or to restrain investment;
>
> 5. Agreements to impose on other enterprises conditions for signing contracts for the purchase and sale of goods and services or to force other enterprises
>
> to accept obligations which are not related in a direct way to the subject matter of the contract;
>
> 6. Agreements which prevent, impede or do not allow other enterprises to participate in the market or to develop business;
>
> 7. Agreements which exclude from the market other enterprises which are not parties to the agreement;
>
> 8. Collusion in order for one or more parties to win a tender for supply of goods and services.

[192] CUTS, *Competition in Vietnam: A Toolkit*, above n 68, 29. Horizontal agreements are covered in the *Competition Law 2004* art 8, ss 1-5, 8; vertical agreements are covered in ss 5-7.

[193] *Competition Law 2004* art 9(1): *Prohibited agreements in restraint of competition*

> 1. The agreements stipulated in clauses 6, 7 and 8 of article 8 of this Law shall be prohibited.
>
> 2. The agreements in restraint of competition stipulated in clauses 1, 2, 3, 4 and 5 of article 8 of this Law shall be prohibited when the parties to the agreement have a combined market share of thirty (30) per cent or more of the relevant market.

[194] *Competition Law 2004* art 9(2): *Prohibited agreements in restraint of competition*

> 2. The agreements in restraint of competition stipulated in clauses 1, 2, 3, 4 and 5 of article 8 of this Law shall be prohibited when the parties to the agreement have a combined market share of thirty (30) per cent or more of the relevant market.

namely (i) those that hold the dominant position[195] and (ii) those that hold a monopoly in the market.[196]

Whether an enterprise holds a dominant position is considered by two criteria. The first one is based on the market share of that enterprise in the relevant market. In this case, the Law applies the statutory presumption of market dominance identified by market share[197] based on a certain percentage.[198] It is designed to eliminate any administrative difficulties of determining market dominance.[199] The second one is based on an interpretation that an enterprise is 'capable of considerably restricting competition'.[200] In this case, the enterprise in question does not hold a market share as set by the law, but in reality it can conduct considerable anti-competition practices.[201]

A firm holds a monopoly position when there is no other enterprise competing in the goods or services dealt in by such enterprise on the relevant market.[202] This position is regarded as the highest level of market power and the law must address the abuse of a monopoly position much more strictly than in the case of a dominant position.[203] Unlike in restrictive competition agreements, no exemptions are provided.[204]

In terms of the percentage of market share, the degree of market share in the relevant market to which an enterprise owes its dominant position is considerably lower than in

---

[195] *Competition Law 2004* art 11.

[196] Ibid art 12.

[197] This approach is used in the competition laws of countries such as Korea and Japan.

[198] The percentage criterion to consider if a firm holds market dominance is based on that of the US standard.

[199] This provision was due to the concern that most monopoly firms in Vietnam were created through administrative decisions, rather than through competition. Hence, the determination of market dominance can be impacted from administrative bodies. See Tran, above n 167.

[200] *Competition Law 2004* art 11(1).

[201] *Decree 116/2005/ND-CP* lays down the criteria by which the capability of an enterprise of substantially restraining competition in the relevant market shall be considered.

[202] *Competition Law 2004* art 12. The concept 'monopoly position' is regarded as the monopolisation in production, exchange, distribution of goods and services. See Standing Committee of the National Assembly, above n 90.

[203] Phat, 'Bao cao Tong hop', above n 1, 57.

[204] It is explained that the law sets a 'safe harbour' in which only when the combined market share of all the parties to the agreements is 30 percent or more on the relevant market, will such agreements be prohibited. See CUTS, *Competition in Vietnam: A Toolkit*, above n 68, 20.

the new Chinese *Anti-Monopoly Law (AML).*[205] It is also relatively lower than that of the provision regarding abuse of dominant position laid down in Article 86 of the *EC Treaty*.[206] Similarly, it is relatively lower than the percentage recommended in the suggested OECD framework.[207]

The drafting committee argued that such a percentage (30 per cent) has been applied in the anti-monopoly law of a number of countries and also in the *Ordinance on Postal and Telecommunication 2002*, to identify whether a firm holds a dominant position.[208] This is a concern because with this percentage, many firms can be said to have attained a dominant position in the market. The reason for such a low percentage, as argued by the drafters, was that there were not many enterprises with over than 30 per cent of the relevant market, so that the stipulation was in accordance with Vietnam's situation.[209]

The law provides that market dominance can be attained by a group of firms.[210] The Law provides different percentages (50, 65 and 75 per cent respectively) to define group dominance, depending on the number of firms engaged in certain cases.[211] This approach is similar to that of Article 102 *TFEU* (ex Article 82 *TEC*).[212]

- **Abuse of market dominance**

There are two approaches in the legislation of countries in dealing with market

[205] According to Article 19, *Chinese AML*, a business operator may be assumed to have a dominant market position if '… the relevant market share of a business operator accounts for1/2 or above in the relevant market…' See People's Daily Online, 'Full Article of Anti-Monopoly Law of the People's Republic of China' <http://english.peopledaily.com.cn/90001/90776/90785/6466809.html>.

[206] Under Article 86 of the *EC Treaty*, 40 per cent is the percentage to consider a firm having a dominant position and 70% in the case of a group of firms.

[207] The percentage of 35 per cent is applied for consideration of whether an enterprise has a dominant position. See OECD, *A Framework*, above n 162, 142.

[208] *Ordinance on Postal and Telecommunication No. 43/2002/PL-UBTVQH10* dated on 25/05/2002 art 39; National Assembly Website, 'Du an Luat Canh Tranh', above n 146.

[209] Standing Committee of the National Assembly, above n 90.

[210] According to Article 11, a group of firms will be considered to be in a dominant market position if they act together in order to restrain competition.

[211] According to the *Competition Law 2004* art 11, group dominance can occur in the following situations:

- Two enterprises with a market share of 50 per cent or more in the relevant market;
- Three enterprises with a market share of 65 per cent or more in the relevant market;
- Four enterprises with a market share of 75 per cent or more in the relevant market

[212] Harris, above n 137, 198.

dominance. The first is called the 'lower legislative principle', reflecting the view that the law should only be resorted to if there exists an abuse of market dominance.[213] The second is called the 'higher legislative principle'. Whenever a dominance of the market is declared, the competition authority will consider if the dominance has any anti-competitive effects on the market in question and can then decide to apply strict measures, such as breaking up the enterprises which holds the dominant position and consider the potential effects of the enterprise's break-up.[214]

Vietnam's anti-monopoly provisions appear to follow the first principle, in which the state must intervene only if abuse of the market dominance occurs. This can be explained by the fact that the abuse of a dominant or monopoly position in Vietnam scarcely occurs, as the level of market dominance or monopoly is relatively low at this stage. Thus the harmfulness to fair competition caused by abusive practices may not be as serious as in other countries. Besides, the state is encouraging the establishment of large firms having international competitive capacity. Finally, any such consideration of anti-competitive effects will be faced with the current lack of experience and human resources of Vietnam's competition authority.

As in many other countries, the Law does not aim to eliminate dominant or monopoly positions of firms. It also does not prohibit firms from achieving market power if that is the result of a legal process of market power formation through competition and accumulation of capital and assets. Competition law is only sought for eliminating the abuse of a dominant position in the market and preventing the firm from taking advantage of it or distorting competition. Once firms achieving market power do not appear to commit abusive behaviour, they are still legally protected by law.[215]

In general, the Law acknowledges all basic forms of abuse of market dominance which are commonly stipulated in competition jurisdictions.[216] Abusive behaviour is divided

[213] This approach is applied in most countries, including Germany, Korea, Poland, Hungary and Taiwan. See Lijie, above n 172.

[214] This approach is currently employed by the US and Japan. See Lijie, above n 172.

[215] Phat and Son, *Phan tich va Luan giai*, above n 79, 3.

[216] CUTS, *Competition in Vietnam: A Toolkit*, above n 68, 36; UNTACD, 'Model Law', above n 119, 35.

into groups according to the purpose of the firm exhibiting such behaviour.[217] The Law prohibits them in relation to two levels of market dominance: behaviour relating to a dominant position on the market (Article 13)[218] and behaviour based on a monopoly position (Article 14).[219]

When the Law was being drafted, there was a view that it should only regulate the abuse of a monopoly position and should not be concerned with abuse of a dominant position. This was argued on the grounds that obtaining market dominance was the target of firms. In response, drafters argued that the Law would not aim to prohibit the formulation of market dominance and monopoly positions, including natural monopolies. However, the Law should supervise this process and prevent and deal with the abuse of such positions. It was intended to ensure a fair and healthy competitive environment, to encourage the development of small and medium enterprises, which make up of 96 per cent of all

[217] The approach of the Law appears to be the same as that of the EU competition law as well as other countries' laws. Article 14 prohibits certain acts of abusing the monopoly position on the market, including those that are defined in Article 13 and the imposition of unfavourable conditions on customers and the abuse of the monopoly position to unilaterally modify or cancel contracts already signed without plausible reasons. See *Competition Law 2004* arts 13-14. In both Articles, similar provisions are stipulated in terms of price discrimination; predatory pricing; price squeezing by integrated firms; refusal to deal/sell; tied selling or product bundling; and pre-emption of facilities.

[218] Article 13: *Prohibited acts of abusing the dominant position on the market*

> Firms, groups of firms holding the dominant position on the market are prohibited from performing the following acts:
>
> > 1. Selling goods, providing services at prices lower than the aggregate costs in order to eliminate competitors.
> >
> > 2. Imposing irrational buying or selling prices of goods or services or fixing minimum re-selling prices causing damage to customers;
> >
> > 3. Restricting production, distribution of goods, services, limiting markets, preventing technical and technological development, causing damage to customers;
> >
> > 4. Imposing dissimilar commercial conditions in similar transactions in order to create inequality in competition;
> >
> > 5. Imposing conditions on other firms to conclude goods or services purchase or sale contracts or forcing other firms to accept obligations which have no direct connection with the subject of such contracts;
> >
> > 6. Preventing new competitors from entering the market.

[219] Article 14: *Prohibited acts of abusing the monopoly position*

> Firms holding the monopoly position are prohibited from performing the following acts:
>
> > 1. Acts defined in Article 13 of this Law;
> >
> > 2. Imposing unfavorable conditions on customers;
> >
> > 3. Abusing the monopoly position to unilaterally modify or cancel the contracts already signed without plausible reasons.

enterprises in Vietnam and to protect customers' rights.[220]

4.3.3.3 Economic concentration

Economic concentration activities may be defined as any conduct by a firm that aims to govern the activities of other enterprises.[221] In competition literature, it also refers to mergers and acquisitions (M&A).[222] With the use of the term 'economic concentration', the Law covers all of the basic forms of M&As commonly used in the competition legislation of other countries.[223] Details of such forms of economic concentration are described in Article 17.[224] Article 18 prohibits economic concentration cases where the combined market share of enterprises participating in economic concentration accounts for over 50 per cent of the relevant market.[225]

During the drafting process Vietnamese legislators held the view that such a

---

[220] Standing Committee of the National Assembly, above n 90.

[221] CUTS, *Competition in Vietnam: A Toolkit*, above n 68, 3.

[222] Consumer Unity & Trust Society International (CUTS International) in its publication defines 'mergers and acquisitions' or 'M&A' as 'the aspect of corporate finance strategy and management dealing with the merging and acquiring of different companies as well as other assets'. See CUTS, *Competition in Vietnam: A Toolkit*, above n 68, 53. Mergers are possibly the most concerning issue that is regulated by anti-monopoly laws of countries. The reasons are that the merging of enterprises can lead to market dominance or monopoly positions, thus affecting market price and production and distribution and causing difficulty in supervising large enterprises by the competition authority. The control of mergers is to avoid over-concentration and retain competitive order and limit the effects of mergers which can be seen as being the same as cartels. See Lijie, above 172. The control of mergers is regarded as important to prevent the creation of monopolies in the first place. See Wang Xiaoye, 'Issues Surrounding the Drafting of China's Anti-Monopoly Law' (3) *Washington University Global Studies Law Review* 289.

[223] According to Article 16 of the *Competition Law 2004*, economic concentration can be occur by means of the merger of enterprises; consolidation of enterprises; acquisition of enterprises; joint ventures between enterprises and forms prescribed by law.

[224] Article 17 of the *Competition Law 2004* categories forms of economic concentration as below:

> - The merger of enterprises means an act whereby one or several enterprises transfer all of its/their property, rights, obligations and legitimate interests to another enterprise and at the same time terminate the existence of the merged enterprise (s).
>
> - Consolidation of enterprises means an act whereby two or more enterprises transfer all of their property, rights, obligations and legitimate interests to form a new enterprise and, at the same time, terminate the existence of the consolidated enterprises.
>
> - Acquisition of enterprises mean an act whereby an enterprise acquires the whole or part of property of another enterprise sufficient to control or dominate all or one of the trades of the acquired enterprise.
>
> - Joint venture between enterprises means an act whereby two or more enterprises jointly contribute part of their property, rights, obligations and legitimate interests to the establishment of a new enterprise.

[225] *Competition Law 2004* art 18.

concentration would entail the possibility of causing restriction to competition.[226] The 50 per cent threshold would be sufficient to enable the firm after concentration to conduct market behaviour by itself without considering its competitors.[227] Moreover, the stipulation of thresholds for economic concentration, as argued by the law drafters, is necessary to avoid the arbitrary interference of a competition authority.[228] A prior notification is required for those cases of concentration in which the combined market shares of participants make up from 30 to 50 per cent of the relevant market.[229] Additionally, the Law provides two exemption cases in Article 18.[230]

4.3.4 The state bodies in charge of anti-monopoly matters

4.3.4.1 Vietnam Competition Administration Department

Before the adoption of the Law, a Board for Competition Management within the Ministry of Trade was established to participate in the drafting process and to be involved in the handling of cases of trade remedies initiated by foreign trade agencies against Vietnamese exports.[231] In early 2004 it was re-organized to be in charge of all issues related to competition and all drafts of the implementation guidelines for the competition law.[232] This agency was again built into the Competition Administration Department after the law was passed. The competition authority is named Vietnam's Competition

[226] See, eg, Tuoitre (Online), 'Chi Cam Tap trung Kinh te Khi chiem tren 50 per cent Thi phan' [Only Economic Concentration account for over 50 per cent of Market Share is Prohibited] <http://www.tuoitre.com.vn/Tianyon/Index.aspx?ArticleID=44189&ChannelID=11>; VN Express, 'Cam Tap trung Kinh te chiem tren 50 per cent Thi phan' [Prohibiting Only Economic Concentration Case account for over 50 per cent of Market Share] < http://vnexpress.net/GL/Kinh-doanh/2004/03/3B9D07DA/>.

[227] VN Express, above n 226.

[228] Standing Committee of the National Assembly, above n 90.

[229] *Competition Law 2004* art 20(1).

[230] The two cases are provided in Article 18 are: (i) cases specified in Article 19 or (ii) a case where enterprises, after implementing economic concentration, are still of small or medium size as prescribed by law. In relation to exemptions, a confirmation must be provided in writing of VCAD to inform how the proposed economic concentration may proceed under the Law and whether such proposed economic concentration can proceed without exemption or whether it requires prior exemption. See USVTC, above n 132.

[231] OECD, 'The Relationship between Competition Authorities and Sectoral Regulators', above n 129, 2.

[232] USVTC, *Catalog Legal Update on Vietnam Trade Regime* (2006), 4 <http://www.usvtc.org/updates/legal/Catalog/CatalogSep06.pdf>.

Administration Department (VCAD).[233] The tasks and powers of VCAD are provided in Article 49(2).[234]

4.3.4.2 Vietnam Competition Council

The Vietnam Competition Council (VCC) was then established according to Article 53, composed of between eleven and fifteen members appointed or dismissed by the Prime Minister at the proposal of the Trade Minister. The Competition Council shall organize the handling and settlement of complaints about competition cases involving competition restricting acts under the provisions of this Law.[235]

- **Conclusion**

The *Competition Law 2004* has covered all aspects of a standard competition law in regulating both restrictive business practices and unfair trade practices. It sets up a mechanism for the settlement of competition cases as well as the operation of competition authorities. It confirms the role of competition and competition law in the market. It is important to ensure economic efficiency and customer welfare by restricting unnecessary interventions or abuses caused by the state and private sector enterprises in the marketplace. It enables the state to supervise the concentration of economic power and rent-seeking behaviour. It facilitates conditions to entry to the market for all enterprises, strengthening economic democracy and social cohesion through the prevention of anti-competitive practices conducted by dominant firms.[236]

---

[233] In March 2004, Vietnam Competition Administration Department (VCAD) was established as a statutory body directly under Ministry of Trade of Vietnam, pursuant to the *Decree No. 29/2004/ND-CP* of the Government on defining the functions, tasks, powers and organisational structure of the Ministry of Trade.

[234] The competition administration authority (titled the competition-managing agency in the law) shall have the following powers:

- To control the process of economic concentration according to the provisions of this Law;

- Accepting exemption application dossiers; putting forward opinions to the Trade Minister for decision or submission to the Prime Minister for decision;

- Investigating competition cases related to competition-restricting acts and unfair competition acts;

- Handling and sanctioning unfair competition acts;

- Other tasks prescribed by law.

[235] *Competition Law 2004* art 53(2).

[236] Pham, above n 3, 548; OECD, *A Framework,* above n 162, 141.

It appears that the Law has comprehensively dealt with unfair competition practices. However, the control of monopoly activities and abuse of dominant and monopoly positions seems not to be as clear and comprehensive as expected. Monopolies and the control of monopolies are closely linked to the definition of the role of the state in the economy and this has a strong impact on how the state intervenes in the economy.[237] Hence, anti-monopoly law in Vietnam has become an even greater concern.

[237] Thai, Hong and Hoa, above n 8, 140.

Chapter 5

FUNDAMENTALS FOR THE APPLICATION OF COMPETITION RULES TO STATE MONOPOLIES

This chapter links the first part of the thesis, focusing on Vietnam's specific issues regarding state monopolies, with the second part concerning the application of competition rules to state monopoly behaviour in particular fields. It is structured into 3 sections:

The first section reviews the theoretical underpinning of anti-competitive behaviour of state monopolies under different economics approaches and focuses particularly on the *Structure–Conduct–Performance* (SCP) paradigm. Then it establishes how the behaviour of state monopolies is explained in the competition context. The second section discusses the fundamental principles that are applied to regulate their market behaviour. It reviews approaches to the application of competition rules to state monopolies and the experiences of selected countries. The last section examines the implications of the application of competition rules to state monopoly behaviour, focusing on the public choice and public interest theories and their influence on the application process.

5.1 Theoretical underpinnings of anti-competitive behaviour

5.1.1 Anti-competitive behaviour from an economics approach

This section discusses the theoretical foundations used to identify anti-competitive behaviour of firms in the market. It argues that the market conduct of state monopolies is no different from that of other firms, because they are based on the same theoretical underpinnings that influence the competition policy of any country. Hence, competition law can be applied to the market conduct of state monopolies.

The section begins with the preliminary questions: what market behaviour fall within the scope of competition law and why they are concerned with competition law?

It is accepted that firms in the market usually strive to maximize their profits.[1] Guided by profit maximisation, a firm's conduct is aimed at achieving a higher position in the market and attaining more advantages than competitors and the desire of most firms is to attain a dominant position.[2] There are a number of concerns about such conduct of firms in so far as it may impact on competition.[3] First, there is collusion between firms to restrict the market entry of other competitors or to fix prices.[4] Such conduct could alter existing market structure, impact on the allocation of resources and cause inefficiency in the market. Under normal circumstances a competitive market structure will allocate resources in such a way as to 'produce the goods and services which consumers value most highly and are prepared to pay for and the use of resources is limited at the lowest possible cost'.[5] Second, some conduct could result in an increase in market power or result in a substantial lessening of competition.[6] Furthermore, the attainment of market dominance makes it possible for the firm (firms) to abuse this position to affect competition. Third, mergers and acquisitions entail the potential to directly alter market structure[7] and they serve the desire to create market power or to exploit more from the firm's existing market power.[8]

As concluded by Martyn Taylor, there should be two types of regulation by means of

---

[1] Michael Trebilcock and Edward Iacobucci, 'Privatization and Accountability' (2003) 116 (5) *Harvard Law Review* 1424; Herbert J Hovenkamp, 'Antitrust Policy after Chicago' (1985) 84 (2) *Michigan Law Review* 226-229. See also 'firm objective' and 'profit maximization' in John Black, Nigar Hashimzade and Gareth Myles, *A Dictionary of Economics* (Online) (Oxford University Press, 2009).

[2] 'A dominant position is a position of economic strength enjoyed by an undertaking which enables it to prevent effective competition being maintained in the relevant market by affording it the power to behave to an appreciable extent independently of its competitors, its customers and ultimately of the consumers'. See 'dominant position' in Peter Cane and Joanne Conaghan, *The New Oxford Companion to Law* (Oxford University Press, 2008).

[3] Rhonda L Smith, *Competition Law and Policy- Theoretical Underpinnings* <http://www.regulationbodyofknowledge.org/documents/011.pdf>.

[4] 'Collusion refers to covert arrangements between firms to agree pricing policies or general market behaviour, or both. For example, firms could agree to split up a market such that each firm promises to stay within a particular sector, leaving it free to pursue its own strategies without fear of competition from other members of the colluding group. When such agreements are made formal they are called cartels'. See 'collusion' in Peter Moles and Nicholas Terry, *The Handbook of International Financial Terms* (Oxford University Press, 1997).

[5] Smith, above n 3.

[6] Ibid. Market power is referred to as a situation where a firm (or group of firms acting jointly) has discretion in its decision making because it is free from constraints imposed by competition.

[7] Smith, above n 3.

[8] John F Stewart, Robert S Harris and Willard T Carleton, 'The Role of Market Structure in Merger Behaviour (1984) 32 (3) *Journal of Industrial Economics* 296-297.

competition law. The first is 'behavioural regulation' which refers to the regulation of behaviour of market participants. It is important to prevent firms from seeking market power individually and collectively in the form of engaging in anti-competitive behaviour. The second one is 'structural regulation', which refers to the prevention of firms from merging with other firms in order to increase their market power excessively. Such regulation is commonly applied because the potential for anti-competitive conduct exist in all markets.[9] Therefore, despite differences in detail between countries, anti-competitive conduct is commonly regulated according to these three categories: (i) collusion in the forms of contracts, arrangements and understandings between competitors; for example, market sharing, price setting, etc; (ii) making use of market power either in the form of unilateral or collective conducts; and (iii) altering market structure by means of merger or acquisition.[10] This categorisation is common in competition jurisdiction, of which good examples can be found in the EU, US and Australia.[11]

The next question is how a firm's conduct is explained and when it can be considered as harmful to competition. These questions can be answered by observing the theoretical underpinnings of various countries' competition policies. The conceptual framework for the consideration of the conduct of firms and their regulation by a competition law can be derived from two sources:

---

[9] This preposition is made in most of the major textbooks on competition law, for example, Edward M Graham and J David Richardson (eds), *Global Competition Policy* (Institute for International Economics, 1997); G Bruce Doern and Stephen Wilks, *Comparative Competition Policy: National Institutions in A Global Market* (Oxford University Press, reprinted 2001); Richard A Posner, *Antitrust Law* (University of Chicago Press, 2nd, ed, 2001); Gorgio Monti, *EC Competition Law* (Cambridge University Press, 2007); Alison Jones and Brenda Sufrin, *EC Competition Law: Text, Cases and Materials* (Oxford University Press, 3rd ed, 2008); Martyn Taylor, *International Competition Law: A New Dimension for the WTO* (Cambridge University Press, 2006); Barry J Rodger and Angus MacCulloch, *Competition Law in the EC and UK* (Routledge-Cavendish, 4th ed, 2009); S G Corones, *Competition Law in Australia* (Thomson Reuters, 5th ed, 2010); Maher M Dabbah, *International and Comparative Competition Law* (Cambridge, 2010); Lee McGowan, *The Antitrust Revolution in Europe: Exploring the European Commission's Cartel Policy* (Edward Elgar Publishing, 2010).

[10] Taylor, above n 9; Smith, above n 3. See also Corones, above n 9, 11; Monti, above n 9, 2; Rodger and MacCulloch, above n 9; 2-3; Dabbah, above n 9, 13-14, 32-35.

[11] The practice of EU competition law offers a good example. The aim of the European Competition Law stated in Article 3(1) (g) of the EU Treaty is to condemn anti-competitive behaviour in order to ensure that competition in the internal market is not distorted. European competition rules encompass prohibitions and remedies to three types of anti-competitive behaviour: (i) entering into agreements restrictive of competition (e.g. price fixing cartels); (ii) harmful behaviour to the competitive process by dominant firms; and (iii) mergers that may harm competition. See Monti, above n 9, 2.

(i) The argument over the market conduct of firms. Although theories of economics explaining the conduct of firms are different,[12] most of them employ the same method; that is, to place it in relation to two other factors: market structure and market performance. The triangular correlation among the three factors is the key principle of the '*Structure–Conduct–Performance*' paradigm (hereinafter referred to as the SCP paradigm).[13] Explanations for the identification and regulation of anti-competitive conduct are inferred from the impacts of such conduct over other elements of the SCP paradigm.

(ii) The attainment of market power of a firm in the market. In this regard, the market conduct of firms is motivated by the desire to achieve individual or collective market power.

5.1.1.1 The Structure–Conduct–Performance paradigm[14]

The SCP paradigm suggests that how firms conduct themselves in the market can be inferred by observing the structure of a market, while the conduct of firms can be used to

[12] For example, Harvard School with the SCP paradigm; Chicago School; Market Structure of Industrial Organisation of F M Scherer…See, e.g. Monti, Van den Bergh and Camesasca, Rhonda Smith.

[13] The SCP paradigm was introduced by E Mason in the 1930s and further expanded by his colleagues such as J S Bain in the 1950s. See Jones and Sufrin, above n 9; Paul R Ferguson and Glenys J Ferguson, *Industrial Economics: Issues and Perspectives* (Newyork University Press, 2nd ed, 1998).

[14] For a summary of this paradigm, see Frederic M Scherer, *Industrial Market Structure and Economic Performance* (Rand McNally, 1970) ch 1; Paul and Glenys Ferguson, above n 13, 16; Leonard W Weiss, 'The Structure-Conduct-Performance Paradigm and Antitrust' (1979) 127 (4) *University of Pennsylvania Law Review* 1104-1140.

The core theory of the Harvard School called the Structure – Conduct – Performance paradigm (SCP) was developed by Edward Mason in the 1930s and 1940s. See E S Mason, 'Price and Production Policies of Large Scale Enterprises' (1939) 29 *American Economic Review* 61; E S Mason, 'The Current State of the Monopoly Problem in the United States' (1949) 62 *Harvard Law Review* 1265; Roger van den Bergh and Peter D Camesasca, *European Competition Law and Economics: A Comparative Perspective* (Intersentia, 2001), 68.

This theory later became prominent in the 1950s and 1960s. See Monti, above n 9, 57. It was the articulation of the basic perceptions of industrial organisation theory and used to explain the relationship among three variables and to describe the direction of causality from structure to conduct to performance. See Bergh and Camesasca, 55-67.

The SCP paradigm was tested and further developed by the works of the Harvard School economists e.g. Chamberlin and Robinson, Bain and Clark. This paradigm was challenged by the Chicago School theorists, principally in relation to the price theory. The SCP paradigm prevailed in the theory of industrial organisation, but it has become less widely applied today due to the emergence of theories arguing about other determinants of market conduct beyond market structure alone. See Taylor, above n 9, 78-79.

evaluate the market's economic performance.[15] This sub-section concludes that the interpretation of the SCP paradigm can be employed to explain how state monopolies' behaviour in the market has an impact on competition and thus that competition rules can apply to state monopolies, as they do to every other firm.

This is summarised as below:[16]

Market structure refers to the characteristics of a given product market within which firms operate. Among these, the number of firms and their size are the principal ones. Market structure is an indirect causal determinant of the extent of competition in a particular market.[17]

Conduct is defined as the way in which the firms behave. It includes criteria that firms use to set prices (e.g. collusion, independently or on the basis of consumer demand). It also includes how they decide on advertising and research and development expenditure. Market conduct is the direct causal determinant of the extent of competition in a particular market and it is influenced by market structure.[18]

Performance is described as the measure of business conduct which determines whether the firms enhance economic welfare. Performance refers to the results of a given structure-conduct pattern and the economic performance of a firm is measured based on its productive, allocative and dynamic efficiency.[19] Performance is also measured by other criteria such as, but not limited to, efficiency and technical progressiveness, employment of human resources, equitable distribution of income.[20]

The SCP paradigm is used as the groundwork for the consideration of anti-competitive conduct in competition law. It is concluded from the SCP paradigm that market structure determines conduct and this in turn determines performance. As a result of a firm's anti-

[15] Corones, above n 9, 28-32; Monti, above n 9, 57-59; Bergh and Camesasca, above n 14, 24-26; Paul and Glenys Ferguson, above n 13, 16-17.

[16] Monti, above n 9, 57. See also Taylor, above n 9, 79; Corones, above n 9, 28; Bergh and Camesasca, above n 14, 24.

[17] Taylor, above n 9, 79.

[18] Ibid. Corones, above n 9, 28.

[19] For further discussion about economic efficiency, see Corones, above n 9, 25-26; Taylor, above n 9, 12-13, Maher M Dabbah, above n 9, 23-25.

[20] Monti, above n 9, 57; Corones, above n 9, 28.

competitive conduct, there will be an increase in the firm's market power and consequently a substantial lessening of competition.[21] The two following analyses are also drawn from a study of the SCP paradigm to further demonstrate this conclusion.

From the structural approach, it is widely believed that a market with many buyers and many sellers is good for guaranteeing the welfare of consumers.[22] Chicago School economists argue that a monopolist in a market with easy market entry will not raise prices due to the fear of losing its dominant position to other competitors.[23] Nevertheless, without challenging the above arguments of the Chicago approach, it can be inferred that the ability to raise prices will be restricted by the entry into the market of competitors, unless this is constrained by entry barriers. The more existing and perhaps potential competitors there are in a particular market, the more difficult it is to raise prices. Firms tend to collude therefore in order to restrict entry into the market. One practice used to frustrate competition is predatory pricing, because it excludes from the market or weakens the competitive strength of competitors.[24] The SCP paradigm identifies predatory pricing as anti-competitive behaviour because it affects market structure by reducing the numbers of competitors and leads to increased concentration.[25]

It can also be inferred from the relationship between the three elements in the SCP paradigm that merger and acquisition conducts cause changes in market structure and this later impacts on economic performance, or economic efficiency.[26] A high concentration in the market will limit the participation of new competitors and reduce rivals among them, while allowing firms after concentration to attain market power for profit maximisation through their pricing policy. A high level of concentration therefore increases significantly the possibility of anti-competitive conduct and this is likely in turn

[21] Ibid; Corones, above n 9, 28; Smith, above n 3.

[22] Monti, above n 9, 4.

[23] Ibid.

[24] Monti, above n 9, 57.

[25] Ibid 62.

[26] Jones and Sufrin, above n 9.

to cause poor performance, such as the restriction of output or higher prices.[27]

There are also two competing hypotheses in the SCP paradigm with regard to market concentration.[28] The first one, called 'structure performance hypothesis', states that the degree of market concentration is inversely related to the degree of competition and that this is a direct relationship between them, because market concentration encourages firms to collude. It explains why firms in more concentrated industries will earn higher profits than those in less concentrated ones.[29] It is then inferred that firms are motivated by the pursuit of profits to undertake mergers and acquisitions, thus distorting market structure and lessening competition.

The other, called 'efficient structure hypothesis', argues that the performance of a firm is positively related to its efficiency. Whenever firms in a low cost structure increase profits by reducing prices and expanding market share, this causes increased market concentration.[30] It is inferred from this hypothesis that firms are motivated by the desire to enhance their efficiency to pursue market concentration. In both theories there is obviously a link between market concentration and the conduct of firms. The concern is that such market concentration will cause a change in market structure which reduces the number of firms and concentrates market share to some firms, enabling them to undertake pricing policies. As a result, economic performance is restricted.

---

[27] The concern about mergers and acquisition causing distortion to competition was once the central point of antitrust law and the incorporation of SCP analysis of the legality of horizontal mergers under section 7 of the *Clayton Act* by the US Supreme Court was formally used in the *US v Philadelphia National Bank.* See *United States v Philadelphia National Bank* 374 US 321(1963). Besides, the SCP paradigm influence was found in the Department of Justice Merger Guidelines adopted in 1968 for the implementation of merger control. It was considered that the conduct of the individual firms in the market tends to be controlled by the structure of that market; hence the focus of the Department's merger policy was market structure. See Monti, above n 9, 60.

[28] Seanicaa Edwards, Albert J Allen and Saleem Shaik, *Market Structure Conduct Performance (SCP) Hypothesis Revisited using Stochastic Frontier Efficiency Analysis* (2006), 1-2 <http://www.docstoc.com/docs/10381823/Market-Structure-Conduct-Performance-(SCP)-Hypothesis-Revisited-using-Stochastic-Frontier-Efficiency-Analysis>.

[29] Ibid.

[30] Ibid.

5.1.1.2 Market power as the motivation for anti-competitive behaviour of firms

This sub-section argues that competitive behaviour of firms is also motivated by the desire to achieve market power. This argument relies extensively on the writing of Martyn Taylor, who believes that market power is the desire of firms, even though an increased market power may cause distortion to competition.[31] The target of achieving market power is considered the cause of anti-competitive conduct of firms. This in turn is a cause of market failures resulting from imperfect competition. Market failure refers to 'a situation in which markets left to themselves do not efficiently organise the production or allocation of goods and services to consumers in a way that achieves the highest total social welfare'.[32]

Having market power will clearly enable a firm to enjoy many benefits, including the ability to impose monopoly prices and to eliminate potential competitors or launch barriers for competition. It is therefore concluded that the desire for market power is also a significant motivation for state monopolies to conduct anti-competitive behaviour.

The motivation of firms in colluding with others is also explained as a means to attain market power.[33] Since a monopoly in the market is hard to accomplish[34] because of the number of firms normally operating in the market, firms seek cooperation among themselves. Such cooperation is useful for coordinating their business activities, achieving their commercial objectives and reducing competition between them. By cooperating, firms may be able to enhance their market power, allowing them to engage in the same kind of conduct that a firm having significant market power alone can do,

---

[31] As concluded by Martyn Taylor, the necessity of regulating against market power is clear, because increased market power will give market participants an increased ability to influence market prices to maximise profits, thus harming market efficiency. They will also be less subject to competitive constraints imposed by other competitors. See Taylor, above n 9.

[32] Corones, above n 9, 19. Due to various market imperfections, perfect competition cannot be achievable in the real world. For that reason, the best outcome envisaged (in the 'Pareto Optimal') sense cannot be attained. The idea of a completely efficient market is rarely, if ever, observed in practice. The greater the impact of competition becomes, the more chance there is for market failure. See Clifford Winston, *Government Failure versus Market Failure – Microeconomics Policy Research and Government Performance* (2006) <http://reg-markets.org/admin/authorpdfs/redirect-safely.php?fname=../pdffiles/php3v.pdf>.

[33] Taylor, above n 9, 89.

[34] Ibid.

such as monopoly pricing.[35] Collaboration among firms may be seen at two levels. At a lower degree, cooperation among firms is in the forms of agreements, arrangements, understandings and concerted practices. At a higher level, such cooperation can become complete where cooperative conduct is then internalised within a single legal entity (merger).[36]

However, not all cooperative forms among firms should be considered as harmful to competition. Some of them increase net welfare and cooperative activity may enable firms to achieve economics of scope and scale, leading to a reduction in their production costs and increased productive efficiency.[37] But the consequence to competition brought about by the concerted conduct of firms must be taken seriously into account.[38]

In sum, anti-competitive conduct of firms in the market that is subject to the regulation of competition law can be grouped into three types: (i) the use of market power of firms having individual market power; (ii) concerted behaviour of firms in order to achieve collective market power; and (iii) merger of firms to enhance their structural market power.[39] Arguments for the anti-competitive nature of such types of conduct are derived from theories of economics that are principally found in the SCP paradigm, as briefly discussed above.

5.1.2 Anti-competitive behaviour by state monopolies

This section firstly argues that the occurrence of state monopolies is deep-rooted because of the state participation in the market through the presence of state-owned enterprises (SOEs). The establishment and maintenance of SOEs are justified by the need of a state

[35] Ibid 19.

[36] Ibid.

[37] Taylor, above n 9, 20.

[38] This was noted by the prominent economist Adam Smith: 'People of the same trade seldom meet together, even for merriment and diversion, but the conversation ends in conspiracy against the public or in some contrivance to raise prices'. See Adam Smith, *An Inquiry into the Nature and Cause of the Wealth of Nations* (1976) IV.7.175 (5th ed, annotated reprint, Methuen, London ,1904) <http://www.econlib.org/library/Smith/smWN.htm>

[39] Taylor, above n 9, 16.

presence in the market. There are many reasons for that,[40] including: political and ideological reasons, such as the desire for the achievement of better distribution of wealth and power within society;[41] social reasons, such as guaranteeing employment, offering better working conditions to the labour force and improving industrial relations;[42] and economic reasons, such as the treatment of market failure and finally, the need for promoting of economic growth in undeveloped areas or in industrial sectors.[43] SOEs are commonly found in the supply of public goods such as telecommunications, energy and transportations and the provision of social services such as health and education.[44] However, when participating in competition with other firms, they benefit from a number of significant privileges and immunities that can enable them to be state monopolies, making it easy to conduct anti-competitive behaviour.

The next section discusses anti-competitive behaviour committed by certain state monopolies under competition law, particularly their incentives to such behaviour. It argues that state monopolies participate in the market legally as firms; hence they can conduct market behaviour as other firms do. For the purpose of this thesis, this is significant, because the consideration of anti-competitive behaviour of state monopolies can be directly inferred from similar behaviour of other firms. Finally, this section explains why state monopolies can conduct these types of behaviour.

---

[40] Pierangelo Toninelli, 'The Rise and Fall of State-Owned Enterprises, the Framework' in Pierangelo Toninelli (ed) *The Rise and Fall of State-Owned Enterprises in Western World* (Cambridge University Press, 2000) 3-24, 3-24; OECD, 'State-Owned Enterprises and the Principle of Competitive Neutrality' (Policy Roundtable, DAF/COMP(2009)37, 2009), 27 <http://www.oecd.org/dataoecd/43/52/46734249.pdf>; Winston, above n 32, 2-3.

[41] This ideological and political motive can be found in countries whose policies are grounded by the belief that SOEs can be instructed by their governments to reduce prices, particularly for goods that are in demand by lower income earners, so that this can influence the distribution of real income within society. Besides, through SOEs, the state can control strategic resources. See Dieter Bös, *Public Enterprise Economics: Theory and Application* (Amsterdam, 1989); Joseph E Stiglitz et al, *The Economic Role of the State* (Oxford, 1989); Shleifer, 'State Versus Private Ownership' (1998) 12 (4) *Economic Perspective* 130-150. See also OECD, 'Principle of Competitive Neutrality', above n 40, 27.

[42] Maxim Boycko andrei Shleifer and Robert W Vishny, 'A Theory of Privatization' (1996) 106 (435) *Economic Journal* cited in OECD, 'Principle of Competitive Neutrality', above n 40, 28.

[43] OECD, 'Principle of Competitive Neutrality', above n 40, 28.

[44] International Competition Network (ICN), *Report on the Objectives of Unilateral Conduct Laws, Assessment of Dominance/Substantial Market Power and State-created Monopolies* (2007), 65-66 <http://www.icn-moscow.org/page.php?id=7>.

Due to their 'state' nature, state monopolies are SOEs or formed from SOEs,[45] so that the term 'state monopolies'[46] is used interchangeably with 'state-owned enterprises' (SOEs) in this section. In many countries state monopolies participate in the market with the same legal status as other firms as they carry out economic activities.[47] It is argued that state monopolies have stronger incentives and more advantages in committing anti-competitive behaviour than others. Following reasons are given:

Firstly, state monopolies participate in the market with a variety of government granted subsidies and special benefits that bring them more competitive advantages over private rivals.[48] For example, they are entrusted by governments with exclusive or monopoly rights over some of the activities that they are mandated to pursue[49]. They can receive direct or indirect subsidies from the government or from other public forms of financial assistance that is significant to lower their operating costs.[50] Besides, they benefit from preferential access to credit and other financial services and from information asymmetries, because they can have access to data and information that are not available or limited for their private counterparts.[51] The benefit from the lack of bankruptcy

[45] There are not many differences between the two notions: (i) state monopolies and similar terms such as government businesses (for example, the term 'government business' is preferred in Australia); public monopolies and (ii) State-owned enterprises (SOEs). In some written works of scholars discussing questions surrounding state monopolies, for example in that of David Sappington, the term SOEs is used rather than state monopolies. Anti-competitive behaviour in the form of pricing undertaken by state monopolies is explained thoroughly in the written work of Sappington, despite the fact that throughout the work, the term 'state-owned enterprises' is used rather than 'state monopolies'. See David E M Sappington and Gregory J Sidak, 'Competition Law for State-Owned Enteprises' (2003) 71 (2) *Antitrust Law Journal*. See also David E M Sappington and Gregory J Sidak, 'Anti-competitive Behavior by SOEs: Incentives and Capabilities' in Richard R Geddes (ed), *Competing with the Government: Anti-competitive Behaviour and Public Enterprises* (Hoover Institution Press, 2004) 28.

[46] What is a 'state monopoly' is discussed earlier in Chapter 3. State monopolies can include state firms with dominant position in the market.

[47] Examples of competition legislation with regard to state monopolies' behaviour can be found in country reports to the International Competition Network (ICN) <http://www.internationalcompetitionnetwork.org/>.

[48] Richard R Geddes, 'Case Studies of Anti-competitive SOE Behaviour' in Richard R Geddes (ed) *Competing with the Government: Anti-competitive Behaviour and Public Enterprises* (Hoover Institution Press, 2004) 28.

[49] For example, in the US, the US Postal Service is granted by the federal government exclusive monopoly over both the delivery of letters and the use of customers' mailbox. Or monopoly over the carriage of passengers on intercity railroad routes is granted to Amtrak. See Geddes, above n 47, 28.

[50] OECD, 'Principle of Competitive Neutrality', above n 40, 36-37.

[51] Ibid. Trebilcock and Iacobucci, above n 1, 1428; Sappington and Sidak, 'Competition Law for SOEs', above n 45.

constraint allows them to generate losses for a long period of time.[52] They can benefit from privileges and immunities that allow them to recoup losses incurred in non-core markets or make them irrelevant[53] or transform losses into their future debts.[54] They are also relieved of the obligation to compensate their investors or can enjoy exemption from taxation that can help to reduce their operating costs.[55] They may benefit from less binding price regulation, while a typical private firm is subject to such regulation. The lack or absence of necessary powers of the regulatory agency gives opportunities for them to engage in anti-competitive behaviour, including below-cost pricing.[56]

These privileges and immunities are a significant competitive advantage that creates incentives for them to get involved in competitive ventures on favourable terms; therefore, it can lead to unfair and inefficient competition with private firms.[57] When SOEs enjoy a statutory monopoly[58] in a core market, they can easily become monopolist, making possible for them to raise prices rather than minimising costs to maximise their profits.[59]

Secondly, state monopolies are primarily entrusted to pursue goals other than seeking a

[52] Geddes, above n 48; OECD, 'Principle of Competitive Neutrality', above n 40, 36-37; Trebilcock and Iacobucci, above n 1, 1428-1429.

[53] Sappington and Sidak, 'Competition Law for SOEs', above n 45.

[54] Gregory J Sidak and Daniel F Spulber, *Protecting Competition from the Postal Monopoly* (AEI Press, 1996) 116.

[55] Trebilcock and Iacobucci, above n 1, 1428. An example can be taken from the case of Polish SOEs where the tax authority might not press troubled SOEs to pay taxes because this might force them to go bankcruptcy. See answer by Polish authority to the OECD, 'Roundtable on the Application of Antitrust law to SOEs – Contribution from Poland' (Working Party No.3 on Cooperation and Enforcement, DAF/COMP/WP3/WD (2009)37, (2009) <http://www.uokik.gov.pl/download.php?id=47>.

[56] Sappington and Sidak, 'Competition Law for SOEs', above n 45, 517. This is demonstrated in the case of the US Postal Rate Commission where this Commission lacks subpoena power and has limited powers to set maximum prices for postal services.

[57] Michael A Crew and Paul R Kleindorfer, *Privatizing the U.S. Postal Service* (2000), 6 <http://crri.rutgers.edu/pub/wp/Privatization-Cato1.pdf>.

[58] 'Statutory monopoly' is defined as 'a monopoly protected by law from entry by rivals. Such monopolies are sometimes set up as a quid pro quo for an obligation to provide a universal service; the UK Post Office is an example of this.' See 'statutory monopoly' in John Black, Nigar Hashimzade and Gareth Myles, *A Dictionary of Economics* (Online) (Oxford University Press, 2009).

[59] Giacomo Dalla Chiara, 'A Monopolistic State in Competitive Markets: How State Ownership and State Intervention Affect Competition' (Bachelor Degree Thesis, Luiss Guido Carli University, 2010) 17 <http://tesi.eprints.luiss.it/379/1/dallachiara-tesi.pdf>.

maximisation of profits. Profit maximisation is limited to merely one of their objectives,[60] or it may not exist at all or could be avoided.[61] State monopolies can be assigned by governments to treat market failure[62] or to implement a desired social objective, such as income redistribution.[63] and thus they are often imposed by the law with the duty or prerogative to pursue specific objectives.[64] This can provide them with greater ability to sustain prices below costs for more extended periods of time than a private profit-maximizing firm.[65] State monopolies have more freedom to expand the scale or scope of their activities than private ones because they are not subject to takeover threats and, in general, are not restricted in terms of the discipline of capital markets.[66] Hence it is argued that an important incentive is the lower concern of profit maximisation than private firms with profit generation have, because it enables state monopolies to commit anti-competitive behaviour, including the consolidation of the monopoly position that they have.

Sappington and some others believe that SOEs can lobby for regulations leading to an increase of operating costs of their competitors; can restrict their rivals in accessing essential productive inputs; or they can raise the market price of inputs by buying

[60] OECD, 'Promoting Competition in Postal Service' (Roundtable on Competition Policy, DAFFE/CLP (99)22, 1999) 55 <http://www.oecd.org/dataoecd/35/36/1920548.pdf>.

[61] Trebilcock and Iacobucci, above n 1, 1422-1425. According to Rees, 'the objective of profit maximization has been explicitly rejected for public enterprises because in general they have monopoly power in at least some of the market they supply and so profit maximization would result in policies which nationalization was expressly intended to avoid'. See Ray Rees, *Public Enterprise Economics* (Weidenfeld and Nicolson, 1976) 5 cited in Giacomo Dalla Chiara, above n 59, 17.

[62] Swedish Competition Authority, *The Pros and Cons of Competition in/by the Public Sector* (2009), 46 <http://www.kkv.se/upload/Filer/Trycksaker/Rapporter/Pros&Cons/Pros_and_Cons_Comp_by_public_sector.pdf >.

[63] Ibid. See also Sappington and Sidak, 'Competition Law for SOEs' above n 45, 515; Jenik Radon and Julius Thaler, 'Resolving Conflicts of Interest in State-Owned Enterprises' (2005) 57 (1) *International Social Science* 11-20.

[64] For example, the US Postal Services has its objectives as 'to provide postal services to bind the Nation together through the personal, educational, literary and business correspondence of the people. It shall provide prompt, reliable and efficient services to patrons in all areas and shall render postal services to all communities. The Postal Service shall provide a maximum degree of effective and regular postal services to rural areas, communities and small towns where post offices are not self-sustaining'. See US Code - Title 39: Postal Service <http://vlex.com/vid/sec-postal-policy-19236133>.

[65] OECD, 'Principle of Competitive Neutrality', above n 40, 37.

[66] Sappington and Sidak, 'Competition Law for SOEs', above n 45, 500.

excessive amounts of these inputs.[67] Among the consequences of the relaxation of profit-making, the use of pricing becomes one of the most visible advantages.[68] State monopolies are able to set particularly low prices for the products for which they face the most intense competition,[69] or to maintain prices below costs for a long period.[70] Besides, they may be able to escape from any restriction of pricing by taking actions to relax binding constraints against pricing below marginal cost.[71] This is also supported by the reduced concern about loss making and recoupment of losses and by the ability to cross-subsidise.[72] As a result, the strategy of pricing below cost can reduce competitors' shares or force them out of business or prevent the entry of new competitors.[73]

State monopolies can also take advantage of raising a rival's costs by increase their product and services prices[74] so as to disadvantage them.[75] The goal of raising the rival' costs is to increase their price of output and ensure any average cost increases of the dominant firm are less than the incremental costs of the rival.[76] It is not necessarily intended to exclude firms with higher costs from the market. Rather, it allows the

[67] As cited by Sappington and Sidak, 'Competition Law for SOEs' above n 45, 510: Thomas Krattenmaker and Steven Salop, 'Anti-competitive Exclusion: Raising Rivals' Costs to Achieve Power Over Price' (1986) 96 *Yale Law Journal* 209; Steven Salop, 'Strategic Entry Deterrence' (1979) 69 (3) *American Economic Review* 415; Steven Salop and David Scheffman, 'Cost-Raising Strategies' (1987) 36(1) *Journal of Industrial Economics* 19; Steven Salop and David Scheffman, 'Raising Rivals' Costs, (1983) 73 (2) *American Economic Review* 267.

[68] According to an OECD report, a firm is able to maintain prices below cost that are supported by either prices above cost in some other segment or by some other source of funds if it does not have to seek to strictly maximise profits. See OECD, 'Promoting Competition in Postal Service', above n 60, 55.

[69] According to Sappington, SOEs may set the prices for some of their products below their marginal costs of production, which is difficult for private firms, because their price for a product must be set in a way that is close to its marginal cost of production. So that a higher price would inversely lead to the move of many potential customers to purchase the product of the others. See Sappington and Sidak, 'Competition Law for SOEs' above n 45, 502-504.

[70] OECD, 'Promoting Competition in Postal Service', above n 60, 55.

[71] A variety of ways is pointed out by Sappington as the intentional understatement of marginal production cost by manipulating of accounting data in order to understate their actual marginal cost; recording costs that are truly incurred in producing the product whose price the firm would like to set below marginal cost; or overinvesting in capital to reduce its marginal cost, etc. See Sidak and Spulber, above n 54, 22, 105-26.

[72] OECD, 'Principle of Competitive Neutrality', above n 40, 39.

[73] Ibid 41.

[74] Salop and Scheffman, above n 67, 267.

[75] Sappington and Sidak, 'Competition Law for SOEs' above n 45, 511.

[76] Krattenmaker and Salop, above n 67, 209.

dominant firm to raise its price above the competitive level.[77] The raising of the rival's costs increases the demand for the state monopolies' product or service[78] and enables them to expand their scope because their competitors are less able to invest in increased research and development and to roll out new products and services and processes.[79] This will have impacts on competitors because it will reduce the amount of output they choose to sell to customers and/or to increase the prices they charge for their products.[80]

In sum, there are a number of reasons for the presence of state enterprises in the market. As they engage in economic activities, there is potential anti-competitive conduct in the same way as is that of private firms. This is why competition jurisdictions tend to treat state and private firms equally. However, the concern here is not only about whether universal application is necessary, but also about the ability of state firms to act in restraint of competition. This is because they have incentives to engage in such behaviour due to their privileges and immunities.

5.2 Fundamental principles applying to anti-competitive behaviour of state monopolies

The first part of this section discusses different approaches to the application of competition rules to the behaviour of state monopolies and the experiences of various countries in this regard. The second one examines the principles of competition law that are applicable to state monopolies.

5.2.1 Approaches to the application of competition rules to state monopolies

Countries may employ different approaches to the application of competition rules to state monopolies and this is determined by such factors as the theoretical groundwork;

---

[77] Ibid. See also David T Scheffman and Richard S Higgins, '20 Years of Raising Rivals' Costs: History, Assessment and Future' 12 (2) *George Mason Law Review* (2003) 371 <http://www.georgemasonlawreview.org/doc/12-2_Scheffman-Higgins.pdf>.

[78] David E M Sappington and Gregory J Sidak, 'Incentives for Anticompetitive Behavior by Public Enterprises' 22 *Review of Industrial Organisation* (2003) <http://www.springerlink.com/content/l510108833125137/fulltext.pdf>.

[79] Eleanor M Fox, 'US and European Merger Policy--Fault Lines and Bridges: Mergers That Create Incentives for Exclusionary Practices' (2001-2002) 10 *George Mason Law Review* 471, 474 cited in Swedish Competition Authority, *The Pros and Cons of Competition,* above n 62, 61.

[80] David E M Sappington and Gregory J Sidak, 'Incentives for Anticompetitive Behavior', above n 78.

objectives of competition policy; the situation and the development of state monopolies as well as their importance in each country, etc. Not only do state monopolies matter in developing and transitional countries, they are important in developed countries. Generally, competition rules apply to state monopolies in the same ways as they do to other firms. Standards for determining dominance/substantial market power, for that reason, are applied in the same way to state monopolies.[81] The enforcement of competition law is also neutral as to the firm's ownership.[82] For example, in many OECD countries, it is stated that public sector businesses are not excluded from competition law.[83] In the EU, it is required that all economic sectors, the public sector, must be governed by the same rules, even though state members are free to determine the extent and the internal organization of public sectors, as is provided in Article 295 of the *EC Treaty*.[84] This requirement is applied consistently in the practices of the EU members.[85]

Countries may assert clearly in their law that the same set of competition rules are applicable to state monopolies. Normally, the scope of the competition law is stipulated as covering the conduct of any 'person' or 'undertaking' engaged in a commercial activity regardless of the character of its ownership or financing. These terms are generally

[81] ICN, *Objectives of Unilateral Conduct Laws,* above n 44. In a number of OECD countries, the investigation and imposition of sanctions against abuse of dominance and monopolisation conducted by SOEs are based on common competition rules. See Background Note of the Secretariat in OECD, 'State-Owned Enterprises and the Principle of Competitive Neutrality' (Policy Roundtable, DAF/COMP (2009)37, 2009), 25 <http://www.oecd.org/dataoecd/43/52/46734249.pdf>.

[82] See Contribution of the European Commission in OECD, 'Principle of Competitive Neutrality', above n 40, 235.

[83] OECD, 'Principle of Competitive Neutrality', above n 40, 325

[84] Erika Szyszcak, *The Regulation of the State in Competitive Markets in the EU* (Hart Publishing, 2007) 107.

[85] ICN, *Objectives of Unilateral Conduct Laws,* above n 44, 68-69.

interpreted to include state monopolies.[86] This can also be done by amendments to extend the scope of their competition laws to state monopolies in those countries where competition rules previously did not apply, such as the case of Australia.[87]

However, while competition rules are basically applied to state monopolies, there are some circumstances that they are subject to exemptions. It is also observed that exemptions are reserved for those state monopolies in strategic or crucial areas of the economy.[88] Countries may specify circumstances, where competition laws do not apply to state monopolies, for example, when they carry out 'services of general interests'.[89] Countries may also provide some special cases that will be regulated by a number of

[86] For example, Article 101 and 102 *TFEU* (ex Article 81 and 82 TEC) apply to 'undertakings' regarding to agreements between them which have as their object or effect the prevention, restriction or distortion of competition and conduct by one or more undertakings which amounts to an abuse of a dominant position. The concept of 'undertaking' is applied in EU member competition laws, for example, the UK *Competition Act 1998* and the question whether the firm in question is privately or publicly owned (controlled) is irrelevant. This shows that the application of prohibitions is therefore neutral to the ownership of the firms.

According to *Competition Act of 1996* art 1 of the Republic of Hungary, the Act applies to 'market practices carried out on the territory of the Republic of Hungary by natural and legal persons and companies with no legal personality, including branches in Hungary of undertakings domiciled abroad...' In that sense, the aim of this practice is the application of same competition rules against public and private ownership. See ICN, *Objectives of Unilateral Conduct Laws,* above n 44, 68-69.

Similarly, in the Czech Republic, the *Competition Act 1991* generally applies to all subjects falling within the notion of undertaking as defined in the Act. As the Article 2(1) does not distinguish between private and public entities, the Act covers all enterprises, including those are owned or controlled by the government or other public authority. See contribution of the Czech Republic in OECD, 'Principle of Competitive Neutrality', above n 40, 114.

[87] The extension of scope of application of the Australian *Competition and Consumer Act 2010* (Cth) (formerly the *Trade Practices Act 1974* (*Cth*)) to government business entities and the dismissal of the Crown immunity in Australia are discussed in detail in the next section of this part.

[88] For example, firms that hold power sourced from a statute in New Zealand will not be subject to the prohibitions arising from the application of the competition act and any conduct specifically authorized by a statute is exempt from the prohibition.

In Mexico, monopolies belonging to the 'strategic sectors' are exempted from the monopoly prohibition while they are still subject to other legal restrictions. In Pakistan, the *Competition Act* lays down exemptions for those sectors regulated by sector specific regulators and the government entities. See ICN, *Objectives of Unilateral Conduct Laws,* above n 44, 75.

[89] For examples, in Italy, public enterprises and state-controlled firms are fully subject to the Italian Competition Act's basic prohibitions. Exemptions in this regard are such activities relating to 'general interest services'. Prohibitions in the Italian *Competition ang Fair Trading Act 1990* do not apply to firms that provide 'services of general economic interest' that they are entrusted to do. ICN, *Objectives of Unilateral Conduct Laws,* above n 44, 68-69.

separate regulations[90] or subject to individual reviews and application.[91] Besides, exemptions reserved for state monopolies are reasoned by the doctrine of 'state action defence'.[92] The application of competition rules is also complicated in federal countries where state monopolies are created on the basis of both federal and state statutes. This case will be determined by the arrangement of application between federal and state statutes.[93]

For example, even though most OECD countries apply competition rules to both private and public firms, a few specific firms are exempted. There may be partial exemptions aimed at protecting some types of public sector businesses or some aspects of their business activities.[94] In Canada, state monopolies are regulated by competition rules as long as they are engaged in commercial operations, otherwise more specific federal law

[90] For example, in Korea, competition law applies with no exemptions to state monopolies as it is stated that any commercial activities conducted by an enterprise in the market, including public corporation monopoly are subject to the *Monopoly Regulation and Fair Trade Act (MRFTA)* . However, some public corporations may be granted monopoly rights by other laws, for example Korean Gas Corporation is granted a monopoly statute under the *Urban Gas Business Ac*t or Korea Electric Power Corporation is granted monopoly right in power transmission, distributions and sales. See contribution of Republic of Korea in OECD, 'Principle of Competitive Neutrality', above n 40.

[91] For example, in France, any anti-competitive practice of an entity providing a public service is in principle subject to the general provisions of antitrust rules enforced by the French competition agencies. Exemption is provided in a case where the anti-competitive practice can be deemed to result from an administrative act or measure. In this case, the control of such practice will be performed by the French administrative courts. In Germany, the scope of a possible 'state action defence' is quite limited; it could only apply where a conduct does not affect trade between EU member states and state action defence may be rejected. See ICN, *Objectives of Unilateral Conduct Laws*, above n 44, 68-69.

[92] 'State action defence' is also called 'state action doctrine' which was originated from the US antitrust law. According to the *Black's Law Dictionary*, it refers to 'the principle that the antitrust laws do not prohibit a state's anti-competitive acts, or official acts directed by a state'. See *Black's Law Dictionary* (Thompson West, 8th ed, 2004). See also OECD, *Competition Law and Foreign-Government Controlled Investors* (2009), 3 <http://www.oecd.org/dataoecd/30/42/41976200.pdf>; Opinion of Advocate General Jacobs delivered on 22 May 2003 in joined cases C-264/01, C-306/01, C-354/01 and C-355/01 (2003) (Competition - Undertakings - Sickness funds - Agreements, decisions and concerted practices - Interpretation of Articles 81 EC, 82 EC and 86 EC - Decisions of groups of sickness funds determining maximum amounts paid in respect of medicinal products) <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:62001C0264:EN:NOT>.

[93] For example, in the US, the application of federal antitrust law to those monopolies created by the federal government is determined by statute. If such monopoly is regulated by a state law, it is subject to the court-created doctrine of 'state action'. Under 'state action defence' doctrine, immunity is granted from federal antitrust liability for certain private or state actors for certain conduct that would otherwise violate the national antitrust laws. Federal antitrust law will not obstruct the state law so long as that decision is made at the highest levels of state government and implemented by state actors or by private actors 'actively supervised' by the state. See ICN, *Objectives of Unilateral Conduct Laws*, above n 44, 76.

[94] OECD, 'Principle of Competitive Neutrality', above n 40, 44

prevails over the Competition Act.[95]

5.2.1.1 State monopolies in the European Community, Australia and the United States

Unlike the US practice, the existence of SOEs was a common phenomenon and their roles were clearly recognized in the EU before the liberalisation of state monopolies started took place in the mid-1980s,[96] and Australia before the release of the Hilmer Report in 1993.[97] This has strongly influenced the development of competition law concerning state monopolies, with many similarities found in both places. The growing concern regarding the existence of public monopolies and their influence on competition was one of the major reasons for bringing wide-ranging reforms and adjustments to competition policy.

- **European Union**

The EU competition law shows great concern regarding public undertakings (public monopolies or state monopolies) and the high degree of state involvement in the market.[98] A number of reasons were put forward by European states to justify this. For example, state monopolies were often granted monopoly status and exclusive rights to provide 'universal services' or 'service of general economic interests'. They were also created to achieve some 'public' objectives such as consumer equality.[99]

---

[95] ICN, *Objectives of Unilateral Conduct Laws,* above n 44, 70.

[96] Damien Geradin (Ed), *The Liberalization of State Monopolies in the European Union and Beyond* (Kluwer Law International, 2000) ix; Damien Geradin, *The Liberalisation of Network Industries in the European Union: Where Do We Come from and Where Do We Go?* (2006), 8 <http://www.vnk.fi/hankkeet/talousneuvosto/tyo-kokoukset/globalisaatioselvitys-9-2006/artikkelit/Geradin_06-09-20.pdf >.

[97] In 1992, the Council of Australian Governments commissioned Professor Fred Hilmer to undertake an 'Independent Committee of Inquiry into National Competition Policy'. The subsequent report, known as the Hilmer Report, was released in August 1993. Based on the Hilmer Report's recommendations, a number of reforms were drawn up in 1995 to form a package called the National Competition Policy. See Independent Committee of Inquiry in Australia, *National Competition Policy* (AGPS, Canberra, 1993). This report hereinafter is referred as Hilmer Report throughout chapters of this thesis.

[98] Before the large scale liberalisation of state monopolies in the mid 1980s, major sectors of European industry were dominated by state monopolies such as telecommunications, postal services, energy and transport. Some sectors of strategic importance were often run by a single company, preferably controlled by the state. See Geradin, *The Liberalization of State Monopolies,* above n 96, ix. They have currently been operated in these areas where most of them have been privatised.

[99] According to Geradin, a monopoly could maintain a uniform tariff throughout the territory because it can benefit from cross-subsidies between profitable and non-profitable services. See Geradin, *The Liberalization of State Monopolies,* above n 96, ix.

Competition rules concerning state monopoly firms in the EU illustrate the historical character of state enterprises and reflect their importance. While the US antitrust law was originally influenced by the fear of the rapid expansion of private economic power, EC competition rules embodied in Articles 85 and 86 of the *EC Treaty 1957* (currently Articles 101 and 102 *TFEU*) were established because of concern about the existence of state monopolies and powerful public enterprises during that time. The strong prohibition of anti-competitive behaviour such as unfair pricing and refusal to deal reveals concern about the fact that many monopolies and dominant firms were created by government regulations, not by innovation and internal growth of the most efficient firms. That Article 102 dealing with abuses of market dominance appears to be stricter than Section 2 of the US *Sherman Act* is a good example.[100] The cautiousness about state firms under EU law is illustrated by the fact that not only does EC competition law apply to the behaviour of SOEs, it also imposes obligations on the member states themselves.[101] EU members are under obligation not to enact any legislative measure which could risk endangering the effectiveness of the *EC Treaty*.[102]

Due to increasing liberalisation, EU public firms have reduced their monopoly position in many areas.[103] This accounts for the fact that the application of EU competition rules, particularly to public monopolies, is not a major concern; rather how competition rules are utilised to deal with anti-competitive activities of public firms has become more common.

- **United States**

In the US the application of antitrust law to SOEs reflects a different attitude. Historically, the US public enterprises mostly were formed in the early days of the nation's founding to meet the demand for infrastructural construction and providing

[100] Geradin, 'Limiting the scope of Article 82 EC: What Can the EU Learn from the US Supreme Court's Judgment in Trinko in the Wake of Microsoft, IMS and Deutsche Telekom' (2004) 41 *Common Market Law Review* 48 - 89, Thomas Eger, Michael G Faure and Naigen Zhang (eds), *Economic Analysis of Law in China* (Edward Elgar Publishing, 2007) 98.

[101] OECD, 'Roundtable on the Application of Antitrust Law to State-owned Enterprises' submission by the European Commission' (Working Party No.3 on Cooperation and Enforcement, DAF/COMP/WP3/WD (2009)42, 2009), 2 <http://ec.europa.eu/competition/international/multilateral/antitrustlaw.pdf>.

[102] Ibid. In this regard, such state measures as the requirement or encouragement of firms to create cartels or the grant to the firms the responsibility for taking decisions about the boundaries of competition may constitute a breach of competition rules, for example Article 101 *TFEU*.

[103] Geradin, *The Liberalization of State Monopolies*, above n 96.

public goods such as banks, transportation system and schools.[104]

In other countries such as the EU, Australia and Newzealand, the development of competition law, in part, has originated from the prevalence of state enterprises in sectors involving the provision of public goods.[105] In contrast, government ownership of enterprises in the US has never been embraced, the government generally has refrained from nationalizing and from directly managing private industries, except in wartime.[106] Hence, state-owned, state-controlled, or state-enabled or facilitated monopolies are quite rare.[107] The concept of 'state monopoly' appears to be absent and the matter of application of competition law for SOEs has not received much contribution from the US courts and legislators.[108] Competition rules governing SOEs are virtually limited in American jurisprudence[109] and the US Constitution is said to immunise from US antitrust law much anti-competitive behaviour by SOEs.[110] As a result, legal and economic principles for regulating anti-competitive behaviour by private enterprises have been the focus of the US antitrust law.[111]

Besides, the involvement in commercial activities by various levels of government (federal, state and local) in the US is not popular, or it is undertaken with special objectives and the extent of competition between the government and private sector in

---

[104] Jerry Michell, 'Public Enterprises in the United States' in Ali Farazmand (ed) *Public Enterprise Management: International Case Studies* (Greenwood Press, 1996) 69.

[105] In these places, the state routinely owns and normally operates such industries as railroads, telephone companies, electric utilities, banks, airlines, steel mills, automobile factories and aircraft plants. See David E.M Sappington and Gregory J Sidak, *Anti-competitive Behavior by State-Owned Enterprises: Incentives and Capabilities* (2004), 2-3 <http://media.hoover.org/documents/081793992X_1.pdf>.

[106] Ibid 3.

[107] ICN, *Response of the United States Federal Trade Commission and Department of Justice to Unilateral Conduct Working Group Questionnaire* (2007), 20 <http://www.internationalcompetitionnetwork.org/media/library/unilateral_conduct/questionnaire/US_FTC-DOJ_UCWG_Questionnaire.pdf>; and <http://www.internationalcompetitionnetwork.org/media/library/unilateral_conduct/questionnaire/ICC_US_NGA-Howrey.pdf>.

[108] Sappington and Sidak, 'Competition Law for SOEs', above n 45, 479-523.

[109] The question of why the US antitrust law does not to take seriously into consideration the matter of the public sector has been explained by several writers. For example, as found by Epaminondas Spiliotopoulos, there are few cases of direct entry into industry or commerce by either the Federal or the States authorities. However, government corporations have been used as a form of special centralised agencies for the Federal Government to carry out industrial and commercial activities. See Epaminondas Spiliotopoulos, 'The Nature of the Public Undertaking' (1966) 37 (3) *Annals of Public and Cooperative Economics* 7 <http://www3.interscience.wiley.com/cgi-bin/fulltext/119729100/PDFSTART>.

[110] Sappington and Sidak, Competition Law for SOEs', above n 45, 522.

[111] Sappington and Sidak, *Anti-competitive Behavior by SOEs*, above n 105.

those cases is indirect and often negligible or non-existent. There are, however, some cases where the government gets involved in commercial activities and thus competes with the private sector (e.g. the operation of national parks, transportation facilities, some major sports facilities and colleges and universities). In such cases, the products offered are distinct and the government's involvement is not controversial.[112]

Currently, there is only one state-controlled monopoly, which is the US Postal Service (USPS).[113] The USPS is not subject to antitrust law. This is due to the view that the USPS does not have legal status as a 'person'.[114]

- **Australia**

In Australia, public monopoly structures[115] (state monopolies) were popular until recently. As in the European Community, public monopolies were often found in the provision of public utilities.[116] Government business enterprises held monopolies in key areas of the economy which had monopoly characteristics e.g. water supply, telecommunication[117] and electricity. The role of government trading enterprises was

[112] OECD, 'Regulating Market Activities by the Public Sector' (Competition Policy Roundtable, DAF/COMP (2004)36, 2005), 263 <http://www.oecd.org/dataoecd/61/5/34305974.pdf>.

[113] The USPS has existed since the beginning of the United States. It was firstly known as the United States Post Office, a predecessor to the current USPS and was a cabinet level department of the U.S. government. Since 1970 the USPS has been an independent establishment of the executive branch charged with financing its own operations and providing postal services to the nation in a business-like manner. The USPS has become a monopoly on the pick-up and delivery of non-expedited letters under Federal law, while its rates are reviewed by the Postal Rate Commission (PRC). See ICN, *Response of the United States Federal Trade Commission and Department of Justice,* above n 107, 20.

[114] In *United States Postal Service v Flamingo Indus*, it was held that the Postal Service is not a separate person from the United States and thus not subject to suit, under the *Sherman Act*. The PRA's designation of the Postal Service as an 'independent establishment of the executive branch of the Government of the United States,' is not consistent with the idea that the Postal Service is an entity existing outside the Government. See *United States Postal Service v Flamingo Indus*., 540 US 736 (2004).

[115] The term 'public monopoly structure' is mentioned in the Report to Parliament of the Commonwealth of Australia, *National Competition Policy: Overview and Assessment* (1994). See also Commonwealth of Australia, *National Competition Policy: Report by the Independent Committee of Inquiry* (the Hilmer Report) (1993) <http://ncp.ncc.gov.au/docs/Hilmer-001.pdf>.

[116] Ibid.

[117] For example, Australian telecommunications services were provided until the 1980s by a government-owned monopoly. See John Quiggin, 'The Premature Burial of Natural Monopoly: Telecommunications Reform in Australia' (1998) 5 (4) *Agenda* 430 <http://epress.anu.edu.au/agenda/005/04/5-4-A-4.pdf>.

important.[118] According to the Hilmer Report, nearly all 'essential facilities' fell within the public sector despite the fact that some were potentially given the prospect of privatisation in such areas as gas pipelines.[119] Many fell within the responsibility of the state governments and it is in the area of state-owned essential facilities that there was a challenge in achieving a consistent national approach to third party access rights.[120] Until the mid-1990s there remained large sectors of the economy in which competition was not open.[121] This was due to the conception that public utilities were traditionally considered to be 'natural' monopolies, so that a single producer could supply the entire market at the lowest cost.[122] The Hilmer Committee recommended that public monopoly structures which restrict competition, denying potential competitors access to infrastructure, monopoly pricing and competitive neutrality had to be addressed.[123]

5.2.1.2 The application of competition rules to state monopolies

This sub-section is concerned with the application of competition rules to state monopolies regardless of what they are called in each jurisdiction. The practices of the EU, US and Australian are discussed. There are three sub-sections, each of which focuses on a particular practice.

---

[118] The Productivity Commission estimated that in 2001-02, 84 government trading enterprises (GTEs) in Australia controlled assets valued at more than A$162 billion and generated A$55 billion in revenue, in key areas of infrastructure - including electricity, water, urban transport, railways, ports and forests. Revenue from these GTEs, expressed as a proportion of GDP, was almost eight percent of GDP. See OECD, 'Regulating Market Activities', above n 112, 127.

[119] Commonwealth of Australia, *National Competition Policy: Overview and Assessment* (1996) 22.

[120] Hilmer Report.

[121] Ibid 11. At the time the Hilmer Report was released, government businesses accounted for 10 per cent of Australia's gross domestic product of which nearly 50 per cent was contributed by rail, electricity, gas and water utilities. See EPAC, *Productivity Growth of Government Business Enteprises and the Private Sector* (1993); Industry Commission Reports, *Rail Transport* (1991); *Energy Generation and Distribution* (1991); *Water Resources and Waste Water* Disposal (1992).

[122] Hilmer report, 12.

[123] In terms of the structural reform, there were three main areas to address proposed by the Hilmer Review, including the separation of regulatory and commercial activities; the separation out of those parts of a utility's activities which are natural monopolies in character from those which are potentially competitive and the separation of potentially competitive activities. Besides, the Hilmer Report proposed the establishment of a new legal regime under which firms should be given access to essential facilities when the provision of such a right is deemed by the government to meet certain public interest criteria together with a pricing oversight mechanism to be set up. More importantly, the Hilmer Committee argued that a consistent national approach on competitive neutrality, which has been adopted as part of the National Competition Policy, was necessary to address these concerns. The Committee suggested a set of principles addressing the distortions that can arise when government business competes with private firms (competitive neutrality). See Parliament of the Commonwealth of Australia, above n 115, 11-19; Hilmer Report, 305.

- **European Union**

Chronologically, there have been developments in EC competition rules regarding the application of Article 90 (currently Article 86) to state monopolies. The traditional approach is found in the interpretation of Article 90 (86) which was first mentioned in the *Sacchi* case in 1974[124] when state monopolies were generally accepted.[125] In 1991, there were fundamental changes made in the *Terminal Equipment* case.[126] The Court held that the monopoly was contrary to the rules on free movement of goods and was therefore illegal. Since then, monopolies can now potentially be illegal *per se* and all national monopolies may be considered as contrary to the Treaty in so far as they restrict imports. With later cases including *Corbeau*[127] and *Almelo*[128], the permitted scope of monopolies has been limited to cases where they carry out a task of general public interest.[129]

While anti-monopoly rules are merely stipulated in Articles 101 and 102 *TFEU* (ex Articles 81 and 82 *TEC*) as well as in some other Articles of the *EC Treaty*, EU case law has contributed significantly to the interpretation of anti-monopoly law. It is noteworthy that both member states and their firms are responsible for violations of EC competition law. However, the *EC Treaty* clearly defines separate cases in which competition rules will apply to the firms alone, or the only to the state concerned, or where they will apply to both the firm and the member state, depending on the how anti-competitive behaviour

[124] The case involved a monopoly granted to an enterprise by the Italian State in television broadcasting. *Sacchi* (C-155/73) [1974] ECR 409.

[125] The Court held that a monopoly is not incompatible with the Treaty rules on competition and the existence of a monopoly which receives exclusive rights from the state is not contrary to Article 86 EC Treaty 1957 (currently Article 102 *TFEU*), as long as it behaves in a fair manner consistent with the competition rules in its relations with third parties. See *Sacchi* (C-155/73) [1974] ECR 409. Understandably, this was in line with the views of the Treaty founders and the context when the Treaty was made: the need for the state to reserve to itself certain sectors of the economy and thus exclude them from other competitors. See Françoise Blum and Anne Logue, *State Monopolies under EC Law* (Wiley, 1998) 2.

[126] This case concerned the monopoly then held by all national telecommunications organisations over terminal equipments such as telephone sets. See *Terminal Equipment* (C-202/88) [1991] ECR 1223.

[127] *Corbeau* (C-320/91) [1993] ECR 2533.

[128] *Almelo* (C-393/92) [1994] ECR 1477.

[129] For example collecting, transporting and delivering mail or supplying electricity. See Blum and Logue, above n 125, 2–4.

have originated and the extent to which state members are involved in particular cases.[130]

- *Competition rules applicable to public firms*

As mentioned above, EU competition rules generally target public undertakings, but firms granted special and exclusive rights are also subjects, rather than that they merely apply to public monopolies or state monopolies. In this regard there are situations in which EU competition law may apply to firms. The first situation is the application of competition rules to such firms as stipulated in Article 86(1). The second one is the application of competition rules to firms entrusted with the provision of services of general economic interest, as mentioned in Article 86(2). Additionally, the *EC Treaty* contains other rules applicable to state monopolies of a commercial character.[131] This is a particular case where competition rules may apply to state monopolies operating in the production, commercialisation, importing and/or exporting of goods.

For the first situation, it is clear that if a public firm commits an anti-competitive act [132] it will be regulated by Articles 101 and 102 *TFEU* , with no differences to private ones.[133] The firm is responsible for the breach of competition rules for itself if such violation is undertaken on an autonomous basis (without state measures).

---

[130] For example, a firm can be caught by the competition rules (Articles 101 and 102 *TFEU*) for the conduct of an anti-competitive behaviour resulting from its autonomous decision. However, the firm in question may escape responsibility under competition law by arguing that such behaviour is conducted under legislation or other forms of state measures and evoking the so called 'state action defence'. See *Strintzis Lines* (T-65/99) [2003] ECR II-5433, paras. 119-122; See also OECD, 'the Application of Antitrust Law to SOEs', above n 101, 4.

A state member is responsible itself for state-imposed abuses or anti-competitive agreements stipulated by Article 106 (1) *TFEU* (ex Article 86) in combination with Article 101 and 102 *TFEU*. These Articles obligate member states to refrain from imposing anti-competitive behaviour on their public or privileged undertakings. On the contrary, if anti-competitive behaviour is state-induced (as opposed to so called state-imposed), competition law will apply to both the state concerned and the firm. Not only does Article 106(1) (in combination with Articles 101/102 *TFEU*) prohibit the Member States from obliging the public undertaking to behave anti-competitively, it also prohibits them from inducing their state-owned or privileged companies to e.g. abuse their dominant position. Responsibility of the firm concerned is such that mere state inducement does not remove the autonomous character of the actions of the public undertaking and thus the potential liability under EC competition law. See *Commission v Italy* (C-118/85) [1987] ECR 2599 [7].

[131] Article 31 of the *EC Treaty* deals particularly with state monopolies of a commercial character, noting that '1. Member States shall adjust any State monopolies of a commercial character so as to ensure that no discrimination regarding the conditions under which goods are procured and marketed exists between nationals of Member States'.

[132] For example, they may conduct agreements in restraint of competition or abuse of market dominance.

[133] OECD, 'the Application of Antitrust Law to SOEs', above n 101, 2.

There are two cases where public monopolies have been disciplined by the European Commission for violation of relevant prohibitions and both of them are related to the abuse of their monopoly positions. The first case is the *Deutsche Post* in 2001[134] which is widely cited as a landmark cases for applying competition law to public monopolies.[135] This case has marked, for the first time, the test for predatory pricing being utilised for a traditional public service such as the postal service. This is also the first time that the test has been applied by the Commission to a network industry which gave rise to particular concerns when calculating the pricing floor for the purpose of predatory pricing.[136] The second case, *Deutsche Telekom,* involved pricing behaviour in relation to customers and potential competitors.[137] The decision of the Commission was later confirmed by the Court of First Instance[138] that Deutsche Telekom had sufficient scope to end the margin squeeze, while still complying with the price ceiling imposed by the German regulator.

Both cases provide good examples for the application of competition rules by the Commission to anti-competitive behaviour of public monopolies, in particular the conduct of activities aimed at preventing the entry of competitors in order to maintain privileges obtained from a dominant position in the market. This also shows the strict attitude of the EU Commission towards behaviour by public undertakings and the willingness to apply

[134] Commission Decision 2001/354/EC of 20 March 2001 relating to a proceeding under Article 82 (currently Article 102 *TFEU*)(*Deutsche Post AG* - Case COMP/35.141), OJ 2001 L 125, 27.

[135] OECD, 'the Application of Antitrust Law to SOEs', above n 101, 5.

[136] Ibid. In this case, Deutsche Post was claimed by UPS in 1994 to use revenues from its profitable letter-mail monopoly to finance a strategy of below-cost selling in business parcel services (a service open to competition). UPS alleged that Deutsche Post could finance such a strategy because it made use of the 'cross-subsidies' from the monopoly position. The test for measuring 'cross-subsidies' between the monopoly area and competitive activities that resulted in predatory prices (in the competitive area) applied by the Commission said that 'any service provided by the beneficiary of a monopoly in open competition has to cover at least the additional or incremental cost incurred in branching out into the competitive sector'. The application of the test is attributed to the Commission's conclusion that Deutsche Post did not cover the costs incremental to providing the mail-order delivery service during five years, thus constituting a breach of competition rules laid down in Article 102 *TFEU.*

[137] The case involved a publicly owned telecom company retaining 95 per cent of the relevant retail market in 2003. Deutsche Telekom was accused of not providing access for competitors to its local loops, thus limiting competition in this domain despite the fact that it was under obligation to do this. The Commission found that the company had abused its dominant position by making use of margin squeeze. It was concluded that Deutsche Telekom's behaviour resulted in a discouragement of market entry as it imposed a new entrants' fees for wholesale access to the local loop which was higher than what Deutsche Telekom's own subscribers paid for fixed line subscriptions. See Commission Decision 2003/707/EC of 21 May 2003 relating to a proceeding under Article 82 (currently Article 102 *TFEU*) (*Deutsche Telekom AG* - Case COMP/C-1/37.451, 37.578, 37.579), OJ 2003 L 263, 9.

[138] Judgment of the Court of First Instance of 10 April 2008 not yet reported in case T-271/03, *Deutsche Telekom AG v Commission* cited in OECD, 'the Application of Antitrust Law to SOEs', above n 101, 6.

competition rules to anti-competitive behaviour to them. The Commission is presently investigating behaviour of the French state-owned company *EdF* which is the largest supplier of electricity in France.[139]

- *Competition rules applicable to state measures*

The launch of state measures[140] depriving the competition rules of their effectiveness can constitute an infringement of EU competition law as stated in Article 86 (1).[141] State measures prohibited under Article 86(1) are considered in conjunction with Articles 101 and 102 *TFEU* and made clear through the case law of the ECJ.[142] The EU case law illustrates a number of typical state measures that fall under competition rules and show the attitude of the European Commission towards state involvement in economic activities that may hinder competition: (i) resulting in discrimination between different economic operators;[143] (ii) leading to conflict of interest/discrimination in favour of its own down-stream arm;[144] and (iii) concerning the reservation of ancillary

[139] The Commission has preliminarily concluded that the contracts concluded by EdF with industrial customers in France result in a reduction of competition because such contracts may prevent customers from switching (especially when considering the exclusive nature and duration of the contracts as well as the share of the market they relate to) to other providers. See OECD, 'the Application of Antitrust Law to SOEs', above n 101, 7.

[140] The term 'state measures' implies a wide meaning and covers even measures which are not legally binding, such as recommendations, provided that it is capable of exerting an influence and of frustrating the aims of the Community. See *Commission v Ireland* (C-249/81) [1982] ECR 4005 [28] (The 'Buy Irish' case).

[141] Article 106(1) *TFEU* addressing state measures stipulates 'In the case of public undertakings and undertakings to which Member States grant special or exclusive rights, Member States shall neither enact nor maintain in force any measure contrary to the rules contained in this Treaty, in particular to those rules provided for in Article 18 and Articles 101 to 109'.

[142] Throughout the cases, the question posed is whether measures adopted by a member state constitute an infringement or might infringe Article 101 and 102 *TFEU* for which Article 106(1) *TFEU* will apply. See OECD, 'the Application of Antitrust Law to SOEs', above n 101, 7.

[143] It was concluded in *Merci* that the discriminatory treatment of customers can be an abuse for which a Member State could be held responsible under Article 86(1). See *Merci Convenzionali v Porto di Genova* (C-179/90) [1991] ECR I-5889.

[144] It was held in *ERT* that the imposition of a discriminatory policy in favour of the Greek broadcasting arm would constitute an infringement of Article 86(1) as it had created a situation in which the broadcaster ERT would be led to infringe Article 102 *TFEU*. See *Elliniki Radiophonia Tilcorasi (ERT) v DEP* C-260/89 [1991] ECR I-2925.

activity/extension of monopoly.[145]

- *Competition rules applicable to firms entrusted with the operation of a service of general economic interest*

Article 86(2) provides conditions under which the competition rules can be set aside for public or privileged undertakings.[146] This Article sets out a narrow exception to the rule that competition law is equally applied to all types of undertakings. Therefore firms entrusted with the task of performing a public service, or rather a service of general economic interest, can fall outside the purview of Articles 101 and 102 *TFEU* from carrying out the tasks assigned to them by the Member State.[147] The reason for this provision is the concern that certain tensions can occur when competition rules are applied to traditionally state-owned undertakings (in sectors such as post, telecoms, electricity, etc). The interest of providing a certain public service, for example affordable and nation-wide postal services, could sometimes conflict with a full application of competition law.[148]

For the exception stipulated in Article 86(1) to apply, three basic conditions must be satisfied. First of all, the firms in question must have been entrusted with the 'operation of a service of general economic interest'.[149] The EU case law gives examples of some areas, such as the provision of services in the transport sector which are not viable on

[145] The Commission held that the extension of a previous monopoly to an ancillary activity in a neighbouring market can also be contrary to Article 86(1) (currently Article 106(1) in combination with Article 82 (currently Article 102 *TFEU*). It was concluded in *RTT v GB-Inno-BM* that the extension of RTT (the Belgian telecom incumbent) to an ancillary activity in a neighbouring but separate market infringed Article 86(1). See *RTT v GB-Inno-BM* [1991] C-18/88 ECR I-5941.

[146] This Article reads as below:

> 'Undertakings entrusted with the operation of services of general economic interest having the character of a revenue-producing monopoly shall be subject to the rules contained in this Treaty, in particular to the rules on competition, in so far as the application of such rules does not obstruct the performance, in law or in fact, of the particular tasks assigned to them. The development of trade must not be affected to such an extent as would be contrary to the interests of the Community'.

[147] OECD, 'the Application of Antitrust Law to SOEs', above n 101, 9.

[148] Ibid 3.

[149] It is noted that the term 'services of general economic interest' is not clearly defined in the Treaty. However, this term obviously covers conventional utilities such as provision of postal services, telecommunication services, gas, electricity etc. In practice, areas that can be considered to be services of general economic interest require the member state to provide their own discretion. See OECD, 'the Application of Antitrust Law to SOEs', above n 101, 10.

their own[150] or the treatment of waste material.[151] Second, the application of the Treaty would obstruct the performance (in law or in fact) of the tasks assigned to this undertaking. However, the exception will only apply if the restriction is proportionate, i.e. necessary for the fulfilment of the service of general economic interest.[152] Third, the behaviour may not negatively affect trade to such an extent as to be contrary to the interests of the Community.[153]

- **United States**

Like the EU, the US antitrust law does not directly regulate state monopolies, but rather there are particular sets of law dealing with state-owned enterprises. The application of antitrust law to SOEs is influenced by a number of important principles, namely the state action doctrine and the commercial clause.

- *State action doctrine*

SOEs in the US may benefit from immunisation which sets them aside from the purview of antitrust law under the doctrine of state action.[154] The core of this doctrine is that federal antitrust laws do not apply to 'anti-competitive restraints imposed by the States 'as an act of government'.[155] Acts of the highest levels of the state government itself, acting

[150] *Ahmed Saeed Flugreisen and Silver Line Reiseburo GmBH v Zentrale zur Bekampfung Unlauteren Wettwerbs eV* (C- 66/88) [1989] ECR 803, 55.

[151] *Entreprenørføreningens Affalds/Miljøsektion v Københavns Kommune* [2000] C-209/98 ECR I-3743, [75].

[152] OECD, 'the Application of Antitrust Law to SOEs', above n 101, 10.

It was held by the Commission in *British Telecommunications* that the defence based on Article 86 (2) of British Telecom was unacceptable and later the European Court of Justice did not consider that the British Telecom's refusal to allow private message-forwarding agencies from using its network to forward messages from other Member States endangered the performance of its tasks. See *British Telecommunications* OJ [1982] L 360/36, [1983] 1 CMLR 457 and *Italy v Commission* (C-41/83) [1985] ECR 873.

By contrast, in *Corbeau*, the Court ruled that the restriction of Belgium's Post was reasonable and it might be necessary for it to benefit from a restriction of competition in order to be able to offset less profitable activities against profitable ones. Hence the prevention of a new entrant from 'cherry picking' the most profitable services can be legitimate because that could prevent the Postal operator from fulfilling its universal service obligation. See *Corbeau* (C-320/91) [1993] ECR I-2533. Another example where the restriction was considered necessary is *Deutsche Post AG v Gesellschaft für Zahlungssysteme mbH and Citicorp Kartenservice GmbH* (C-147/97) [2000] ECR I-825.

[153]OECD, 'the Application of Antitrust Law to State-owned Enterprises' above n 101, 9.

[154] For example, several state utilities such as energy and other state-created public service monopolies The state action doctrine was first set forth by the Supreme Court in *Parker v Brown* 317 US 341 (1943).

[155] *City of Columbia v Omni Outdoor Adver*., 499 US 365, 370 (1991).

as sovereign and actions of a state legislature and probably of the governor are also immunised.[156] Other than these cases, there is no difference in the application of antitrust laws to state-created monopolies, unless otherwise provided by federal statute.[157]

It must be noted that this doctrine does not apply to all subordinate instrumentalities of the state such as political sub-divisions, agencies and business enterprises. In such cases, the extent to which it may apply depends on whether the challenged restraint is undertaken on the basis of a 'clearly articulated and affirmatively expressed' state policy to displace competition and a clear delegation of that power to the subordinate entity is required.[158] In *City of Lafayette v Louisiana Power & Light Co,*[159] it was therefore held by the Supreme Court that the state action doctrine did not immunize a municipal electric utility from federal antitrust law. A number of other cases have been good examples for this.[160] Similarly, the DOJ and FTC have also filed *amicus* briefs against the application of the state action doctrine in cases concerning state-level enterprises.[161]

In further clarifying of the state doctrine and the precluding of granting overly broad antitrust immunity, the FTC State Action Report urged that quasi-governmental entities be subject to a requirement of active supervision by the state and that clear articulation of their powers be required. Such supervision requirement was to ensure that any anti-competitive actions taken by such entities were truly in line with state policy. The Report also recommended that 'the category of entities subject to the active supervision requirement should include either: (a) any market participant or (b) any situation with an appreciable risk that the challenged conduct results from private actors' pursuing private

---

[156] ABA Section of Antitrust Law, *Antitrust Law Developments* (6th ed, 2007) 1279.

[157] ICN, *Response of the United States Federal Trade Commission and Department of Justice,* above n 107, 9.

[158] *California Retail Liquor Dealers Ass'n v Midcal Aluminum, Inc.,* 445 US 97 (1980); ABA Section of Antitrust Law, *Antitrust Law Developments* (6th ed. 2007) 1273-83.

[159] *City of Lafayette v Louisiana Power & Light Co* 435 US 389 (1978).

[160] In *United States v City of Stilwell, Oklahoma and Stilwell Area Development Authority,* the U.S. Department of Justice (DOJ) and subsequently FTC have challenged several mergers involving locally managed hospitals, as well as a tying arrangement involving a city and its development authority that provided both electricity and water/sewer service. See *United States v City of Stilwell, Oklahoma and Stilwell Area Development Authority,* No. CIV 96-196-B (Okla., 1996). See The US Department of Justice, *Antitrust Case Filings* <http://www.usdoj.gov/atr/cases/stilwe0.htm>.

[161] *Surgical Care Center of Hammond, L.C. v Hospital Service District No. 1 of Tangipahoa Parish,* 171 F.3d 231 (5th Cir, 1999) (en banc); *Jackson, Tennessee Hosp. Co. LLC v West Tennessee Healthcare, Inc.,* 414 F.3d 608 (6th Cir, 2005) for antitrust cases involving state-affiliated hospitals where DOJ and FTC filed joint amicus briefs.

interests, rather than from state policy'.[162]

- *The Commerce Clause*

The conduct of state government businesses is also regulated under the *Commerce Clause* of the *US Constitution*. As in the principle against state measures in the EU competition law, the core importance of the *Commerce Clause* is as a general charter for a free internal trade system and it was previously confirmed by the US Supreme Court that this Clause implicitly forbids the states from enacting any legislation that either discriminates against interstate commerce or that places an undue burden on interstate commerce. It is inferred that a state would also be forbidden to use a state-owned company to hamper interstate commerce'.[163] Although a 'market participant' exception to the Commerce Clause allows a state in some cases to favour its own citizens through the conduct of its state-owned businesses,[164] nonetheless there are restrictions to how far it can extend substantial regulatory effects outside its own territory.[165]

- **Australia**

Australia provides another version of the application of competition rules to state monopolies. In this regard the historical development of Australian competition law as it is described in the Hilmer Report[166] shows some similarities to Vietnam. Hence, to understand how Australia's competition laws can be seen as the equivalent of Vietnam's state monopolies, it is important to understand recent history.

Australia undertook a wide range reform of legislation and regulation since the 1990s.[167] The turning point of the development of Australian competition policy was marked by the launch of an Independent Committee of Inquiry into National Competition Policy in

---

[162] Office of Policy Planning, Federal Trade Commission, *Report of the State Action Task Force* (Sept. 2003) 3 (FTC State Action Report) <http://www.ftc.gov/os/2003/09/stateactionreport.pdf>.

[163] Diane P Wood, 'State Trading in the United States' in Thomas Cottier and Petros Mavroidis (eds), *State Trading in the Twenty-First Century* (The University of Michigan Press, 1999) 211, 225.

[164] *Reeves v Stake*, 447 US 429 (1980).

[165] Wood, above n 163, 225-226.

[166] Hilmer Report, 8-17.

[167] For the history of the development of Australian Competition Law, see Commonwealth of Australia, National Competition Policy: *Report by the Independent Committee of Inquiry*, (the Hilmer Report) (1993) 8-13. <http://ncp.ncc.gov.au/docs/Hilmer-001.pdf >.

1993.[168] As the Hilmer Report pointed out, some critical obstacles to competition were exposed at the time.[169] The significant conclusion made by the Hilmer Committee was that the opening of competition must be linked with structural reforms by means of a totally new approach to the provision of traditional government services.[170] Subsequently, a number of reforms were drawn up in 1995 to form a package called National Competition Policy (NCP) which was later agreed upon by all Australian Governments.[171] Most importantly, the Commonwealth and State/Territory Governments signed three agreements in support of the NCP reform package. These Agreements aimed to provide a timely, coordinated and comprehensive approach to competition reform across all levels of government,[172] including (i) the *Conduct Code Agreement* – operating in combination with the *Competition Policy Reform Act 1995* (ii) the *Competition Principles Agreement (CPA)* and (iii) the *Agreement to Implement the National Competition Policy and Related Reforms*.

This section is particularly concerned with the application of competition provisions of the *Trade Practices Act 1974 (Cth) – TPA* (currently the *Competition and Consumer Act*

---

[168] In 1992, Professor Fred Hilmer was commissioned by the Council of Australian Governments to head a Committee to undertake an 'Independent Committee of Inquiry into National Competition Policy'. The subsequent report, known as the Hilmer Report, was released in August 1993.

[169] First of all, until the mid-1990s, there remained large sectors of the economy where competition was not open. At that time government businesses accounted for 10 per cent of Australia's gross domestic product, of which nearly 50 per cent was contributed by rail, electricity, gas and water utilities. See EPAC, *Productivity Growth of Government Business Enteprises and the Private Sector* (1993); *Industry Commission Reports: Rail Transport* (1991); *Energy Generation and Distribution* (1991); *Water Resources and Waste Water Disposal* (1992).

Second, while the *Trade Practices Act 1974* (*Cth*) (currently the *Competition and Consumer Act 2010* (Cth)) was intended to apply to the business activities of the Commonwealth itself or its authorities, it had not applied to the States. Consequently, government ownership was criticised as the greatest impediment to enhanced competition in many sectors of the economy, particularly in the provision of traditional utility services such as water, electricity, gas and rail. See Hilmer Report, 184.

[170] According to the Hilmer Report, opening up traditional government monopolies to competition would not be sufficient to foster effective competition from the private sector. See Russel V Miller, *Miller's Australian Competition Law and Policy* (Thomson Reuters, 2008) 339.

[171] Significant outcomes of the reforms are the extension of the scope of the *Trade Practices Act 1974* (currently the *CCA*), the introduction of the 'competitive neutrality' principle; the launch of an Agenda for the review and reform of all laws that restrict competition, and the development of a 'National Access Regime' to enable competing businesses to use nationally significant infrastructure. Despite some remaining disagreements, the Hilmer Committee's recommendations were revolutionary in bringing about fundamental changes in the way in which State and Territory governments delivered traditional government services. See Miller, above n 170, 340.

[172] Australian Government, *National Competition Policy Report 2005-2007* (2007) 2 <http://www.treasury.gov.au/documents/1306/PDF/Australian_Government_National_Competition_Policy_Report.pdf>.

2010 (Cth), hereinafter referred as the *CCA*)[173] to public monopolies. Changes in legislation concerning public monopolies are significant outcomes of the comprehensive assessment of competition rules since the *TPA* was adopted in 1974. According to the Hilmer Report, public monopolies used to benefit from a number of advantages and exemptions, causing unfairness in the competitive environment between public and private sectors.[174] Importantly, they were not regulated by any respective competition provisions of the *TPA*.[175] These limitations were caused by two main factors. The first was the immunity of the Crown[176] and the second one was the restriction of the application of the *TPA* because of Constitutional limitations.[177] The Shield of the Crown doctrine led to an inapplicability of the *TPA* to instrumentalities of the Commonwealth, States and Territories.[178] Constitutional powers limitation caused restrictions in applying

[173] The *Trade Practices Act 1974* (Cth) was re-named the '*Competition and Consumer Act 2010*' (Cth) by the *Trade Practices Amendment (Australian Consumer Law) Act (No 2) 2010* and became effective since 1 January 2011. No other changes are made to the competition provisions of the Act, except for the following statement in section 1 of the Act: ''This Act may be cited as the *Competition and Consumer Act 2010*' (Cth).

[174] Some government businesses continued to have advantages over private competitors, including exemptions from tax, lower debt costs (as a result of either explicit or implicit government policy) and exemptions from regulatory requirements such as planning and environment laws. See OECD, 'Regulating Market Activities', above n 112, 127.

[175] Joe Dimasi, 'The Role of Competition Policy in Structural Adjustment: An Overview of Recent Australian Structural Reforms' (Paper presented at the APEC High Level Conference on Structural Reform, Tokyo September 2004) 2 <http://www.accc.gov.au/content/item.phtml?itemId=583702&nodeId=2cd7d30c3dad693de87beb0fb2389f4a&fn=20040909%20Dimasi%20APEC.pdf >.

It was observed by Prime Minister Hawke that:

> … [t]here are many areas of the Australian economy today that are immune from that Act: some Commonwealth enterprises, State public sector businesses and significant areas of the private sector, including the professions. This patchwork coverage reflects historical and constitutional factors, not economic efficiencies; it is another important instance of the way we operate as six economies, rather than one….

See Prime Minister Hawke's 12 March 1991 Ministerial Statement, Building a Competitive Australia.

[176] The concept of Crown Immunity originated from the idea that the King or Queen could do no wrong and thus could not be sued in his or her own courts. In Australia, there are ten manifestations of 'the Crown' including the Commonwealth, the six States, the two Territories and Norfolk Island for historical reasons. See Nick Seddon, 'Crown Community and the Unlevel Playing Field' (1998) 5(4) *Agenda* 467 <http://epress.anu.edu.au/agenda/005/04/5-4-A-7.pdf>.

[177] Corones, above n 9, 223.

[178] The amendment of the *TPA* in 1977 removed the immunity of the Crown in right of the Commonwealth in so far as it engaged in business. But it was unclear whether it could bind the Crown in right of the States and Territories, so that it could be interpreted as not binding these entities. The question raised by the Hilmer Committee was whether or not a particular State or Territory business would be entitled to take advantage of the immunity? See Hilmer Report, xxvii.

provisions of the *TPA* to instrumentalities of the states and territories.[179]

A number of adjustments were undertaken in dealing with these limitations. First of all there was the universal application of the *TPA* competition provisions to businesses in all economic sectors. Secondly, it was the introduction of competitive neutrality and a mechanism for monopoly pricing oversight. Finally, there was the enhancement of capacity of the ACCC.

- *The universal application of competition rules*

The question regarding the inapplicability of the *Trade Practices Act 1974 (Cth)* (currently *Competition and Consumer Act 2010* (Cth)) to government businesses originated in the doctrine of Crown Immunity which may exclude a government or a government body from legislation. Central to the debates regarding the application of Crown Immunity was whether the Commonwealth could be bound by State legislation and whether a State government or a State government instrumentality was bound by another state's legislation. These questions were mentioned in cases conducted by the High Courts.[180] While the High Court ruled out that the Commonwealth was bound by State legislation, the question that a state government or its body was bound by another state's legislation was unclear.[181] It was recommended in the Hilmer Report that competition rules must be applied equally to all businesses.[182] To that end, two sections were inserted into the *TPA* to extend its scope of application to all economic entities, including those belonging to the Commonwealth, States and Territories.[183]

---

[179] For example, a business could escape the operation of the Act by virtue of its non-corporate status unless it engaged in interstate or overseas trade or commerce. See Hilmer Report, xxvii.

[180] Three landmark High Court cases with regard to these question were *State Authorities Superannuation Board v Commissioner of State Taxation for the State of Western Australia* (1996) 189 CLR 253; *Re Residential Tenancies Tribunal of New South Wales; ex parte Defence Housing Authority* (1997) 190 CLR 410 and *Commonwealth v Mewett* (1997) 191 CLR 471.

[181] Seddon, above n 176.

[182] Hilmer Report.

[183] It is noted that Commonwealth, State or Territory governments were not bound by the *TPA* (now the *CCA*) when it was first enacted. In 1997, Section 2A was inserted as a result of the Swanson Committee's recommendation, so that section 2A, extended the application of the *TPA* to the Crown in right of the Commonwealth in so far as it 'carries on business' and the term 'business' was defined in s 4(1) including a business not carried on for profit. Section 2B was inserted in the *TPA* in 1995 as a result of the Hilmer Committee's recommendation. See Corones, above n 9, 222-228.

These insertions demonstrate the removal of the shield of the Crown doctrine and have made it possible for the *Competition and Consumer Act 2010* (Cth) - *CCA* (formerly the *Trade Practices Act 1974 (Cth)* - *TPA*) to apply to the Crown and entities controlled by the Crown. Currently, due to constitutional limitation of powers, provisions stipulated in s 2A applies at the Commonwealth level and s 2B applies at State/Territory level.

Under s 2A, the *CCA* applies in so far as the Commonwealth 'carries on a business' directly or by an authority of the Commonwealth.[184] The term 'authority of the Commonwealth' is defined in s 4(1) as including a body corporate established for the purpose of the Commonwealth by or under a law of the Commonwealth or a law of a Territory; or an incorporated company in which the Commonwealth or a body corporate established for the purpose of the Commonwealth, has a strong controlling interest.

Similarly, the *CCA* applies to a State or Territory if it 'carries on a business' directly or by

[184] Section 2A is read as below:

> 2A Application of Act to Commonwealth and Commonwealth authorities
>
> (1) Subject to this section and sections 44AC, 44E and 95D, this Act binds the Crown in right of the Commonwealth in so far as the Crown in right of the Commonwealth carries on a business, either directly or by an authority of the Commonwealth.
>
> (2) Subject to the succeeding provisions of this section, this Act applies as if:
>
> (a) the Commonwealth, in so far as it carries on a business otherwise than by an authority of the Commonwealth; and
>
> (b) each authority of the Commonwealth (whether or not acting as an agent of the Crown in right of the Commonwealth) in so far as it carries on a business; were a corporation.
>
> (3) Nothing in this Act makes the Crown in right of the Commonwealth liable to a pecuniary penalty or to be prosecuted for an offence.
>
> (3A) The protection in subsection (3) does not apply to an authority of the Commonwealth.
>
> (4) Part IV does not apply in relation to the business carried on by the Commonwealth in developing and disposing of interests in, land in the Australian Capital Territory.

authority of the State or Territory, in so far as they 'carry on a business'.[185] The term 'authority of the Commonwealth' is defined in s 4(1) in relation to States and Territories as a body corporate established for the purpose of the State or the Territory by or under a law of the State or the Territory; or an incorporated company in which the State or the Territory, or a body corporate established for the purpose of the State or the Territory, has a strong controlling interest. It is noted that in this case Pt IV of the *CCA* only applies if States or Territories have their own *Fair Trading Acts* applying Pt V (consumer protection) directly to the Crown in right of the States and Territories.[186] Besides, s 2B does not deem a State or Territory or an authority of a State or Territory to be a corporation.

It is also noted that in implementing the *CCA*, each State and Territory government introduced legislation to give effect to the Competition Code as part of its own law, which extended the competition provisions of the Act effectively to all businesses.[187] The States and Territories also agreed that the ACCC, the Australian Competition Tribunal and the Federal Court would be given powers to enforce the Competition Code.[188]

---

[185] S 2B reads as below:

> 2B Application of Act to States and Territories
>
> (1) The following provisions of this Act bind the Crown in right of each of the States, of the Northern Territory and of the Australian Capital Territory, so far as the Crown carries on a business, either directly or by an authority of the State or Territory:
>
> (a) Part IV;
>
> (b) Part XIB;
>
> (c) the other provisions of this Act so far as they relate to the above provisions.
>
> (2) Nothing in this Act renders the Crown in right of a State or Territory liable to a pecuniary penalty or to be prosecuted for an offence.
>
> (3) The protection in subsection (2) does not apply to an authority of a State or Territory.

[186] In particular, *Fair Trading Act 1999* (Vic); *Fair Trading Acts 1987* (NSW); *Fair Trading Acts 1987* (SA); *Fair Trading Acts 1992* (ACT); *Fair Trading Acts 1989* (Qld); *Fair Trading Acts 1987* (WA); *Fair Trading Acts 1990* (Tas) and *Consumer Affairs and Fair Trading Acts 2011* (NT).

[187] For example, the New South Wales' *Competition Policy Reform Act 1995* (NSW), Victoria's *Competition Policy Reform Act 1995* (Vic), Tasmania's *Competition Policy Reform Act 1996* (Tas), Australian Capital Territory's *Competition Policy Reform Act 1996* (ACT), Northern Territory's *Competition Policy Reform Act 1996* (NT), Queensland's *Competition Policy Reform Act 1996* (Qld), South Australia's *Competition Policy Reform Act 1996* (SA) and Western Australia's *Competition Policy Reform Act 1996* (WA).

[188] OECD, *Reviews of Regulatory Reform Australia 2010: Towards a Seamless National Economy* (OECD Publishing, 2010), 161 <http://www.finance.gov.au/deregulation/docs/australia_report_final.pdf>.

- *The application of competitive neutrality principles*

The application of competitive neutrality was one of the six important recommendations of the Hilmer Report.[189] The core standpoint was that government businesses should not enjoy any net competitive advantage simply as a result of their public ownership.[190] Hence, government business enterprises should be treated on the same basis as their private counterparts.[191] The report also pointed out that while the reform of the *Trade Practices Act 1974* (*Cth*) (currently the *Competition and Customer Act 2010* (Cth)) might remove any exemption, the application of the Act would not address all concerns about the cost advantages and pricing policies of government businesses.[192]

Principles of competitive neutrality were embodied in Clause 3 of *the 1995 Competition Principles Agreement (CPA)*. In 1996 the Commonwealth government published a 'Commonwealth Competitive Neutrality Policy Statement' (the Policy Statement). This Policy Statement lists government business activities that are subject to competitive neutrality.[193] The Statement provides definitions of 'significant businesses'[194]

---

[189] It was observed by the Hilmer Committee that:

> Government businesses sometimes enjoy special advantages when competing with private firms, giving rise to concerns over competitive neutrality. Inconsistent approaches to this issue between jurisdictions may distort inter-state markets and may raise particular difficulties if government businesses from different jurisdictions engage in direct competition. This may be a feature of inter-state competition in electricity generation, for example.

See Hilmer Report. 16.

While subjecting government businesses to the provisions of the *Trade Practices Act 1974* (now the *CCA*) addressed in part the regulatory environment in which these businesses operated, the Hilmer Committee acknowledged that this would not of itself address all concerns over the cost advantage and pricing policy of government businesses. Therefore, the Hilmer Committee recommended a set of competitive neutrality principles be applied to government businesses. See OECD, 'Regulating Market Activities', above n 110, 127.

[190] Commonwealth of Australia, *Competitive Neutrality Policy Statement* (1996) 4 <http://www.treasury.gov.au/documents/275/PDF/cnps.pdf >.

[191] Stephen P King, *National Competition Policy* (2007) 3 <http://www.core-research.com.au/Papers/ncp22597.pdf>.

[192] Hilmer Report, xxxiv.

[193] Examples of bodies that apply competitive neutrality are Medicare Private which offers private health insurance in competition with other health insurance providers, or the Snowy Mountains Hydro-Electric Authority which produces and sells electricity in competition with other generators. See Appendix of the Policy Statement, Government Business Activities subject to Competitive Neutrality <http://www.treasury.gov.au/documents/275/PDF/cnps.pdf>.

and 'significant business activities'.[195] Besides, other activities which operate in accordance with the definition of a business and have commercial receipts exceeding $10 million per year were to be assessed for significance on a case-by-case basis.[196]

Currently, Clause 3 of the *CPA* only applies to the business activities of publicly owned entities, not to the non-business, non-profit activities of these entities.[197] Besides, they are reflected in Clause 1(5)[198] and Clause 4(1)[199] and 4(2) of the *CPA.*[200] The *CPA* also sets out a framework for transitioning to competition in a sector traditionally provided by a public monopoly for governments by requiring that a review must be undertaken before

---

[194] The following organisations are deemed to be significant as they have been specifically structured to operate along commercial lines:

- All Government Business Enterprises (GBEs) and their subsidiaries;
- Other share-limited trading companies; and
- All designated business units.

See Commonwealth of Australia, above n 190, 8.

[195] For the purposes of competitive neutrality in the Commonwealth sector, to be considered a 'business activity' the following criteria must be met:

- There must be user-charging for goods or services (the user may be in the private sector or public sector);
- There must be an actual or potential competitor (either in the private or public sector) ie users are not restricted by law or policy from choosing alternative sources of supply; and
- Managers of the activity have a degree of independence in relation to the production or supply of the good or service and the price at which it is provided.

See Commonwealth of Australia, above n 190, 7.

[196] Such businesses are required to implement competitive neutrality. Notably, commercial business activities with a turnover of under $10 million per annum may be also required to follow competitive neutrality arrangements following a complaint to the Commonwealth Competitive Neutrality Complaints Office (CCNCO). This Office is located within the Productivity Commission. In this case, such activities may choose to implement competitive neutrality principles on a notional basis to pre-empt a complaint on the ground of an unfair competitive advantage. See Commonwealth of Australia, above n 188, 8.

[197] *Competition Principles Agreement (CPA)* cl 3(1).

[198] Clause 1(5) expresses that 'this Agreement is neutral with respect to the nature and form of ownership of business enterprises'.

[199] According to Clause 4(1), each government is to be 'free to determine its own agenda for the reform of public monopolies'.

[200] The Agreement requires governments to remove from a public monopoly any responsibilities for industry regulation and re-locate industry regulation functions so as to prevent the former monopolist enjoying a regulatory advantage over its (existing and potential) competitors. See *Competition Principles Agreement* cl 4(2).

privatising a government monopoly.[201] In line with the public monopoly reform, a corporatized model was recommended in the *CPA* which targeted significant government business enterprises classified as 'Public Trading Enterprises' and 'Public Financial Enterprises'.[202] Finally, the *CPA* suggests a number of measures to ensure the competitive neutrality principle in terms of the introduction of competition to the utilities sector.[203]

At the Commonwealth level, the application of competitive neutrality arrangements takes account of the legal structure of the organisation of significant businesses operating within the Commonwealth, its purpose and management processes. For that reason, it may vary depending on the organisation's degree of commercialisation.[204] In particular, Commonwealth organisations carrying on business activities are divided into two types including those which are legally separate from the Commonwealth (government business enterprises – GBEs), non-GBE companies and authorities) and those which are not legally separate from the Commonwealth (business units, other organisations engaging in

[201] According to Clause 4(3), before a state or territory introduces competition to a market traditionally supplied by a public monopoly and before it privatises a public monopoly, a review must be undertaken into: the appropriate commercial objectives for a public monopoly; the merits of separating any natural monopoly and potentially competitive elements of a public monopoly; to identify the most effective means of separating regulatory functions from commercial functions of a public monopoly; to consider the most effective means of implementing the competitive neutrality principles set out in this Agreement; to determine the merits of any community service obligations undertaken by the public monopoly and the best means of funding and delivering any mandated community service obligations; to identify the price and service regulations to be applied to the industry; and define the appropriate financial relationships between the owner of the public monopoly and the public monopoly, including the rate of return targets, dividends and capital structure. See *Competition Principles Agreement* cl 4(3).

[202] The recommendation has two contents: (1) traditional statutory bodies that previously provided services for the state turn into corporations incorporated under the *Corporations Act 2001* (Cth) and, (2) such bodies provide services on a purchaser pays model. Hence it enables the *Competition and Consumer Act 2010* (Cth) to apply to them in the same manner as any other business and this had a profound effect on the way in which governments do business, as many public utilities were corporatized and later were privatised. See Miller, above n 170, 341.

Clause 4(1)(a) recommends that for significant Government business enterprises which are classified as 'Public Trading Enterprises' and 'Public Financial Enterprises' under the Government Financial Statistics Classification, the Parties will, where appropriate, adopt a corporatisation model for these Government business enterprises (noting that a possible approach to corporatisation is the model developed by the inter-governmental committee responsible for GTE National Performance Monitoring).

[203] As is stated, governments need to impose on their government business enterprises full Commonwealth, State and Territory taxes or tax equivalent systems and debt guarantee fees directed towards offsetting the competitive advantages provided by government guarantees. Additionally, they also need to impose on their business enterprises the same regulations that private sector operators in the relevant industry are subject to. See Clause 3(4)(b). They need to ensure that the prices charged for goods and services by significant government business enterprises need to reflect full cost attribution. See *Competition Principles Agreement* cl 4(5)(b).

[204] Commonwealth of Australia, above n 190, 9.

business activities).[205] A government owned corporation (GOC) is considered outside the scope of the government activities covered by the Commonwealth's Competitive Neutrality Policy if it is created to provide public services that are non-market in nature. The non-market nature is regarded as the provision that it is not on a user-charging system and is largely financed through taxes.[206]

At the State and Territory levels, the *CPA* requires Governments to ensure that all Government agencies undertaking significant business activities in contestable markets act in a competitively neutral way i.e. they are subject to taxation, financial and regulatory requirements equivalent to the private sector. However, States and Territories have discretion on how jurisdictions choose to achieve the objectives of Clause 3. Each State and Territory is free to determine its own agenda for the implementation of competitive neutrality principles. They are free to determine which Government businesses are designated to be reformed using their own definitions of 'significant' and 'where appropriate' and are free to calculate the benefits and costs of implementation. 'Government business' in this context often refers to those parts of the public sector that are principally engaged in trading activities, including the provision of goods and services to other parts of the public sector. The term 'Government business' often includes Public Trading Enterprises, State Owned Corporations and General Government Businesses.[207]

In implementing competitive neutrality, States and Territories have established independent entities which consider competitive neutrality complaints[208] together with

---

[205] Ibid 9-11.

[206] Ibid 7; Corones, above n 9, 16.

[207] The New South Wales's Policy Statement on the Application of Competitive Neutrality <http://www.treasury.nsw.gov.au/__data/assets/pdf_file/0007/3868/tpp02-1.pdf>; Victoria's Competitive Neutrality Policy <http://www.dtf.vic.gov.au/CA25713E0002EF43/WebObj/CompetitiveNeutralityPolicy/$File/Competitive%20Neutrality%20Policy.pdf>.

[208] National Competition Council, *Assessment of Governments' Progress in Implementing the National Competition Policy and Related Reforms* (2005) x <http://ncp.ncc.gov.au/docs/2005%20assessment.pdf>. For example, the Queensland Competition Authority (QCA), New South Wales Independent Pricing and regulatory Tribunal (PART), Victoria Competition and Efficiency Commission (VCEC), the South Australia Competition Commissioner, the Tasmanian Government Prices Oversight (GPOC) and the Australian Capital Territory's Independent Competition and Regulatory Commission (ICRC). They are important for enhancing transparency and ensuring a forum for private competitors to complain to if they believe that competitive neutrality principles are not being applied by governments.

their own Competitive Neutrality Guidelines.[209] Besides, the Australian Government Competitive Neutrality Complaints Office (AGCNCO) is an autonomous unit within the independent Productivity Commission. The AGCNCO functions to receive and investigate complaints and advise the Treasurer on the application of competitive neutrality to Australian Government business activities.[210] In 2005, after 10 years of implementing the NCP, major government business enterprises were corporatized in all states and territories, while other significant businesses were exposed to competitive neutrality principle.[211]

It can be observed that having the same objective as Article 87 of the *EC Treaty*,[212] Australia's competitive neutrality goes further by addressing all types of competitive advantage that a government business enterprise might enjoy, the overriding principle mentioned being that government businesses when competing with the private sector should not enjoy any net competitive advantage brought back from their public sector ownership. This is important for eliminating distortions in allocating resources arising out of the public ownership of entities engaged in significant business activities.[213]

---

[209] For example, the Queensland's Competitive Neutrality Complaints Process (2001) <http://www.treasury.qld.gov.au/office/knowledge/docs/ncp/ncp-complaints.pdf >; the Victoria's Competitive Neutrality Policy (2000) <http://www.dtf.vic.gov.au/CA25713E0002EF43/WebObj/CompetitiveNeutralityPolicy/$File/Competitive%20Neutrality%20Policy.pdf > and New South Wales' Policy Statement on the Application of Competitive Neutrality (2002) <http://www.treasury.nsw.gov.au/__data/assets/pdf_file/0007/3868/tpp02-1.pdf>. See also Corones, above n 9,16.

[210] Complaints can be made to the AGCNCO by any individual, organisation or government body if there are grounds that an Australian Government business activity has not been subject to or is not complying with competitive neutrality requirements, or that current competitive neutrality arrangements are not effective in removing a net competitive advantage. The complaint is then resolved through mediation. If this stage is not successful, a formal investigation will be commenced by the AGCNCO. The AGCNCO may advise directly government business entities as to identified inadequacies and suggest actions to improve compliance if it considers that competitive neutrality arrangements are not being followed. It may propose appropriate remedial action or recommend the Treasurer undertake a formal public inquiry into the matter if a complaint is not settled by a suitable resolution. See OECD, 'Regulating Market Activities', above n 110, 130.

[211] National Competition Council, above n 208, x.

[212] Article 87(1) of the *EC Treaty* reads as follows:

> Save as otherwise provided in this Treaty, any aid granted by a Member State or through State resources in any form whatsoever which distorts or threatens to distort competition by favouring certain undertakings or the production of certain goods shall, insofar as it affects trade between Member States, be incompatible with the common market.

[213] Miller, above n 170, 340.

- *The role of institutions for the implementation of the NCP*

Besides making the *Competition and Customer Act 2010* (Cth) (formerly the *Trade Practices Act 1974* (*Cth*)) applicable to all Australian businesses, the reorganisation of the institutional framework was the next step which was important for implementing the NCP. Following the Hilmer Committee's recommendations, four institutions were established and made up the competition policy reform package which plays an essential role under Australian Competition Law, namely: the Australian Competition and Consumer Commission (ACCC), the National Competition Council (NCC), the Australian Competition Tribunal and the National Energy Regulator.[214] For the purpose of this section, the roles of the first two institutions are particularly focused on because they are significantly related to the implementation of competition rules to public monopolies.

The ACCC was established in November 1995 by the merger of the former Trade Practices Commission[215] and the Prices Surveillance Authority[216] upon the recommendation of the Hilmer Committee. The ACCC is an independent, national statutory authority.[217] It has a wide range of roles and responsibilities, such as enforcing the competition provisions in Pt IV and Pt VII, as well as governing access to essential facilities under Pt IIIA of the *CCA*. As a result of the Hilmer reforms the ACCC also administers the Competition Code (known as associated State/Territory competition policy application legislation). In this domain, it can undertake actions to enforce the provisions of the Competition Code and deal with authorisation applications and notifications that arise under the Code. Since the merger of the Prices Surveillance Authority in 1995, the ACCC has undertaken responsibility for price surveillance in those market where competitive pressure are not sufficient to achieve efficient prices and

[214] Ibid 57.

[215] The Trade Practices Commission was created under the *Trade Practices Act 1974* (*Cth*) (currently the *Competition and Consumer Act 2010* (Cth)) which had a wide ranging role to administer the Act. The amendment of the *TPA* following acceptance of the Hilmer Report resulted in the reconstitution of the Australian Competition and Consumer Commission.

[216] The Price Surveillance Authority was created according to *Prices Surveillance Act 1983* s 6.

[217] OECD, *Competition Policy in Australia* (2010), 6 <http://www.oecd.org/dataoecd/63/61/44529918.pdf>.

protect customers.[218]

The next institution which had an important role in the implementation of NCP and the application of competition rules to public monopolies at nationwide level was the National Competition Council.[219] This institution was established jointly between the Commonwealth, State and Territory governments under the recommendations of the Hilmer Committee.[220] Since 1995 the Council has played a key role in extending the scope of competition laws.[221] The NCC was constructed in order to measure the progress of the States and hence to determine payment tranches under the agreements. It was therefore set up not to regulate but to assess.

The Council's main function is to recommend on the regulation of third party access to services provided by monopoly infrastructure[222] in order to promote the efficient operation of, use of and investment in monopoly infrastructure. For example, in 2005, the NCC published the Council's 2005 assessment report, providing a snapshot of the outcomes achieved under the National Competition Policy from 1995 to 2005 and final recommendations on the distribution of National Competition Policy payments.[223] Its recommendations are made to relevant ministers in relation to applications for declaration of services and also the certification of state or territory access regimes. The Council has a similar role under the *National Gas Law*, whereby it makes recommendations on the

[218] *CCA* (formerly *TPA*) s 95E. Its roles in terms of surveillance of prices include receiving notification of price increases in relation to declared goods and services; monitoring prices in industries as directed by the Treasurer and undertaking price inquiries at the Treasurer's request. See the *CCA* ss 95F, 95G, 95P, 95X and 95ZE.

[219] It was originally established under the *Trade Practices Act 1965* and continues under the *Trade Practices Act 1974* (*Cth*). Prior to 6 November 1995, the Tribunal was known as the Trade Practices Tribunal. See Parliament of Australia, Australia's National Competition Policy: Its Evolution and Operation (2001) <http://www.aph.gov.au/library/intguide/econ/ncp_ebrief.htm>.

[220] The establishment of a National Competition Council under the *TPA* (now *CCA*) was raised in the Competition Principles Agreement and the Council was formed after the adoption of the Competition Policy reform Act 1995. National Competition Council was formed in 1995 by agreement of the Council of Australian Governments (COAG) See <http://www.ncc.gov.au/index.php/about/about_us >.

[221] Miller, above n 170, 60.

[222] It is noted that access regulation for third parties is embodied in Part IIIA of the *Conpetition and Consumer Act 2010* (formerly the *Trade Practice Act 1974*) (Cth) under the title 'The National Access Regime'. The regime provides for access to the services of infrastructure facilities on appropriate terms, through the declaration of services.

[223] National Competition Council, above n 208.

coverage of natural gas pipeline systems.[224]

In sum, from these experiences in the application of competition law to state monopolies, a few points can be made here. First, there should be a strong mechanism for supervising and dealing with breaches of competition law and a powerful competition authority, together with a transparent system for assessing conditions of granting exemptions. Second, there should be a clear list of areas in which state monopolies may be exempted from the coverage of competition law. Third, the law must facilitate the reduction of using state measures that may hinder competition by advocating the competitive neutrality principle. Finally, there must be a close coordination between the competition authority and regulators in industries that state monopolies are operating.

5.2.2 Principles of competition law applied to state monopolies

There are three principles (also referred to as approaches or rules) that are mainly applied to state monopolies in the US and EU as well as other competition legislations, namely: *per se*, *rule of reason* and *ancillary restraints*. Such principles are important for declaring an anti-competitive practice illegal, determining whether an exemption can be granted, or deciding whether a merger or acquisition can be performed. The premise for this discussion is that state monopolies are basically being treated equally to other firms.

5.2.2.1 Per se

The *per se* principle is often employed to decide whether an agreement is anti-competitive.[225] In general, anti-competitive agreements[226] are considered illegal by themselves (*per se*), without any further consideration.[227] In the US, the *per se* principle applies to such practices as price fixing and market sharing, group boycotts, tie-in

[224] National Competition Council website, <http://www.ncc.gov.au/index.php/about/about_us>.

[225] It was held in *National Society of Professional Engineers* that '…agreements whose nature and necessary effect are so plainly anti-competitive that no elaborate study of the industry is needed to establish their illegality- are "illegal per se"'. See *National Society of Professional Engineers v United States* 435 US 679, 692 (1978).

[226] The term 'agreement' is used to include such kinds of cooperation among undertakings as agreements, contracts, understandings or similar terms.

[227] CUTS, *Competition in Vietnam: A Toolkit* (CUTS International, 2007) 107.

contracts and other kinds of exclusive dealing, including requirements contracts.[228]

The premise for the *per se* principle is the belief that there exist certain types of agreements which always or almost always tend to raise prices or reduce output by themselves (*per se*) and no pro-competitive effects can be found.[229] An agreement is declared *per se* illegal if it 'facially appears to be one that would always or almost always tend to restrict competition and decrease output'.[230] Hence, an agreement will automatically be considered as 'illegal' without any further detailed inquiry into the market positions of the parties as well as the justifications for its existence.[231] The *per se* principle is believed to have advantages as it makes the law 'self-enforcing', without depending on an evaluation of the impact of the conduct on competition conditions.[232] It makes legal proceedings to enforce the law simpler because it need only identify the illegal conduct and prove that it occurred.[233] Finally, p*er se* prohibitions offer savings in enforcement costs and greater certainty for firms seeking to comply with the law.[234]

The EU competition law approach appears to be similar. The *Guidelines on the Application of Article 81(3)* (currently Article 101 *TFEU*) *of the Treaty*[235] sets out guidance to determine the illegality of an agreement which provides two tests to see if it meets the criteria set forth in Article 101(1) and does not meet the exemption conditions

---

[228] Corones, above n 9, 35. Criteria to assess the illegality of an agreement were mentioned in *Chicago Board of Trade.* See *Chicago Board of Trade v United States* 246 US 231, 238(1918).

[229] Nguyen Van Cuong, *Illegality of Cartel: Comparative Study of Criteria in the U.S, EC and Japan and their Implications for Vietnam* (LLM Thesis, Niigata University, 2004) 62.

[230] *Broadcast Music Inc. v Columbia Broadcasting Sys. Inc.* 441 US 1 (1971).

[231] Cuong, above n 229, 61.

[232] Corones, above n 9, 35; Hilmer Report, 28.

[233] Kaysen and Turner, *Antitrust Policy: An Economic and Legal Analysis* (Harvard University Press, 1959) 142. It was explained by the US Supreme Court in *Northern Pacific Railway Co. v United States* that:

> …[t]his principle of *per se* unreasonableness not only makes the type of restraints which are proscribed by the Sherman Act more certain to the benefit of everyone concerned, but it also avoids the necessity for an incredibly complicated and prolonged economic investigation into the entire history of the industry involved, as well as related industries, in an effort to determine at large whether a particular agreement has been unreasonable- an inquiry so often wholly fruitless when undertaken.

See *Northern Pacific Railway Co. v United States* (1958) 356 US 1; Similar statement can be found in *Continental TV Inc v GTE Sylvania Inc* 433 US 36(1976); Hilmer Report, 28.

[234] Hilmer Report, 28.

[235] Commission of European Communities, *Guidelines on the Application of Article 81(3) of the Treaty* (2004) OJ C 101 <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2004:101:0097:0118:EN:PDF>.

set forth in Article 101(3).[236] The Commission took the view that agreements should be distinguished between those which have as their *object* the restriction of competition and those which have as their *effect* the restriction of competition. Hence, certain agreements are considered as anti-competitive if they are in nature restrictive to competition (restrictions of competition by objective).In that case, no further inquiry into their actual effects in the market is needed.[237] As in the US, agreements subject to the *per se* principle are those among competitors to fix prices,[238] limit output,[239] market division,[240] and bid rigging.[241]

The *per se* rule of illegality is also employed in Australian competition law, which corresponds to that under US jurisprudence. As was noted by the High Court in *Rural Press Ltd v ACCC*,[242] there are some practices that are so generally offensive to the competitive goals that 'they are to be condemned without consideration of any purpose or effect of substantially lessening competition in a market'.[243] There is no further inquiry needed in relation to conducts including cartel offences, cartel civil prohibitions, exclusionary provisions, third-line forcing, re-sale price maintenance, misuse of market power and misuse of trans-Tasman market power. The court is simply required to determine if such conducts fall within the relevant statutory definition, in which case they

---

[236] Ibid para 11.

[237] Ibid para 20-24. It was stated by the ECJ in *Consten and Grundig* that '…there is no need to take account of the concrete effects of an agreement once it appears that it has as its object the prevention, restriction or distortion of competition'. See *Consten and Grundig v Commission* (C-56-8/64) [1966] ECR 342, 473. See also in *BNIC v Clair* (C-123/83) [1985] ECR 391, 399 and *Verband der Sachversicherer v Commission* (C-45/85) [1987] ECR 405.

The principle was mentioned in a number of cases where it was considered that 'if an agreement is indisputably intended to restrict competition, e.g. by price-fixing, it is unnecessary to show that price competition has in fact been affected in order to establish the infringement'. See *Miller v Commission* (C-19/77) [1978] ECR 131; *BMW Belgium SA et al v Commission* (C-32/78 and C-36-82/78) [1979] ECR 2435; *Hasseblad v Commission* (C-86/82) [1984] ECR 883.

[238] *ACF Chemiefarma v Commission* (C-41/69) [1970] ECR 661; *VBVB and VBBB v Commission* (C-43 & 63/82) [1984] ECR 19; *BNIC v Clair* (C-123/83) [1985] ECR 391 399; *Erauw-Jacquery* (C-27/87) [1988] ECR 1919.

[239] *Guidelines on the Applicability of Article 81 of the EC Treaty to Horizontal Cooperation Agreements*, Jan. 6, 2001 (2001/C 3/02) <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2001:003:0002:0030:EN:PDF>.

[240] *ACF Chemiefarma v Commission* (C-41/69) [1970] ECR 661 696; *IAZ v Commission* (C-96/82) [1983] ECR 3369.

[241] Richard Whish and Brenda Sufrin, *Competition Law* (Butterworths, 3rd, 1993) 409.

[242] *Rural Press Ltd v ACCC* (2003) 216 CLR 53 87 [82].

[243] Ibid 87.

will be prohibited without relaxation of prohibition from the court.[244] However, these *per se* prohibitions under the *Competition and Consumer Act 2010* (Cth) (formerly *Trade Practices Act 1974* (*Cth*)) are, in effect, statutory *per se* rules. Hence, this is a difference between Australia and the US antitrust law, as in the latter they are court-based rules developed by the courts over time.[245]

5.2.2.2 Rule of reason

The *rule of reason* is another principle applied to the analysis, based on a number of factors to determine whether a practice is a restraint of competition. *Standard Oil*[246] was the first case in which the US Supreme Court stated that only 'unreasonable restraint of trade' was condemned by this Section, bringing a change in the way to interpret Section 1 of the *Sherman Act*, even though what 'unreasonable' really means was not clearly defined.[247] This was later dealt with in *Chicago Board of Trade*.[248] The groundwork for the rule of reason principle is that a practice can have both pro-competitive effects ('efficiency-enhancing' effects) and anti-competitive effects ('efficiency-reducing' effects). Efficiency is assessed by such indicators as increase in market output (market supply quantity), the lowering of the market price and bringing new products to market faster.[249] An assessment using the *rule of reason* principle is to determine the overall

---

[244] Corones, above n 9, 185.

[245] Ibid. There has been some modifications in terms of conducts that are subject to *per se* prohibitions in Australia Competition Law, including the definition of the concept 'restraint of trade' with regard to 'contracts, arrangements or understandings' and the insertion of some new *per se* prohibitions, such as two cartel offences and two parallel civil prohibitions for making or giving effects to contracts, arrangements or understandings. See *Visy Paper Pty Ltd v ACCC* (2003) 216 CLR 1 19.

[246] *Standard Oil Co of New Jersey v United States* 221US 1, 58 (1911).

[247] Cuong, above n 229, 57.

[248] *The rule of reason* principle was defined by this statement:

> The legality of an agreement or regulation cannot be determined by so simple a test as whether it restrains competition. Every agreement concerning trade, every regulation of trade, restrains... The true test of legality is whether the restraint imposed is such as merely regulates or perhaps thereby promotes competition or whether it is such as may suppress or even destroy competition. To determine that question the court must ordinarily consider the facts peculiar to the business…; its condition before and after the restraint was imposed; the nature of the restraint and its effect, actual or probable. The history of the restraint, the evil believed to exist, the reason for adopting the particular remedy, the purpose or end sought to be attained, are all relevant facts. This is not because a good intention will save an otherwise objectionable regulation or the reverse; but because knowledge of intent may help the court to interpret facts and to predict consequences.

See *Chicago Board of Trade v United States* 246 US 231 (1918)

[249] Federal Trade Commission and the U.S. Department of Justice, *The Antitrust Guidelines for Collaborations among Competitors* (2000) ss 2.1- 2.2 <http://www.ftc.gov/os/2000/04/ftcdojguidelines.pdf>.

competitive effect, which will be measured by balancing the pro-competitive effect or benefit brought to competition and the anti-competitive effect or harmfulness caused to competition. An agreement in particular and a competitive practice in general, will be considered as anti-competitive if the result of the determination shows that the anti-competitive effect triumphs over the pro-competitive effect, otherwise it is regarded as being to promote competition. A number of factors are employed to assess the balance between the two effects.[250]

In the EU, this principle is provided through a process (or restriction of competition tests) in coordination with the *per se* principle. An agreement is declared illegal if it meets the criteria set forth in Article 101(1) while it does not meet the exemption conditions set forth in Article 101(3) *TFEU* .[251] The principle of *per se* is provided by Article 101(1) *TFEU* and the *rule of reason* principle is provided in Article 101(3) through a process to consider granting exemptions. A final conclusion about the illegality of the agreement in question will depend on the assessment of the balance of anti-competitive effects and pro-competitive effects. Even though an agreement is caught by Article 101(1) *TFEU* as illegal, it is still considered legal if it satisfies conditions to be exempted according to Article 101(3) *TFEU* . The spirit of *rule of reason* is observed in the similar way to that of the US antitrust law.[252] Criteria for the determination of exemptions under *rule of reason* principle set forth in Article 101(3) *TFEU* and in the *Guidelines on the Application of Article 81(3) of the Treaty* are: (i) efficiency gain, (ii) fair share for consumers, (iii)

---

[250] For example, factors to consider an agreement illegal include the market conditions before and after the presence of the agreement, the nature of the agreement, the history of the agreement and the actual or probable effects of the agreement. See Cuong, above n 229, 59.

[251] Where all anti-competitive effects of an agreement are decided by Article 101(1) *TFEU*, all pro-competitive effects of the agreement in question are based on criteria in Article 101(3). See *Guidelines on the application of Article 81(3) of the Treaty* on 27 April 2004 (2004/C 101/08) para 11.

[252] This is stated by the EU Commission:

> The aim of the Community competition rules is to protect competition in the market as a means of enhancing consumer welfare and of ensuring an efficient allocation of resources. Agreements that restrict competition may at the same time have pro-competitive effects by way of efficiency gains. Efficiencies may create additional value by lowering the cost of producing an output, improving the quality of the product or creating a new product. When the agreements outweigh its anti-competitive effects the agreement is on balance pro-competitive and compatible with the objectives of the Community competition rules… This analytical framework is reflected in Article 81(1) and Article 81(3) (currently Articles 101(1) and 101(3) *TFEU*).

See *Guidelines on the Application of Article 81(3) of the Treaty*, 27 April, 2004 (2004/C 101/08) para 41.

indispensability of the restrictions and (iv) no elimination of competition.[253]

In Australia the *rule of reason* principle is applied through a competition test.[254] The purpose of this test is to evaluate the competitive effect of a conduct by considering such questions as the nature of the restriction, the purpose or reason of such conduct and structure or markets in which it has an effect on competition. Such a conduct which is subject to a competitive test will not be prohibited absolutely, but only if there is evidence that it has the purpose of substantially lessening competition, or has the effect of substantially lessening competition, or is likely to have the effect of substantially lessening competition.[255] Hence, the prohibition of conducts under this principle depends on the consideration of the anti-competitive purpose of the conduct in question or its impact on competitive conditions. Under the *CCA* (formerly *TPA*), conducts subject to the *rule of reason* principle are: arrangements between competitors such as joint-ventures and other forms of collaboration (other than price fixing and exclusionary provisions which are *per se* prohibited); exclusive dealing and distributions arrangements such as franchising and mergers and other forms of acquisitions of shares and assets.[256]

However, in the application of this principle, the courts in Australia have a more limited role because competition and efficiency considerations are partitioned between the courts, the ACCC and the Tribunal. This is different from the United States where courts take

---

[253] Commission of European Communities, *Guidelines on the Application of Article 81(3) of the Treaty* (2004) OJ C 101 97 – 118 <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2004:101:0097:0118:EN:PDF>.

[254] Although a competition analysis is said to be based on the rule of reason principle, it is not always the same as the consideration of a conduct based on public benefit grounds. The aim of a rule of reason analysis is to consider the extent to which a conduct may affect competition. A rule of reason analysis is only concerned with the competitive significance of the restraint. Therefore, it does not either require or permit the consideration of other social or economic factor. Under the US rule of reason, the challenged restraint's competition impact is the only proper subject for evaluation. See John Dunns, 'Competition Law and Public Benefits' (1994) 16 *Adelaide Law Review* 258. See further Earl W Kintner, *A Treatise on the Antitrust Laws of the United States* (Anderson Publishing, 1980) 361-362.

In Australia, a rule of reason analysis is carried out by an assessment of the purposes of the behaviour and likely effect of the behaviour to see if there is substantial lessening of competition. An important distinction is that, a rule of reason analysis aims to prohibit behaviour that is unreasonable restraints of trade based on the view that such conduct is a likely detriment to competition. A consideration of public benefits brought by a conduct, through notification or authorization, may allow such a restrictive conduct to proceed or exemptions can be granted. This is done after competition authority concludes that its benefits outweigh the benefits to the public foregone by the absence or restriction of competition. See Commonwealth of Australia, Trade Practices Act Review Committee, *Report to the Minister for Business and Consumer Affairs* (1976) 11.14-15.

[255] Corones, above n 9, 186-187; Hilmer Report, 28.

[256] Corones, above n 9, 186.

into account efficiency and a pro-competitive justification as part of the *rule of reason*.[257]

5.2.2.3 Ancillary restraint doctrine

The ancillary doctrine originated in the viewpoint of the US courts that there should be distinguished restraints to competition brought by an ancillary agreement to a bigger one and those caused by an agreement itself. In *Addyston Pipe*[258] the court firstly argued that some agreements which were in fact ancillary to a bigger transaction should be allowed to effectively ensure that this transaction could be carried out. This viewpoint is interpreted as meaning that when an agreement serves as a necessary part of a bigger scheme or bigger agreement among competitors, it is considered as an 'ancillary' agreement and such ancillary restraints are regarded as legal.[259] An agreement which is not ancillary will be considered as a naked agreement.[260]

Similarly, the ancillary restraint doctrine has been adopted by the ECJ in a number of cases such as *Remia BV and Verenigde Bedrijven Nutricia BV*[261] and *Pronuptia de Paris GmbH*.[262] In these cases the ECJ took the view that pricing agreements are allowed on the grounds that restrictions were objectively necessary for the success of otherwise legitimate agreements. The ancillary doctrine has recently been explained by the *Guidelines on the Application of Article 81(3) of the Treaty*, in which ancillary restraints cover any restriction of competition which is directly related and necessary to the

---

[257] Corones, above n 9.

[258] *United States v Addyston Pipe & Steel Co* 85 F. 271 (6th Cir. 1898), *modified and affirmed* 175 US 211 (1899).

[259] *Arizona v Maricopa County Med. Society* 457 US 332 (1982).

[260] This was clearly stated in *Rothery Storage & Van Co.* as below:

> To be ancillary and hence exempt from the *per se* rule, an agreement eliminating competition must be subordinate and collateral to a separate, legitimate transaction. The ancillary restraint is subordinate and collateral in the sense that it serves to make the main transaction more effective in accomplishing its purpose. Of course, the restraint imposed must be related to the efficiency sought to be achieved. If it is so broad that part of the restraint suppresses competition without creating efficiency, the restraint is, to that extent, not ancillary.

Taft (cited from *United States v Addyston Pipe & Steel Co.* (1898) added the further obvious qualification that even restraints ancillary in form are illegal if they are part of a general plan to gain monopoly control of a market. See *Rothery Storage & Van Co. v Atlas Van Lines* 792 F.2d 210 (1986).

[261] *Remia BV and Verenigde Bedrijven Nutricia BV v Commission* (C-42/84) [1985] ECR 2545.

[262] *Pronuptia de Paris GmbH v Pronuptia de Paris Irmgard Schillgalis* (C-161/84) [1986] ECR 353.

implementation of a main non-restrictive transaction and proportionate to it.[263] It is further explained in another case that if an agreement in its main parts does not have as its object or effect the restriction of competition, then restrictions which are directly related to and necessary for the implementation of that agreement (i.e. ancillary restraints), also fall outside Article 101(1) *TFEU* .[264]

5.3 Implications for the application of competition law to state monopolies

There are two influential discussions that impact most on the application of competition law, namely public choice and public interest. This section is divided into two sub-sections to deal with each of them separately.

5.3.1 Public choice relating to the application of competition law

5.3.1.1 What is 'public choice'?

Public choice is an economic theory of politics which was introduced by Duncan Black in 1948[265] and Kenneth Arrow in 1951.[266] It was then developed by Gordon Tullock and James M Buchanan in 1962 in their book *The Calculus of Consent* and later in Buchanan's book *The Limits of Liberty* in 1975.[267] Using the tools of modern (neoclassical) analysis, it tries to analyse political processes and the interaction between the economy and the polity. It explains the workings of political institutions and of the behaviour of governments, parties, voters, interest groups and (public) bureaucracies.[268] The core idea of this theory is that governments are not free in following their choices, but depend on those of powerful interest groups. Regulation is often a product of rent-

[263] *Métropole Télévision SA (M6) and others* (T-354/00) [2001] ECR II-2459 10, cited in note 37 of the *Guidelines on the Application of Article 81(3) of the Treaty* <http://www.oeaw.ac.at/eif/competition/en/guidelines/c_10120040427en00970118.pdf>.

[264] *Luttikhuis v Corbeco* (C-399/93) [1995] ECR I-4515, 12 -14 cited in note 38 of the *Guidelines on the Application of Article 81(3) of the Treaty* <http://www.oeaw.ac.at/eif/competition/en/guidelines/c_10120040427en00970118.pdf>.

[265] Duncan Black, *The Theory of Committees and Elections* (Cambridge, 1948).

[266] Kenneth J Arrow, *Social Choice and Individual Values* (New York, 1951).

[267] James M. Buchanan, *The Limits of Liberty* (Chicago, 1975).

[268] Bruno S Frey, *The Public Choice View of International Political Economy* (1983), 4 <http://www.iiasa.ac.at/Admin/PUB/Documents/CP-83-007.pdf>.

seeking by interest groups,[269] thus laws and regulations will tend to benefit small and well-organised interest groups, bringing among other things immunities from antitrust to them.[270] Government behaviour cannot be separated from the interests of those groups and this will affect the decision making.[271] Governments become subject to political capture by national interest groups engaged in rent-seeking activities. Similarly, rent-seeking and hidden political interests can undermine domestic constitutive rules.[272]

In development of public choice theory, Stigler in 1971 developed an idea that actions of the government are influenced by special interests group that provide financial and political support in exchange for favoured legislation.[273] Special interest groups seek political favours in the form of legislation and to achieve this they often lobby those parties whose programmes and policies favour their interests and offer them contributions in order to convince uninformed or easily impressed voters then they should succeed in the election.[274] In that case governments become the tools of rent seekers who can intervene in the competition process and the allocation of resources.

The motivation for interest groups in engaging in the influence of political choices is explained by the pursuit of their own interests.[275] Particular groups, for example, industries, tend to use political influence to enhance the well-being of their members. Because these groups compete each other to gain political influence, this competition determines the equilibrium structure of taxes, subsidies and other political favours.[276]At the same time governments, characterised by individuals working for the governments

---

[269] James M Buchanan and Gordon Tullock, *The Calculus of Consent: Logical Foundations of Constitutional Democracy* (Univesity of Michigan Press, 1962); George J Stigler, 'The Theory of Economic Regulation' (1971) 2 *Bell Journal of Economics and Management Sciences.*

[270] Daniel Sokol, *Limiting Anti-Competitive Government Intervention That Benefit Special Interests* (2009) <http://www.coleurop.be/content/gclc/documents/GCLC%20Working%20Paper%2002-09%20-%20Daniel%20Sokol.pdf>.

[271] Anna Riviere Cinnamond, *A Public Choice Approach to the Economic Analysis of Animal Health Care Systems* (2004), 5 <ftp://ftp.fao.org/docrep/fao/010/ag276e/ag276e.pdf>.

[272] Taylor, above n 9, 166.

[273] Stigler, 'The Theory of Economic Regulation' above n 269, 3-21.

[274] Bert Van Roosebeke, *State Liability for Breaches of European Law: An Economic Analysis* (Deutscher Universitätsvlg, 2007).

[275] Mancur Olsen, *The Logic of Collective Action: Public Goods and the Theory of Groups* (Harvard University Press, 1965); Gene M Grossman and Elhanan Helpman, 'Protection for Sale' (1994) 84 (4) *American Economic Review* 833-850 <http://pages.uoregon.edu/bruceb/Andrea.pdf>.

[276] Becker Gary, 'A Theory of Competition among Pressure Groups for Political Influence' (1983) 98 (3) *Quarterly Journal of Economics* 371 <http://www.jstor.org/stable/pdfplus/1886017.pdf>.

but also pursuing their own interests, must also seek the support of such interests groups, as prolonging their term of the government is the condition for the achievement of their own interests.

5.3.1.2 The application of competition law from a public choice perspective

Having observed that special interests groups and individuals in these groups can influence the making of political choices of governments, it must be assumed that such activities can affect the application of competition law.

Interests groups can play an active role in the process of formulating substantive rules of competition law. Their activities can advocate or defend the transplantation of competition rules into domestic legislation so as to maintain or facilitate their competitive advantages. An example for this is the passage of the *Robinson-Patman Act 1936* which was originated from the proposal of the US Wholesale Grocers Association.[277] The initial title of the Act –'*Wholesale Grocer's Protection Act*' reflected the desire for protection of a particular interest group to protect them from price discrimination.[278] Similarly, in the European community, large firms in some countries have defended the transplantation of the EC rules into national competition laws.[279] Interests groups can take advantage of their influence on the legislation and decision making by lobbying for the support of legal

[277] Earl W Kintner, *A Robinson-Patman Primer: A Guide to the Law Against Price Discrimination* (Macmillan, 2nd ed, 1979).

[278] The Act was an attempt a group of smaller retailers to reduce the ability of the the A&P grocery chain in using of its scale advantage to extract better tersm from suppliers through price discrimination or buyer power, thus disadvantaging its smaller smaller competitors. See Joel B Dirlam and Alfred E Kahn, 'Antitrust Law and the Big Buyer: Another Look at the A&P Case' (1952) 60 (2) *Journal of Polictical Economy* 118, cited in Sokol, above n 270. See also Terry Calvani and Gilde Breidenbach, 'An Introduction to the Robinson-Patman Act and Its Enforcement by the Government' (1990-1991) 59 *Antitrust Law Journal*; Magaret M Zwisler, '*Volvo Trucks v Reeder Simco*: Judicial Activism at the Supreme Court?' (2006) 20 (3) *Antitrust* <http://apps.americanbar.org/antitrust/at-committees/at-pdiscr/special-resources/pdf/Sum06-ZwislerC.pdf>.

[279] Bergh and Camesasca, above n 14, 156-157. For example, large export firms in Sweden requested that the uniformity between EC law and national law should bring an advantage for export businesses, since the same rules will operate in the Common Market and at home. Similarly, large Dutch firms were concerned about a competitive struggle on the European market with the view that American firms might be tempted to use the possibility of initiating legal proceedings with the European Commission or national judges as a competitive weapon. In the setting down of thresholds for merger control, a lower rate was favoured by European Industry and advised by the Economic and Social Committee with the view that controls by different national authorities would increase uncertainty.

barriers for market entry.[280] They can also demand to enjoy more privileges and exemptions, justified by such reasons as the carrying out of public services and try to keep the previously embedded immunities.[281]

The fact that most monopoly firms in Vietnam are in the hands of state owned firms gives an illustration of the public choice approach. Vietnam's state monopolies have turned out to be powerful interest groups, due to their possession of large amounts of capital and of assets in strategic sectors of the economy. Interest groups in Vietnam can act alone or in the form of trade associations. There is complicity in the relationship between state monopolies and state management agencies in Vietnam.[282] The application of competition rules to monopoly behaviour, for these reasons, will be influenced by the activities of such state monopolies or interests groups.

State monopolies can easily benefit from a close connection with former line ministries to launch lobbies in the legislative process in order to gain advantages from the law and policies.[283] They may capture sector regulators to seek for explicit or implicit immunities from restraints created by sector regulation through administrative law.[284] They may also take advantage of the divergence between sectoral regulators and competition authority in terms of control over particular regulated industry to gain supports and protection from

---

[280] Sokol, above n 270; ICN, *Antitrust Enforcement in Regulated Sector: Report to the third ICN Annual Conference, April 2004* (2004) <http://www.internationalcompetitionnetwork.org/uploads/library/doc379.pdf>.

[281] Korean chaebols can provide a good example. On the one hand, Korean chaebols were initially characterised by collusion and close ties with state management bodies for their development. After they had become powerful, chaebols turned to influence and distort the activities of state management bodies. On the other hand, the the military government of Korea had to rely on the chaebols and used them as a key strategy in achieving the rapid development of the Korean economy in the 1960s. See 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) 33–34. See also Sokol, above n 270; UNTACD, *Application of Competition Law: Exemptions and Exceptions* (2002), 32 <http://www.unctad.org/EN/docs/ditcclpmisc25_en.pdf>.

[282] This is illustrated by the origin of state monopolies (previously SOEs belonging to industrial ministries), the assignment of staff to the managing boards of these monopolies and the lack of transparency in the policy making process. It is made more complicated by the organisation of competition authorities which consist of representatives of industries and their position in their relation with the Ministry of Trade. According to the *Decree No. 29/2004/ND-CP* of the Government on defining the functions, tasks, powers and organisational structure of the Ministry of Trade, Vietnam Competition Administration Department (VCAD) is established as a statutory body directly under Ministry of Trade of Vietnam.

[283] For example, they can influence the government in making decisions which create barriers for market entry; delay opening up in monopolistic areas, making recommendations for the regulation of monopoly prices, or ask for more exclusivity such as proposals for granting exemption, etc.

[284] Sokol, above n 270, 14.

these regulators or to escape from the oversight of competition authority.[285]

Industries and their sector regulators (ministries) strongly support state economic groups and consider them as important tools to achieve political and socioeconomic goals. Justified by the argument that state monopolies have contributed considerably to the state budget and implementation of state policies, ministries are advocating the establishment of new state economic groups which will mostly be based on their industries. This is demonstrated by the fact that currently state economic groups are operating in particular industries.[286]

The State may also rely on supporting state monopolies in order to create a domestic foundation in competing with foreign and transnational firms in the context of economic integration. In this regard, interest groups represented by large domestic firms i.e. economic groups, may convince the government that their existence is important to react with the threat of foreign firms when the market is open. Thus, they can lobby government for the support of the establishment and maintenance of large-scale and powerful economic groups (national champions[287]), the creation of market entry barriers enabling them not to concern about competition from foreign firms and the grant of

[285] Ibid 14-15. See also William A Niskanen, *Bureaucracy and Representative Government* (Aldine, 1971) 195-223; Jonathan Bendor, Serge Taylor and Roland van Gaalen, 'Bureaucratic Expertise versus Legislative Authority: A Model of Deception and Monitoring in Budgeting' (1985) 79 (4) *American Political Sciences Review* 1041-1060.

[286] Of the eight state economic groups, Vietnam Post and Telecommunications (VNPT) is operating mostly in the domain of the Ministry of Information and Communications. The others are operating in the domains of the Ministry of Industry and Trade, such as the Vietnam Coal and Mining Industries Group (Vinacomin), Vietnam National Oil and Gas Group (PetroVietnam), the Vietnam Shipbuilding Industry (Vinashin), Vietnam Textile and Garment (Vinatex), Vietnam Rubber Group (VRG), Electricity of Vietnam (EVN), etc.

[287] See below n 304.

immunities from competition law.[288]

In short, under the public choice theory, the application of competition law may be restrained by rent seeking activities. The ability of the government to use competition rules in regulating anti-competitive conduct may easily be manipulated by interest groups. This brings about the concern that a fair competitive environement is hindered and the effectiveness of the application is also limited because of the immunities from competition law that interest group may bargain. Thus, there is the need to elucidate the tasks of sectoral regulators involving competition law issues and to clarify the coordination between these regulators and competition authority. Furthermore, the independence of competition authority is important to limit the effects of rent seeking activities, for example, in dectecting and suggesting the removal of restraints caused by the capture of regulation by interest groups which may impede competition. This should be associated with the ensuring of transparency and accessibility in decision making of the government and its bodies and the oversight of lobbying activities.

5.3.2 Public interest and the application of competition rules to state monopolies

5.3.2.1 What is 'public interest'?

Despite some differences in interpretation of the term, 'public interest' can be regarded as 'the aggregation of the individual interests of the persons affected by a policy or action

[288] These immunities can be explicit or implicit, including the exclusion of competition law prohibitions to a specific group of firms or sectors, the prevalence in competition law given to a particular group or the keeping of old immunities gained during the legislative process. Immunities can also be gained through the judiciary; in particular, they can be created and developed through case law. For example, in the US, the recognition of state exemptions under the state action doctrine was marked by the case of *Parker v Brown*. See Sokol, above n 270, 9-15.

In Vietnam, among rationales for the establishment of state economic groups in Vietnam in 2005-2006s were the need to deal with inefficiency of state sector in the context of economic integration and the demand for enhancement of capacity of Vietnam's firms in competing with foreign and transitional firms. These rationales were strongly advocated by large state corporations. See further in Chapter 3, section 3.2.3.2. See also Vietnam Net, 'Building Powerful Domestic Economic Groups' <http://english.vietnamnet.vn/biz/2008/05/780953/>; MUTRAP, 'Hoi Nghi So ket Thi diem Mo hinh Tap doan Kinh te Thuoc Bo Cong thuong' [Meeting on the Preliminary Wrap-up Report of the Model of Economic Groups belonging to the Ministry of Industry and Trade](2008) <http://www.mutrap.org.vn/Lists/Posts/Post.aspx?List=5276b79d-4e3a-4c5b-a2ad-c903807cc7ea&ID=40>; Tuan Vietnam, 'Dieu hanh Tap doan Kinh te o Vietnam' [Regulating Economic Groups in Vietnam] <http://www.tuanvietnam.net/news/InTin.aspx?alias=tulieusuyngam&msgid=4089>; Tran Tien Cuong, 'Viet Nam Se Co Nhung Tap doan Kinh te Manh?' [Will Vietnam Have Powerful Economic Groups?] <http://www.mof.gov.vn/Default.aspx?tabid=612&ItemID=20841>.

under consideration'.[289] Public interest has a close link with competition policy and many competition laws recognise the protection of public interest as part of competition objectives.[290] The consideration of public interest is based on criteria of objectives of competition policy, so that such criteria as efficiency, consumer welfare and, at times, fairness are seen as the key objectives of public interest considerations.[291]

'Public interest' serves as a ground for the consideration of anti-competitive behaviour to identify what practices can be allowed or subject to exemptions. Competition authorities are also required to consider public interest issues when assessing merger and acquisition cases (M&As) or when dealing with restrictive and unfair trade practices.[292] In summary, public interest goals may include the maximisation of economic freedom; preservation of employment; promotion of national champions; facilitation of restructuring; protection of small firms; ensuring cultural values; and conservation of the environment.[293]

'Public interest' is significant in dealing with market failures, particularly externalities. As mentioned earlier, externalities can be both positive and negative. Some types of externalities can result in positive spillover (external) benefits,[294] known as benefits conferred on others without being reflected in the price.[295] For example, they may arise from the construction of a road which opens a new area for housing, commercial development or tourism.[296] Hence, external benefits can be received by a community or by the entire society. When conducting a public benefits test, those benefits may be taken into account by the competition authority to see if they are greater than the detrimental

---

[289] Iain McLean and Alistair Mc Millan, *The Concise Oxford Dictionary of Politics* (Online) (Oxford University Press, 3rd, 2009).

[290] OECD, 'The Objectives of Competition and Policy – Note by the Secretariat' (Global Forum on competition, CCNM/GF/COMP (2003)3, 2003), 3 <http://www.oecd.org/dataoecd/57/39/2486329.pdf >; ICN, *Objectives of Unilateral Conduct Laws*, above n 44, 31.

[291] CUTS C-CIER, *Public Interest' Issues In Competition Analysis* (Briefing note, 2008) <http://www.cuts-international.org/pdf/CCIER-5-2008.pdf>.

[292] Ibid.

[293] Monti, above n 9, 4.

[294] Martin Van Bueren, *Addressing Water-relaxed Externalities: Issues for Consideration* (2004) <http://www.thecie.com.au/content/publications/CIE-water_externalities.pdf>.

[295] Corones, above n 9, 23.

[296] OECD, *Glossary for Industrial Organisation Economics and Competition Law* (1993), 44 <http://Www.Oecd.Org/Dataoecd/8/61/2376087.Pdf>.

effects caused to competition, in which case an authorisation can be granted.[297]

'Public interest', however, is not explicitly defined in the competition laws of countries. The consideration of 'public interest' can be stipulated specifically in competition law without a clear definition, such as in the case of the Australian *Competition and Consumer Act 2010* (Cth) - *CCA (*formerly the *Trade Practices Act 1974* (*Cth*)).[298] Besides, what can be regarded as 'public interest' and the criteria used for competition authorities to consider 'public interest', are not exactly the same from country to country. It is then interpreted through a number of case laws involving mergers and anti-competitive practices handled by competition authorities.

Australian competition law can provide a good example. 'Public interest' is used as equivalent with the term 'public benefit',[299] even though it is not particularly defined in the *CCA*,[300] and section 90(9A) mentions 'authorisations' in merger cases.[301] However, a comprehensive interpretation of the concept can be found through cases handled by the

---

[297] Allan Fels, *The Public Benefit Test in the Trade Practices Act 1974* (2001), 5 <http://www.accc.gov.au/content/item.phtml?itemId=255465&nodeId=3a08785d8fbb217538091dc68f51a187&fn=Fels_NCC_Workshop>.

[298] Corones, above n 9, 206.

[299] The term 'public interest' was initially used in the draft of the *TPA 1974* (now the *CCA*) but it was later changed to 'public benefit' and included with an introduction of the authorisation process. See ANU Centre for Competition and Consumer Policy, *Evaluating the Public Benefit Test Project: An Assessment of the Public Interest Test in Authorisation Determinations by the ACCC* (2005) 11 <http://cccp.anu.edu.au/projects/VijNagaraganPaperSept05PubBenefit.pdf>.

'Public benefit' is discussed as follows:

> ...[t]he key factor in authorisation and its articulation should be given careful consideration by applicants and by supporters of and those opposing applications for authorisation. It is necessary for applicants to demonstrate how community objectives can be efficiently met in ways other than through the operation of normal competition in the market. Unless benefits are substantiated, authorisation cannot be granted by the Commission.

See Australian Competition and Consumer Commission (ACCC), *Guide to Authorisations and Notifications* (1995) 19.

[300] Hilmer Report, 95; Corones, above n 9, 53; Fels, above n 297, 5.

[301] Section 90(9A) reads as below:

> (9A) In determining what amounts to a benefit to the public for the purposes of subsections (8A), (8B) and (9):
>
> (a) the Commission must regard the following as benefits to the public (in addition to any other benefits to the public that may exist apart from this paragraph):
>
> (i) a significant increase in the real value of exports;
>
> (ii) a significant substitution of domestic products for imported goods; and
>
> (b) without limiting the matters that may be taken into account, the Commission must take into account all other relevant matters that relate to the international competitiveness of any Australian industry.

TPC/ACCC.[302] The Australian Competition and Consumer Commission (ACCC) may authorise anti-competitive conduct where it considers that the public benefit will outweigh the competitive detriment.[303] The ACCC takes the view that any conduct which produces direct or indirect benefit to the Australian public constitutes a public benefit. The ACCC has recognised a wide range of both public benefits of an economic nature, such as economic development, fostering business efficiency, industry rationalisation, industrial harmony and of a non-economic nature, such as environmental, health and public safety promotion, reduction of the risk of conflicts of interest and facilitation of the transition to deregulation.[304] The ACCC must also regard the following as benefits to the public when making its determinations: (i) a significant increase in the real value of exports; and (ii) a significant substitution of domestic products for imported goods and the Commission must take into account all other relevant matters that relate to the international competitiveness of any Australian industry in determining benefits to the public.[305]

5.3.2.2 Rationales for consideration of public interest with regard to state monopolies

Countries have good reasons to support state owned firms by granting them exclusivity and special rights to conduct economic activities at the state's behest. It is explained that the use of public undertakings will enable the state to exercise its influence directly or indirectly in particular sectors of the economy. It then allows the state to control the whole economic activity in a sector where specific economic activity is reserved for the undertaking, operated on behalf of the state.[306]

---

[302] For example, in *Re ACI Operations Pty Ltd*, examples of 'public benefit' were listed by the TPC (ACCC predecessor) to include economic development; fostering business efficiency; supply of better information to consumers and businesses to permit informed choices in their dealings; growth in export markets; expansion of employment in efficient industries; and steps to protect the environment. See *Re ACI Operations Pty Ltd* (1991) ATPR (Com) 50-108. It was in *Re 7-Eleven Stores Pty Ltd* that 'public benefit' was stated as 'anything including as one of its principal elements (in the context of trade practices legislation) the achievement of economic goals of efficiency and progress'. See *Re 7-Eleven Stores Pty Ltd* ATPR 41-357, *Victorian Newsagency* (1994) ATPR 41–357 42, 677.

[303] ACCC, *Merger Guidelines* (1999) <http://www.accc.gov.au/content/item.phtml?itemId=304397&nodeId=a0adea340fc03710a12cf14b7e4fd803&fn=Merger%20guidelines%201999.pdf>.

[304] Fels, above n 297, 6-7.

[305] *Competition and Consumer Act 2010* (Cth) (formerly the *Trade Practices Act 1974* (*Cth*)) s 90(9A).

[306] Szyszcak, above n 84, 26.

Countries are often convinced by the viewpoint that state monopolies will serve as important keys to the pursuit of a 'national champions' policy.[307] In particular, developing countries, directed by their industrial policy, usually pick up individual firms and support them so that they can compete successfully in the world market. National champions[308] are sometimes considered as focal points of economic development or the core of a development strategy. Selected to build up national champions are the only domestic companies that are capable of competing in international markets.[309] They can be important for transitional countries in the context of international economic integration. It is argued that such state monopolies are significant in confronting transnational corporations and public interest can be a good reason for the state to impose import controls or investment restrictions so as to protect domestic firms and deterring new entrants and foreign investment, despite the fact that this can be conflict with competition.[310] Some restrictive measures can be applied, such as the limitation of maximum foreign ownership in holding stocks of domestic and state owned firms, such as

[307] 'National champions' are defined by W Goode as 'companies designated in some countries to act as promoters of new technologies or new processes from whom other companies will be able to learn. Often, they already enjoy a pre-eminent position in their sector when they are nominated'. See Walter Goode, *Dictionary of Trade Policy Terms* (Cambridge University Press, 4th 2003) 251.

[308] 'National Champion' is a term used widely in academic works relating to industrial policy which refers to firms selected and favoured by the government. See Alberto Ades and Rafael Di Tella, 'National Champions and Corruption: Some Unpleasant Interventionist Arithmetic' (1997) 107 (443) *Economic Journal* 1023.

National champions are known as large firms in strategic sectors which they are expected not only to seek profit but also to advance the interests of the nation. The concept of 'national champion' is said to be developed by the former Russian President Vladimir Putin in 1997 when he got this idea from a textbook of University of Pittsburgh's professors William King and David Clelan. The concept was also similarly presented by Charles De Gaulle when he was president in France in the 1950s while it was proposed in 17th century by another French politician Jean-Baptiste Colbert. See Marshall I Goldman, *The New Imperial Russia* (2008) <http://www.demokratizatsiya.org/bin/pdf/DEM%2016-1%20Goldman.pdf>.

'National Champions' is mentioned in a number of OECD Policy Roundtables. See, for example, OECD, 'Competition Policy, Industrial Policy and National Champions' (Competition Policy Roundtable, DAF/COMP/GF (2009)9, 2009) <http://www.oecd.org/dataoecd/12/50/44548025.pdf>; OECD, 'State-Owned Enterprises and the Principle of Competitive Neutrality' (Policy Roundtable, DAF/COMP(2009)37, 2009) <http://www.oecd.org/dataoecd/43/52/46734249.pdf>.

[309] Frank Emmert, Franz Kronthaler and Johannes Stephan, *Analysis of Statements Made in Favour of and Against the Adoption of Competition law in Developing and Transition Economies* (2005) <http://www.iwh-halle.de/projects/competition_policy/Claims_02.PDF>.

[310] UNTACD, *Exemptions and Exceptions,* above n 281, 9.

was the practice of Korea before the economic-financial crisis.[311]

5.3.2.3 Influence of public interest considerations in the legislative process

The state can reserve some significant areas for state monopolies, particularly those relating to the provision of public goods, or apply the idea of general services to set up some exemptions for state monopolies. As one of two approaches to competition policy,[312] public interest can be used as the basis for the setting up of the objectives of competition policy. Countries can select different objectives in pursuing their own competition policies and these objectives can be altered over time. It can be a premise for the maintenance and encouragement of economic efficiency such as in the practice of Canada and New Zealand, or the enforcement of competition laws in the US, which has increasingly focused on consumer welfare and economic efficiency.[313] Preventing the abuse of economic power is often argued as being for the protection of customers.[314] It can also be a good reason for the safeguarding of domestic small businesses and local economies.[315]

5.3.2.4 Public interest implications in the application of competition law

Public interest is an important factor that has implications in the application of competition rules by competition authorities. It serves as the ground for taking action against restrictive trade practices when competition authorities consider such practices as prejudicial to the public interest.

In Australia, the ACCC is entrusted with the power to authorise contracts, arrangements or understandings that substantially lessen competition, according to Section 45, where it

[311] Until the recent economic-financial crisis, Korea had implemented a number of restrictions on foreign ownership. For example, in non-strategic companies, foreign ownership had previously been restricted to a maximum of 10 per cent. This was later increased to 33 1/3 per cent of stock without the approval of the company's board of directors, before this ceiling was completely removed. See UNTACD, *Exemptions and Exceptions,* above n 281, 9.

[312] OCED, *Objectives of Competition Policy*, above n 290.

[313] UNTACD, *Exemptions and Exceptions,* above n 281, 8.

[314] OCED, *Objectives of Competition Policy,* above n 290.

[315] For example, competition laws in Indonesia and the Russian Federation include concerns regarding fairness, diffusion of economic power and safeguarding small and medium-sized enterprises. See UNTACD, *Exemptions and Exceptions,* above n 281, 8.

considers the public benefits and where they outweigh the competitive harm.[316] The ACCC has also adopted a guide to authorisation which sets out criteria for its determination of how much weight to place on particular efficiency gains in assessing an application for authorisation.[317] This approach can also be demonstrated in a case tried by the Indian *Monopolies and Restrictive Trade Practices Commission* in 1984.[318]

It should be noted that authorisation under Australian law may be sought in relation to a wide range of conduct, covering any of the competition prohibitions under Part IV of the *Competition and Consumer Act* 2010 (Cth) except for misuse of market power. In particular, a relevant test is performed with regard to conduct that might constitute the making and/or giving effect to a cartel provision (stipulated in Section 88(1A)), an anti-competitive agreements (Section 88(1)), a secondary boycott (Sections 88(7) and 88(7A)), resale price maintenance (Section 88(8A)) and an acquisition that occurs outside Australia (Section 88(9)). According to the ACCC's guide to authorisation, the authorisation process is done through an open, transparent and public consultation process. A decision to grant authorisation provides immunity from legal action under the *Competition and Consumer Act 2010.*

Public interest consideration is much employed in the case of mergers and acquisitions

[316] Section 88 of the *Competition and Consumer Act 2010* (Cth) (formerly the *Trade Practices Act 1974* (*Cth*)); See also CUTS C-CIER, above n 291, 2.

[317] Such criteria that the ACCC will take account are whether (i) the applicant has provided sufficient evidence to support a claim that efficiency gains are of a particular size; (ii) that the achievement of efficiency gains is sufficiently certain. In particular, gains expected to be achieved a number of years after the conduct starts would be given less weight to reflect the inherent and underlying uncertainty; (iii) the efficiency gains are likely to be offset (partially or even fully) by efficiency losses; and (iv) whether the efficiency gains should be given less weight due to the limited breadth, scope or the nature of beneficiaries See ACCC, *Guide to Authorisation* (2007) 31.

[318] The case involved Shyam Gas Company which is the sole distributor to Bharat Petroleum Corporation Ltd (BPCL) for cooking gas cylinders at Hathras (Uttar Pradesh). The company in question was alleged to engage in restrictive trade practice when it required customers to accept buying a gas stove or a hot plate as the condition for a gas connection, with a charge for the supply of fittings and appliances at twice the market place. It was consequently held by (MRTPC) that the company was indulging in an RTP that was prejudicial to public interest. See CUTS C-CIER, above n 291, 4.

(M&As).[319] It does not matter that neither is 'public interest' explicitly defined, nor what terms can be used to describe 'public interest'. Without many differences, issues that fall 'into public interest consideration can commonly be found in competition laws when assessing merger cases. This may include the definition of equity/fairness; the protection of small business; the guarantee of equality of opportunity; the freedom to carry out economic action; the decentralisation of economic decision making/power; the involvement of economically disadvantaged groups in the market and other relevant issues such as employment, regional development and growth of small and medium-sized enterprises (SMEs), etc.[320]

In terms of the prohibition of horizontal agreements, public interest can be regarded as the groundwork to justify the grant of exemptions. Although it is well accepted that horizontal agreements are harmful to competition, especially those that are price agreements, due to the idea that they would lessen competition, non-price horizontal agreements can be subject to exemptions. 'Public interest' as referred in this case is the better choice for customers, as such when horizontal agreements among firms result in the

[319] For example, in the US, a complicated procedure is applied in the assessment of merger cases. After the US Department of Justice (DoJ) Antitrust Division reaches a conclusion on its analysis and has reached agreements with the parties to the merger, a Competitive Impact Assessment relating to the proposed Final Judgment before submitting it for entry into the civil antitrust proceeding is prepared and filed. The competitive impact statement (CIS) will offer an explanation of the antitrust proceeding and how the proposed settlement remedies the harm that is alleged to occur as a result of the merger. In the CIS, the DoJ explains how the entry of the settlement is in the 'public interest'. It will be then followed by 60 days of extension that allows any person to submit written representations regarding the proposed final judgment. After the expiry of the deadline, the district court in which the CIS has been filed will then determine whether the decision by the DoJ is 'within the interest of the public'. The court in question is required to determine whether the settlement is within the reaches of public interest, not whether a particular decree is one which will best serve society. See the *Antitrust Procedures and Penalties Act 1974*, 15 USC (APPA) s 2(b); See also CUTS C-CIER, above n 291, 2.

[320] For example, according to Section 12A of the *Competition Act 1998 South Africa*, whenever the Commission or the Tribunal is considering a merger, they must initially determine whether or not the merger will result in substantial lessening of competition. It can lead to two situations relating to the possibility of substantial lessening of competition. First, in case such a consequence is found, they must also look at whether the merger can be justified on substantial public interest grounds. Second, if the merger does not result in substantial lessening of competition, they should also assess whether the merger can be justified on public interest grounds. Before a merger is authorised, two equally important tests would be carried out so as to see that a merger can be subjected to public interest and competition grounds.

Also stated in Section 12A, when determining whether or not a merger can or cannot be justified on the grounds of public interest, such criteria can be employed by the Competition Commission or the Competition Tribunal to see if the merger will have on: (a) a particular industrial sector or region; (b) employment; (c) the ability of small businesses, or firms controlled or owned by historically disadvantaged persons to become competitive; and (d) the ability of national industries to compete in international markets. See CUTS C-CIER, above n 291, 2.

standardization of products, improved quality and increased information.[321]

- **Conclusion**

Although there are differences among the competition laws of countries, common basic principles regulating the anti-competitive behaviour of state monopolies are generally applied. The extent to which competition law is applied depends on the consideration of their roles in the market, the objectives of their creation and maintenance and the characteristics of the particular market. However, regardless of objectives and rationales for their existence, in general, state monopolies are being treated equally to private firms.

However, a number of constraints expose countries in the application of competition rules to state monopolies. First, in many countries, state monopolies still play important roles in their countries. This results from the belief that they are significant in implementing socioeconomic policies and the fear of harsh competition from the participation of foreign firms. Thus, the application of competition rules is sometimes hindered by political support for the dominant role of state monopolies and the reluctance to abide by competition law from the state monopolies themselves.

Second, due to their origin, state monopolies can benefit from privileges and immunities, or they can influence the law making process to obtain advantages that bring them success in the competition with private and foreign firms. Besides, the intertwining relationship with ministries and sectoral regulators guarantees them protection and support from the state. Thus it can be difficult for competition authorities to conduct assessment of anti-competitive behaviour, to undertake investigations and impose remedies against such behaviour.

There are some important lessons to be drawn from the study of various countries in terms of applying competition law to state monopolies. First, competition law must be applied to all businesses entities regardless of ownership. Second, the law must cover all market behaviour of state monopolies and eliminate forms of exemptions that cause an unfair competitive environment. Third, a comprehensive competition policy must be created. Competition policy normally comprises a number of factors, including competition law and policies dealing with the extent and nature of competition in the

[321] UNTACD, *Exemptions and Exceptions,* above n 281, 2.

economy.[322] Fourth, principles of competitive neutrality must be applied to ensure state monopolies compete equally with their private counterparts. Last, but not least, there should be a powerful and independent competition authority that is capable of applying competition rules, together with an effective mechanism to ensure compliance by state monopolies.

[322] Competition policy aims at facilitating effective competition to promote efficiency and economic growth while addressing situations where efficiency is not achieved or there are conflicts with other social objectives. See Hilmer Report, xvi.

Chapter 6

THE APPLICATION OF COMPETITION RULES TO STATE MONOPOLIES' ANTI-COMPETITIVE AGREEMENTS

This chapter discusses particularly the application of competition rules to anti-competitive agreements concluded by state monopolies. It starts with a study on fundamental issues concerning anti-competitive agreements. It is noted that Vietnam's *Competition Law 2004* is principally based on the EU competition law model, particularly Article 101 *TFEU* (ex Article 81 *TEC*).[1] Hence, this part is mostly concerned with studies on this Article and its interpretation from the European Court of Justice case law.[2] The next part deals with anti-competitive agreements entered into by state monopolies. It discusses common forms of anti-competitive agreements of state monopolies and why they can easily commit to these kinds of agreements. The last part ends with a study of the application of Vietnam's anti-monopoly law to such behaviour. Problems and shortcomings in Vietnam's current legislation regarding this question are also discussed.

[1] When drafting Vietnamese competition law, the drafting committee conducted a number of studies on competition law model of various countries. The current competition law has heavily relied on the EU competition law, which is principally embodied in Article 101 and 102 *TFEU* (ex Articles 81 and 82 *TEC*). See also USVTC, *Competition Law Update* (2006) <http://www.usvtc.org/updates/legal/PhillipsFox/CompetitionLawUpdate-July2006.pdf>. For example, the EU Commission's viewpoint that market power is an important criterion to declare an agreement to be invalid, regardless of the fact that such agreement is in restraint of competition, is reflected in Vietnam's *Competition Law 2004*. The prerequisite to consider an agreement anti-competitive is whether the firm or group of firms in question has possessed market power, which is defined by the percentage of market share. See Le Danh Vinh, Hoang Xuan Bac, Nguyen Ngoc Son, *Giao trinh Luat Canh tranh* [Textbook on Competition Law] (Hochiminh City National University, 2010) 59. This is reflected in the stipulation of prohibited anti-competitive agreements in Article 8 of the *Competition Law 2004* which is identical to Article 101 *TFEU* and the provision of prohibited abuse of dominant/monopoly positions in Articles 13 and 14 of the *Competition Law 2004* appears similar to Artile 102 *TFEU*.

[2] Most of the substantive contents of the first part of this chapter rely extensively on the book of Alison Jones and Brenda Suffrin, *EC Competition Law – Text, Cases and Materials* (Oxford University Press, 3rd ed, 2008.This section also refers to the academic works of other prominent scholars such as Ivo Van Bael and Jean-Francois Bellis, Mark R Joelson, Lennart Ritter and Braun W David, Barry J Rodger and Angus MacCulloch, etc. This chapter also widely uses OECD materials and cases in a number of relevant Policy Roundtables, including contributions of OECD members and UNTACD publications such as the UNTACD Model Law of Competition.

6.1 Anti-competitive agreements under the EU competition law

The prohibition of anti-competitive agreements is stipulated in Article 101 *TFEU* . It targets explicit collusion between undertakings to coordinate their behaviour and reduce effective competition between them.[3] While Article 102 concerns unilateral market conduct, Article 101 applies to anti-competitive coordination between undertakings. This part presents basic concepts, including forms of anti-competitive agreement, the possibility to affect trade among members and its object or effect on restricting competition.

6.1.1 Basic concepts

Article 101(1) *TFEU* stipulates three forms of collusion between undertakings, namely: (i) agreements between undertakings; (ii) decisions by associations of undertakings; and (iii) concerted practices.[4] It declares the prohibition of such forms if they are determined to affect trade between Member States and they have as their object or effect the prevention, restriction or distortion of competition within the common market.[5] Hence an anti-competitive agreement is prohibited under EU competition law if it is one kind of

---

[3] Jones and Sufrin, above n 2, 173; Ivo Van Bael and Jean-Francois Bellis, *Competition Law of the European Community* (Kluwer Law International, 2005) 27.

[4] Under Australian competition law, collusion among firms in the forms of contracts, arrangements or understandings, whether between competitors or not, which can be proven to substantially lessen competition, or be likely to do so, constitute a civil contravention of the Act pursuant to section 45 of the *TPA*. Besides, a specific prohibition of cartel conduct (both criminal and civil offences) is provided under the Division 1 of part IV (ss 44ZZRA - 44ZZRV) in the form of price fixing, bid rigging, market division and restricting outputs. This Division was to replace the former s 45A of the *Competition and Consumer Act 2010* (Cth) - *CCA* (formerly the *Trad Practices Act 1974* (*Cth*)) which was inserted by the *Trade Practices Amendment (Cartel Conduct and Other Measures) Act 2009* and entered into operation on 24 July 2009.

[5] Article 101(1) *TFEU* (ex Article 81(1) *TEC*) provides that:

> 1. The following shall be prohibited as incompatible with the common 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 common 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 conclusion of contracts subject to acceptance by the other trading parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts.

collusion between undertakings, restricts competition and may affect trade between member states.

6.1.1.1 Collusion between undertakings

- **Agreements**

The classic definition of the concept of 'agreement' was given in *Bayer*.[6] A number of subjective elements are used as the proof of an agreement, including 'a concurrence of wills between economic operators on the implementation of a policy, the pursuit of an objective or the adoption of given line of conduct on the market'.[7]

However, the consideration of proof of an agreement is complicated and based on both direct and indirect findings, in order to prove there is a concurrence of wills between at least two undertakings, the form of an agreement is not important as long as it constitutes the faithful expression of the parties' intention.[8] According to the ECJ, the mutual expression between undertakings of a joint intention is the most important factor in order to consider whether or not an agreement falls within the scope of Article 101(1) *TFEU* .[9]

---

[6] *Bayer AG v Commission* (T- 41/96) [2000] ECR II-3383, *aff'd* on appeal cases (C-2-3/01 P) [2004] ECR I-23; The Court of First Instance reserved a section to interpret the concept of an agreement within the meaning of Article 101(1) *TFEU* and referred to several landmark cases such as *ACF Chiemiefarma NV v Commission* (C-41/69) ECR 661*; Van Landewyck SARL and Others v Commission* (C-218/78) [1980] ECR 3125*; Sandoz v Commission* (C53/69) [1972] ECR I-45*; Hercules Chemicals v Commission* (T-7/89) [1991] ECR II-1711, etc.

[7] *Bayer AG v Commission of the European Communities* (T- 41/96) [2000] ECR II-3383, *aff'd* on appeal cases (C-2-3/01 P), [2004] ECR I-23.

[8] Ibid; *Volkswagen AG v Commission* (T-62/98) [2000] ECR II-2707, *aff'd* Case *Volkswagen AG v Commission* (C-388/00P) [2003] ECR I-9189.

[9] According to the ECJ, the joint intention to conduct 'must be expressed by undertakings'. In *Chiemiefarma*, it was stated that 'in order to be an agreement, the undertakings in questions should have expressed their joint intention to conduct themselves on the market in a specific way'. See *ACF Chiemiefarma NV v Commission (the Quinine Cartel)* (C-41/69) [1970] ECR 661 112; See also *Van Landewyck SARL and Others v Commission* (C-218/78) Joined cases C-209 – 15/78) [1980] ECR 3125 86; *Hercules Chemicals v Commission* (T-7/89) [1991] ECR II-171, 256.

Under Australian competition law the key criterion to establish if there is an anti-competitive agreement is that such agreement must both be 'consensual' and there must be 'some adoption of it'. See Russel V Miller, *Miller's Australian Competition Law and Policy* (Thomson Reuters, 2008) 102. It was stated by Gibbs and Mason JJ in *Federal Commissioner of Taxation v Lutovi Investment Pty Ltd* that*:* 'It is, however, necessary that an arrangement should be consensual and that there should be some adoption of it. But in our view it is not essential that the parties are committed to it or are bound to support it'. See *Federal Commissioner of Taxation v Lutovi Investment Pty Ltd* (1978) 140 CLR 434 at 444.

In most studies[10] it is called the 'concurrence of wills'. What is a 'concurrence of wills' seems to be broad, as has been made clear through a number of cases.[11] It is sometimes termed 'mutual understanding' or 'joint intention'.[12] It does not matter that an agreement is considered as a contract according to national rules,[13] or that parties to this agreement have had their intention to be legally binding.[14] It is not necessary whether or not a breach of this contract is sanctioned; or whether the intention is expressed in writing,[15] it can be oral or even implied from conduct, depending on the situation.[16] A 'gentlemen's agreement' is also prohibited if the parties have declared their willingness to abide by this agreement.[17] It can involve standard conditions of sale,[18] or contain a set of trade association rules[19]

EU competition case law demonstrates the strict application of Article 101 *TFEU* . An agreement will be caught by Article 101 once the parties agree on such matters as 'good

---

[10] Jones and Sufrin, above n 2, 148; Bael and Bellis, above n 3, 34; Maher M Dabbah, *EC and UK Competition Law: Commentary, Cases and Materials* (Cambridge University Press, 2004) 59; See Lennart Ritter and David W Braun, *European Competition Law: A Practitioner's Guide* (Kluwer Law International, 2005) 101; Gorgio Monti, *EC Competition Law* (Cambridge University Press, 2007) 42.

[11] *Ford-Werke AG and Ford of Europe Inc. v Commission* [1985] ECR 2725; *AEG v Commission* [1983] ECR 3151.

[12] Under Australian competition law there must be a consensus, or meeting of minds as to what is to be done by at least one party, to perform an agreed act provided by the *CCA* (divisions 1, 2 of part IV). This consensus is also not merely a hope or expectation as to what might happen. See *ACCC v Leahy Petroleum Pty Ltd* (2004) 141 FCR 183. See also S G Corones, *Competition Law in Australia* (Thomson Reuters, 5th ed, 2010) 275.

[13] *Tepea BV v Commission* (C-28/77) [1978] ECR 1391.

[14] In *Polypropylene* [1986] OJ L230/1 the Commission stated that:

> It is not necessary, in order for a restriction to constitute an 'agreement' within the meaning of Article 81(1) (currently 101(1) *TFEU*) for the agreement to be intended as legally binding upon the parties. An agreement exists if the parties reach a consensus on a plan which limits or is likely to limit their commercial freedom by determining the lines of their mutual action or abstention from action in the market.

[15] *Tepea BV v Commission* (C-28/77) [1978] ECR 1391; Commission Decision of 23 April 1986 relating to a proceeding under Article 81 (currently 101 *TFEU*) of the EC Treaty (IV/31.149 - Polypropylene), [1986] OJ L230/0001.

[16] *Tepea BV v Commission* (C-28/77) [1978] ECR 1391. See Femi Alese, *Federal Antitrust and EC Competition Law Analysis* (Ashgate Publishing, 2008) 53; Jones and Sufrin, above n 2, 149.

[17] The Court held that a 'gentlemen's agreement' constitutes a measure which may fall under the prohibition contained in Article 101(1) *TFEU* if it contains clauses restricting competition in the common market within the meaning of that article and its clauses amount to a faithful expression of the joint intention of the parties. See *ACF Chiemiefarma NV v Commission (the Quinine Cartel)*(C-41/69) [1970] ECR 661.

[18] *Sandoz Prodotti Farmaceutici Spa v Commission* (C-277/87) [1990] ECR I-45.

[19] The Court may consider the rules set out by a trade association as the agreement if its members agree to be abide by them. See *Nuovo Cegam* [1984] OJ L99/29.

neighbour rules', or 'establish practice and ethics', or 'certain rules of the game'.[20] Even where an agreement is terminated, it will still be caught by Article 101 in relation to the period of time after the termination if its effects continue to be felt.[21] An agreement can fall within the scope of Article 101 whether or not it is encouraged or approved by national law[22] or it is implemented with prior consultation with the national authorities.[23] The argument of an undertaking on the ground that it was bullied into concluding the agreement has been said to be no defence.[24] In *Industrial and Medical Gases,*[25] the Court even declared an agreement was caught by Article 101 although the undertakings in question had never intended to implement or adhere to the terms of the agreement.

- **Decisions by associations of undertakings**

Associations of undertakings[26] are subjects to both Articles 101 and 102 *TFEU* , regardless of whether or not they have legal personalities, as long as they exercise a commercial activity and take action on their own initiative. It does not matter what legal forms they may take.[27] Article 101 will apply to them irrespective of their form, as long as they assist the conclusion and implementation of restrictive agreements or conduct.[28]

---

[20] *Van Landewyck SARL and Others v Commission* (C-209 – 15/78) [1980] ECR 3125 85 – 86 and *Cement* [1994] OJ L343/1 45-46.

[21] *SA Hercules NV v Commission* (T-7/89) [1991] ECR II-1711.

[22] *VBVB and VBBB v Commission* (C-43-63/88) [1984] ECR 19' *Aluminium Imports from Eastern Europe* [1985] OJ L92/1; *AROW/BNIC* [1982] OJ L379/1.

[23] *SSI v Commission* joined cases (C-240-2 and C-262/82) [1985] ECR 3831.

[24] *Cimenteries CBR v Commission* (T-25/95) [2000] ECR II-491, 2557.

[25] The Court rejected arguments of two alleged undertakings, Air Liquide and Westfalen, as they argued that they did not take part in the agreements or implemented them, rather they had acted as a 'tough competitor' on the market or had pursued an 'aggressive commercial policy'.

[26] Other than the term 'association of undertakings', there are terms for corresponding forms of association of undertaking, which may be labelled according to the language of their country of origin, each of which was taken into consideration in EC case law, including cooperatives, consortia or trade unions. See *Rennet* [1981] ECR 851 9-13; *Hudson's Bay I* [1988] OJ L 316/43 48, *aff'd* CFI July 2, 1992, ECR 11-1931, 50; *Gottrup – Klim* (C-250/92) [1994] ECR I-5641. A consortium can be labelled, according to different languages, as *Groupement d'intérêt économique* in France, *Vennootschap onder firma* or *Stichting* in The Netherlands, *European Economic Interest Grouping* under EC Law. See Ritter and Braun, above n 10, 49.

[27] Ritter and Braun, above n 10, 49. Such viewpoints were illustrated in EC case law and decisions such as *Eurovision II* (*Eurovision II* [2000] D.Comm. CFI OJ L151/68 68, *rev'd* CFI [2002] ECR 11-3805); *Woodpulp I* [1988] ECR 5193, 24-27); *Steel Beams – Eurofer* (*Steel Beams v Eurofer* (T-T-134-57/94) [1999] ECR II-263, 98-99), *Wirtschaftsvereinigung Stahl* [2001] ECR II-1217); *CEWAL* [2000] ECR I-1365, 144).

[28] *French Federations in the beef sector* [2003] C.Comm IP/03/479; *National farmers' Union* (C-241/01) [2002] ECR I-9079.

In the EU competition law, 'decisions' are normally regarded as binding upon members, as observed in *Belasco.*[29] Decisions can include some non-binding recommendations,[30] as was seen in *IAZ*[31] and *Price Waterhouse.*[32] The concept of 'decisions by associations of undertakings' is interpreted broadly to include resolutions of the association,[33] recommendations,[34] the operation of certification schemes,[35] or through the association's constitution itself, which are designed to coordinate the conduct of the members contrary to Article 101(1) *TFEU* , as stated in *IAZ.*[36]

- ***Concerted practices***

'Concerted practice' is another notion that may sometimes overlap with 'agreement'.[37] For the purpose of Article 101(1) *TFEU* , the notion 'concerted practice' is designed to provide a 'safety-net catching looser forms of collusion'[38], besides those falling into the notion of 'agreement'. It aims to prevent the possibility of undertakings escaping from the scope of Article 101(1) by colluding in another form of collusion, rather than that of an

[29] In this case, members of Belasco (Société Coopérative des Asphalteurs Belges) agreed on an agreement which was intended to ensure control of the Belgian roofing market. Among other things were the agreement to adopt a common price list and minimum selling prices for roofing felt; to set quotas for sales on the Belgian market and to advertise jointly their 'Belasco' products. This was followed by resolutions passed at the general meeting. Belasco itself participated actively in the implementation of such agreements, including monitoring quota compliance and financing the joint advertisement of Belasco trademark in order to foster users' impression of a homogeneous product. In this case, there was obviously an agreement among Belasco members and the crucial role of Belasco in terms of coordinating the operation of the association's members. See *Re Roofting felf cartel: Belasco v Commission* (C-246/86) [1989] ECR 2117.

[30] It has been said that regulations by the Dutch Bar Association such as the 1993 Regulation was such a decision, because it concerned the economic activity of its members (barristers) rather than being related to the social function or to the exercise of powers of a public authority. *See J.C.J. Wouters, J.W. Savelbergh, Price Waterhouse Belastingadviseurs BV v Algemene Raad van de Nederlandse Orde van Advocaten (Price Waterhouse)* (C-309/99) [2002] ECR I-1577.

[31] *NV IAZ International Belgium v Commission* (C-96/82) [1983] ECR 3369.

[32] *J.C.J. Wouters, J.W. Savelbergh, Price Waterhouse Belastingadviseurs BV v Algemene Raad van de Nederlandse Orde van Advocaten (Price Waterhouse)* (C-309/99) [2002] ECR I-1577.

[33] *BELASCO v Commission* (C 246/86) [1989] ECR 2117.

[34] *NV IAZ International Belgium v Commission* (C-96/82) [1983] ECR 3369.

[35] *Stichting Certificatie Kraanverhuurberiif and the Federatie van Nederlandse Krannverhuurbedriijven* [1995] OJ L312/79; on appeal cases *Stichting Certificatie Kraanverhuurberiif and the Federatie van Nederlandse Krannverhuurbedriijven* (T-213/95 and T-18/96) [1997] ECR II-1739.

[36] *NV IAZ International Belgium v Commission* (C-96/82) [1983] ECR 3369.

[37] Barry J Rodger and Angus MacCulloch, *Competition Law in the EC and UK* (Routledge-Cavendish, 4th ed, 2009) 173; Jones and Sufrin, above n 2, 148; Alese, above n 16, 75.

[38] Jones and Sufrin, above n 2, 173; Rodger and MacCulloch, above n 37, 175.

agreement.[39] In this case, undertakings do not need a concurrence of wills.[40]

In *ICI (Dyestuffs),*[41] concerted practice was considered as a form of co-ordination between undertakings but not going as far as an agreement.[42] This form aims to substitute practical co-operation between them.[43] In *Suiker Unie*,[44] it was stated that there was no need to have 'the working of an actual plan'[45] between undertakings. However, direct or indirect contact between undertakings which may have restrictive effects on competition constitutes a concerted practice.[46] Hence the significant difference between an agreement and a concerted practice is that in the latter case each undertaking can operate independently in the market.[47] However, a reciprocal cooperation or contract, through direct or indirect contact, is a required factor when determining whether or not there is a

---

[39] Jones and Sufrin, above n 2,173; Bael and Bellis, above n 3, 51.

[40] Piet Jan Slot and Angus Johnson, *An Introduction to Competition Law* (Hart Publishing, 2006) 58.

[41] *Imperial Chemical Industries Ltd v Commission* [1972] C-28, 49 and 51-7/69 ECR 619.

[42] In *Imperial Chemical Industries Ltd v Commission*, the ECJ held that the purpose of the term 'concerted practice' was to preclude 'co-ordination between undertaking which, without having reached the stage where an agreement properly so called had been concluded, knowingly substitutes practical cooperation between them for the risks of competition'. See *Imperial Chemical Industries Ltd v Commission* (C-28, 49 and 51-7/69) [1972] ECR 619, 64.

[43] This viewpoint was illustrated in the ECJ observation in *ICI* as '…[b]y its very nature, then, a concerted practice does not have all the elements of a contract but may inter alia arise out of coordination which becomes apparent from the behaviour of the participants'. See *Imperial Chemical Industries Ltd v Commission* (C-28, 49 and 51-7/69) [1972] ECR 619, 65.

[44] *Cooperatiëve Vereniging Suiker Unie UA v Commission (European Sugar Cartel)* Joined cases (C-40-48/73, C-50/73, C-54-56/73, C-111/73, C-113-114/73) [1975] ECR-1663.

[45] Ibid 173. A similar observation was also found in *Cimenteries*, in which the ECJ held that 'the concept of concerted practice does in fact imply the existence of reciprocal contacts. That condition is met where one competitor discloses its future intentions or conduct on the market to another when the latter request it or, at the very least, accepts it'. See *Cimenteries CBR SA et al. v Commission* Joined cases (T-25 etc./95) [2000] ECR II-491.

[46] In *Suiker Unie*, it was held that:

> Although it is correct to say that this requirement of independence does not deprive economic operators of the right to adapt themselves intelligently to the existing and anticipated conduct of their competitors, it does however strictly preclude any direct or indirect contact between such operators, the object or effect whereof is either to influence the conduct on the market of an actual or potential competitor or to disclose to such a competitor the course of conduct which they themselves have decided to adopt or contemplate adopting on the market.

See *Cooperatiëve Vereniging Suiker Unie UA v Commission (European Sugar Cartel)* Joined cases (C-40-48/73, C-50/73, C-54-56/73, C-111/73, C-113-114/73) [1975] ECR-1663 174.

[47] As stated in *Suiker Unie* , each one 'must determine independently the policy which he intends to adopt on the common market including the choice of the persons and undertakings to which he makes offers or sells'. See *Cooperatiëve Vereniging Suiker Unie UA v Commission (European Sugar Cartel)* Joined cases (C-40-48/73, C-50/73, C-54-56/73, C-111/73, C-113-114/73) [1975ECR-1663 173.

concerted practice between undertakings.[48]

Evidence of a concerted practice can be inferred from either of the two main sources, depending on whether the coordination is found directly or indirectly:

- Direct: plans, meetings, minutes of meetings, exchange of confidential market information or other close contacts.[49]

- Indirect can be inferred from: (i) the participation in an information exchange system and joint discussions of the exchanged data,[50] or (ii) from the market behaviour of the parties which cannot be explained otherwise than by collusion.[51]

6.1.1.2 Affecting trade between Member States

An act of collusion between undertakings, whether it is an agreement, decision or concerted practice, only falls into the scope of Article 101*TFEU* if it is proved to have an effect on trade between EU Member States.[52] EU competition case law shows its broad and flexible interpretation of the meaning of the phrase 'having effect on trade between Member States'. It can be an influence, direct or indirect, actual or potential, on the pattern of trade between Member States.[53] Furthermore, it does not necessarily mean that such agreement must be an actual restraint on or hindrance to trade between Member States. The possibility that there exists potential effect on trade will be sufficient to fulfil the criterion 'having effect on trade between Member States'. Besides, it is also sufficient if one of the clauses of the agreement in question can have this effect.[54] A national agreement concluded and effected among members could be caught by Article 101(1) if it can extend the effects over the territory, corresponding to the criterion 'having effect on

[48] Slot and Johnson, above n 40, 58; Jones and Sufrin, above n 2, 174.

[49] *Polypropylene* [1986] D.Comm OJ L 230/1 ECR II-867 120 – 127; *PVC II* [1999] ECR 931 715 – 730; *Polypropylene – Montecatini* C-235/92P [1999] ECR I-4539, 133 – 148.

[50] *Polypropylene – Atochem* (T-3/89) [1991] ECR II-1177 43-44 and 52-57; *Dunlop – Slazenger* (T-43/92) [1994] ECR II-441 106.

[51] *SACEM III* Joined cases (C-110, C-241-2/88) [1989] ECR 251 20-26.

[52] That means that an agreement that does not 'have as object or effect the prevention, restriction or distortion of competition within the common market' will not be covered by Article 101 *TFEU*. In this case, this agreement will be considered under a national competition law.

[53] *Société La Technique Minière v Maschinenbau Ulm GmbH* (C-56/65) [1966] ECR 235 249.

[54] *Windsurfing International Inc. v Commission* (C-193/83) [1986] ECR 611.

trade between Member States'.[55]

Recently, the concept of 'trade' is described as 'not limited to traditional exchanges of goods and services across borders'.[56] It covers all cross-border economic activity including establishment' and also encompasses 'cases where agreements or practices affect the competitive structure of the market'.[57] For this interpretation, 'effect on trade between Member States' refers to an impact on cross-border economic activity involving at least two Member States. It is not required that the agreement or practice affect trade between the whole of one Member State and the whole of another Member State.[58] Finally, the notion 'may affect' implies that 'it must be possible to foresee with a sufficient degree of probability on the basis of a set of objective factors of law or fact that the agreement or practice may have an influence, direct or indirect, actual or potential, on the pattern of trade between Member States'.[59]

6.1.1.3 Having as object or effect the prevention, restriction or distortion of competition within the common market

Acts of collusion between undertakings are prohibited under Article 101(1) *TFEU* if they have an 'object or effect' that may prevent, restrict or distort competition within the common market.[60] 'Object or effect' must be assessed as a whole in its economic context

[55] Regarding the question of whether a national agreement can be caught by Article 101(1) *TFEU*, the ECJ in *Cementhandelaren* concluded that purely national agreements could fall under the prohibition of Article 101(1), because the Court believed that such national agreements can raise barriers that prevent foreign firms from accessing that national market in order to provide competition for those members of the agreement in question. In this case, the Court held that 'an agreement extending over the whole of the territory of a Member State by its very nature has the effect of reinforcing compartmentalization of markets on a national basis, thereby holding up the economic interpenetration which the Treaty is designed to bring about and protecting the domestic production'. See *Vereeniging van Cementhandelaren v Commission* (C-8/72) [1972] ECR 977, 29

[56] *Commission Notice Guidelines on the effect on trade concept contained in Articles 81 and 82 of the Treaty* [2004] (OJ C 101/81 <http://www.oeaw.ac.at/eif/competition/en/guidelines/c_10120040427en00810096.pdf>, (hereinafter referred as *Commission Notice*).

[57] *Commission Notice*, s 2.2, 19–20.

[58] Ibid s 2.2, 21.

[59] Ibid s 2.2, 23.

[60] Under Australian competition law, s 45(2)(a) or 45(2)(b)(ii) of the *CCA* (formerly the *TPA*), a contract, arrangement or understanding is prohibited if it contains provisions having the purpose, effect or likely effect of substantially lessening competition. There are three different types of such provisions, namely: (i) Provisions that have the *purpose* of substantially lessening competition; (ii) provisions that have the *effect* of substantially lessening competition and (iii) provisions that have the *likely effect* of substantially lessening competition.

and particularly in the light of the situation in the relevant market.[61] In the case of a written agreement, the economic context in which an agreement is made is also taken into consideration, besides the reference to what is written.[62]

The assessment of whether there is an act of collusion is carried out with the individual considerations of 'object' and 'effect', even though both of them can be linked with the prevention, restriction or distortion of competition.[63] The object to restrict competition must result from the agreement itself without need to prove intention on the part of the parties to restrict competition.[64] Additionally, the existence of an anti-competitive object does not depend on the apparent effectiveness of the restrictive practice.[65]

The object of an agreement, decisions or concerted practice, however, must be sufficiently clear. In the case of an agreement or decision, it is easier because their object to restrict competition can be recognised explicitly and need not be confirmed from other sources.[66] Nevertheless, the circumstances and context of the agreement or decision are still important as they are usually relevant; in many cases they become significant to remove any possible doubt as to the purpose behind it.[67] In terms of a concerted practice, it is more complicated, but the anti-competitive intent of the participants can normally be inferred from their actions and the background against which the conduct took place.[68]

Effects that prevent, restrict or distort competition become another criterion by which an agreement, decision or concerted practice can fall under the prohibition of Article 101(1)

---

[61] *General Motors – Opel* [2003] CFI T-368/00 102.

[62] *Phillip Morris/Rothmans* [1987] ECR 4487, 32-64.

[63] It appears that the object to restrict competition is the more important factor in this regard, because it was held in the ECJ cases that 'If an object to restrain competition is evident, then the agreement itself, or at least any anti-competitive clause in the agreement, constitutes a restraint of competition 'by its very nature' and its effects on the market and damage to customers need not be examined'. See *Krupp Thyssen* [2001] ECR II-3757 151-154.

[64] *CMA – FETTCSA* (T-213/00) [2003] CFI 39-48.

[65] *Woodpulp II* [1993] ECR I-1307, 132.

[66] Ritter and Braun, above n 10,114.

[67] *Société La Technique Minière v M aschinenbau Ulm GmbH* (C-56/65) [1966] ECR 235, 249-250 ; *AEG-Telefunken AG v Commission* (107/82 R) [1983] ECR 3151, 39, 44-46 ; *Anseau – Navewa* [1983] ECR 3369, 22-25.

[68] *PVC II* [1994] OJ L239/14 35-38 *aff'd* in CFI [1999] ECR II-931 and ECJ [2002] ECR I-8375.

TFEU , if there is no anti-competitive object established.[69]

6.1.2 Specific forms of anti-competitive agreements: Horizontal and Vertical Agreements

Article 101(1) *TFEU* applies to two categories of agreements namely: (i) 'horizontal agreements' and (ii) 'vertical agreements'. In such agreements it does not matter whether they involve *intra-brand* or *inter-brand* competition.[70]

6.1.2.1 Horizontal Agreements

Horizontal agreements are defined by the *Commission Guidelines* as agreements or concerted practices entered into between two or more undertakings operating at the same levels (competitors) in the market, e.g. at the same level of production or distribution, whether those competitors are actual or potential.[71] Horizontal agreements are referred to as agreements and concerted practices,[72] hence, the forms of decisions are excluded from the definition. Article 101(1) *TFEU* does not explicitly separate horizontal and vertical anti-competitive agreements. However, in the Article prohibited horizontal agreements are named as including those for fixing prices and those for limiting or controlling production.

- **Agreements to fix prices**

Agreements aimed at fixing prices for purchasing or selling are prohibited under Article 101(1)(a) *TFEU* . Price competition is the most visible and important, but that does not mean it is the only form of competition.[73] In fact, forms of price fixing are commonly treated as hard core infringements which are *per se* illegal,[74] and have rarely been granted

[69] Ritter and Braun, above n 10,115.

[70] Rodger and MacCulloch, above n 37, 209; Ritter and Braun, above n 10, 268.

[71] *Commission Notice on Guidelines on the application of Article 81 of the Treaty to horizontal cooperation agreements* [2001] OJ C 3/2 9.

[72] Agreements refer to joint collusions with concurrences of wills between undertakings and concerted practices refer to safety-net catching looser forms of collusion without reaching as far as an agreement. See Jones and Sufrin, above n 2, 173.

[73] As observed by the ECJ in *Metro SB-Großmärkte v Commission* (C-26/76**)** [1977] ECR 1875, 20-21.

[74] Monti, above 10, 155; Ritter and Braun, above n 10, 125; Bael and Bellis, above n 3, 389.

exemptions, except for limited cases e.g. price fixing in the maritime sector.[75] The notion of 'fixing prices' encompasses the setting of prices for goods and services, the setting of minimum or maximum resale prices, the rigging of public bids, the prohibition of discounts or discriminatory prices, the fixing of minimum commissions, etc.[76]

The prohibition of price fixing is considered as the key point of the Commission's policy against cartels.[77] The EU Commission also demonstrates its strict treatment toward price fixing arrangements by rejecting persistently any justifications for horizontal price fixing agreements.[78] The prohibition of price fixing cartels is illustrated though first case, *Quinine Cartel.*[79] The later cases, *Dyestuffs*[80] and *Cementhandelaren,*[81] contributed to the elucidation of the prohibition of price fixing cartels.[82] The Court also considered the exchange of information in relation to price fixing as a violation of Article 101(1) *TFEU*

[75] Mark R Joelson, *An International Antitrust Primer: A guide to the Operation of United States, European Union and Other Key Competition Laws in the Global Economy* (Kluwer Law International, 3rd ed, 2006) 299.

[76] Ibid 299; Bael and Bellis, above n 3, 389; Ritter and Braun, above n 10, 125

[77] Cartels are regarded as a form of agreement or concerted practice in which competitors are engaging with the aim to avoid the competitive process through the fixing of non-competitive price levels and/or other terms of trade within the community or a part of it. The ultimate goal of a cartel's participants is to raise or maintain their prices and hence their profits.

[78] For instance, suggestions given by an industry on the ground that such agreement may be vital to protecting itself from facing ruinous competition; or the prohibition of 'recommended' price setting. See Joelson, above n 75, 300.

[79] The case against French, German and Dutch firms in relation to their cartel arrangement of selling quinine and synthetic quinidine; allocating particular local and export markets).

[80] *ICI v Commission* (C-48-69) [1972] ECR 619.

[81] *Cementhandelaren v Commission* (C-8/72) [1972] ECR 977.

[82] In *Dyestuffs,* the Court considered the cooperation among manufacturers of dyes aimed at keeping prices at their desired levels as a 'concerted practice prohibited by Article 85(1) (currently 101(1) *TFEU*)'. In *Cementhandlelaren,* the Court held that both regulations adopted by an association of Dutch cement dealers (VCH) relating to fixed and recommended prices clearly violated 101(1) *TFEU* (ex 85(1)). This was also previously held by the Commission's decision. These regulations included the launch of mandatory resale prices for deliveries of less than 100 tons; and the recommended prices for deliveries of 100 tons or more. As observed by the Court: 'While a system of "fixed prices" is clearly contrary to that provision, the "recommended price system is equally so"'.

.[83] Other than price fixing, the prohibition of fixing of other trading conditions is also included in Article 101(1).[84]

The action of concerted refusal to deal is also subject to prohibition under Article 101(1) *TFEU* .[85] The collective boycott implemented by a group of undertakings to refuse to deal with another undertaking was observed in *Papiers Peints de Belgique (Belgian Wallpaper)*[86] as 'one of the most serious infringements of the rules of competition', constituting an international violation of Article 101(1). Less serious agreements among undertakings are also regarded as infringements of Article 101(1), such as concerted action to impose discriminatory terms in dealing with particular undertakings e.g. suppliers, purchasers or other parties. Finally, joint purchasing, a form of agreement for collective purchasing by undertakings, can also be considered as an infringement of Article 101(1).[87] It is regarded as a scheme for the coordination of collective purchasing by imposing fixed prices within a cartel.[88]

- **Agreements intended to limit or control production**

A cartel can also exist in horizontal agreements to limit and control the production of competitors. Cartel participants often seek commitments to limit or otherwise coordinate the amount of products that are available for the market in order to raise or maintain prices and enhance profits.[89] Limiting investment or production capacity or production

[83] Joelson, above n 75, 302. The exchange of information itself is not prohibited by Article 101(1), but if such an information exchange system conveys precise information of pricing or other sensitive matters, it can be seen to have an adverse influence on competition. This was illustrated in *UK Agricultural Tractor Registration Exchange.* In *Thyssen Stahl AG,* again the exchange of information may constitute a breach of competition rules if it reduces market uncertainty and affects the participant's decision-making independence. *Thyssen Stahl AG v Commission.* Another kind of information exchange implemented within an industry trade association, which is designed to protect the domestic market by determining what imports would be allowed into the domestic market of participating producers, is not allowed, as was seen at *Cembureau.*

[84] It is known as collusion by undertakings aimed at fixing terms of payment, including credit, fixing the length of warranty periods and the amount of interest charges and other arrangements in relation to the provision of services.

[85] This action is equivalent to a 'naked competitive boycott', under the US antitrust law. See Joelson, above n 75, 305.

[86] *Papiers Peints de Belgique and Others v Commission* [1975] ECR II-1491.

[87] Bael and Bellis, above n 3, 1290; Ritter and Braun, above n 10, 234; Jones and Sufrin, above n 2, 1122.

[88] It was illustrated in cases of the aluminium and zinc cartels in the 1980s. The purpose of such schemes is to enable the cartel participants to control the availability and price of the products at its source in the market place. See Joelson, above n 75, 306.

[89] Ibid 307.

itself is the means of such commitments. Such limitations are often referred to as the imposing of production quotas and sale limitations.[90]

6.1.2.2 Vertical agreements[91]

Vertical agreements (vertical restraints) refer to restrictive distribution agreements concluded between manufacturers or suppliers of particular goods or services and their distributors.[92] Such agreements involve those concluded between parties operating at different levels, such as an agreement between a manufacturer and its distributor.[93] This kind of agreement occurs when products will not be sold directly to end-users from the manufacturers or suppliers and they still want to retain control over such questions as how their distributors market and sell these products.[94]

The application of Article 101(1) *TFEU* to vertical agreements and the declaration of illegality of agreements setting out absolute territorial protection on distributors were first mentioned in *Consten and Grundig.*[95] Vertical agreement is indirectly defined as an 'agreement or concerted practice entered into between two or more undertakings where each of which operates at a different level of the production or distribution chain and relating to the conditions under which the parties may purchase, sell or resell certain goods or services.[96] Vertical agreements include those between undertakings[97] or between

[90] The ECJ held that such quota agreements aim to set or control the quantities of goods or services that undertakings are to produce or market. As a result, the total output or the volume of sales within a certain territory will be limited. Quota agreements are seen as a classic form of market sharing. See *Sarrio v Commission* [1998] CFI T-334/94 ECR II-1439, 328; *Baustahlgewebe v Commission* [1994] CFI T-145/89 ECR II-987, 60; *Thyssen Stahl v Commission* [1999] CFI T-141/94 ECR II-347, 331-349.

[91] Vertical agreements are generally considered as less harmful than horizontal agreements. However, they can hinder the market integration process, which is one of the prime objectives of the European Community See *Grundig and Consten v Commission* [1966] ECR 299, 339; *Nungesser v Commission (Maize Seed)* (C-258/78) [1982] ECR 2015, 64-67.Vertical agreements have currently been regulated by the *European Commission Regulation (EC) No 2790/1999 of 22 December 1999* on the application of Article 81(3) (currently Article 101(3) *TFEU*) of the Treaty to categories of vertical agreements and concerted practices (Vertical Regulation) and the *Guidelines on Vertical Restraints of 13 October 2000* OJ C 291 *(*hereinafter referred as *Vertical Guidelines 2000).*

[92] Alese, above n 16, 143.

[93] Jones and Sufrin, above n 2, 121.

[94] Alese, above n 16, 143.

[95] *Consten and Grundig* Joined cases (C-56-8/64) [1966] ECR 56/64 339.

[96] *Commission Regulation (EC) No 2790/1999* art 2(1).

[97] Ibid.

an association of undertakings and its members or suppliers.[98]

The *Vertical Guidelines* introduces the most common vertical restraints and combinations of vertical restraints,[99] namely: single branding,[100] exclusive distribution,[101] exclusive customer allocation,[102]selective distribution,[103] (almost always used to distribute branded final products),[104] franchising,[105] exclusive supply[106] and tying.[107]

---

[98] Ibid art 2(2).

[99] These agreements are explained with examples included in the *Vertical Guidelines 2000* in part IV (Enforcement policy in individual cases), section 2 (analysis of specific vertical agreements). See Commission, *Guidelines on Vertical Restraint* (2000) OJ C 291 <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2000:291:0001:0044:EN:PDF >.

[100] Single branding refers to a non-competing arrangement based on an obligation or incentive scheme which makes the buyer purchase practically all his requirements in a particular market from only one supplier. As explained in *Vertical Guidelines 2000* s 2.2, 138, not only can the buyer buy directly from the supplier, but he/she will also not buy and resell or incorporate competing goods or services. This agreement will limit the competition and participation of competing and potential suppliers and facilitate collusion between suppliers in cases of cumulative use and, where the buyer is a retailer selling to final consumers, this causes a loss of in-store inter-brand competition.

[101] An exclusive distribution agreement is one in which the supplier agrees to sell his products only to one distributor for resale in a particular territory, while the distributor is usually limited in his active selling into other exclusively allocated territories. See *Vertical Guidelines 2000* s 2.2, 161.

[102] An exclusive customer allocation agreement is a kind of agreement in which the supplier agrees to sell his products only to one distributor for resale to a particular class of customer. Unlike exclusive distribution agreements, the distributor in this kind of agreement is usually limited to exclusively allocated classes of customer. Ibid s 2.3, 178.

[103] A selective distribution agreement will contain restrictions on the number of authorised distributors, on the one hand and the possibilities of resale on the other. However, there are two differences of this kind of agreement as compared with exclusive distribution agreements. First, the restriction of the number of dealers will depend on selection criteria linked in the first place to the nature of the product, instead of depending on the number of territories. Second, the restriction on resale refers to a restriction on any sales to non-authorised distributors, leaving only appointed dealers and final customers as possible buyers.

[104] *Vertical Guidelines 2000*, s 2.4, 184.

[105] Franchise agreements involve a number of questions relating to intellectual property rights. It relates particularly to trademarks or signs and know-how for the use and distribution of goods or services. Besides giving licence to IPRs, the franchiser usually provides the franchisee during the life of the agreement with commercial or technical assistance which will be integral components of the business method being franchised. Franchising may enable the franchiser to establish, with limited investments, a uniform network for the distribution of his products. Hence, franchise agreements usually contain a combination of different vertical restraints concerning the products being distributed, in particular selective distribution and/or non-compete and/or exclusive distribution, or weaker forms thereof. See *Vertical Guidelines 2000*, s 2.5, 199.

[106] Exclusive supply agreements contain provisions that there is to be only one buyer inside the Community to which the supplier may sell a particular final product. Hence it restricts the participation of other buyers. See *Vertical Guidelines 2000*, s 2.6, 202.

[107] A tying agreement is one which contains provisions that the sale of one product will include the purchase of another distinct product from the supplier or someone designated by the supplier. The first product is referred to as the tying product and the second is referred to as the tied product. See Ibid s 2.7, 215.

6.1.3 Principles for assessing an anti-competitive agreements

6.1.3.1 Per se

A *per se* rule is not explicitly declared in EU competition law, even though the wording of Article 101(1) and (2) *TFEU* appears to show that such a rule is fully applicable.[108] While considering the invalidity of an agreement that infringes Article 101(1), the ECJ holds the view that it should distinguish between those agreements having the 'object' to restrict competition and those having the 'effect' of competitive restriction. The ECJ believes that certain agreements must be declared as invalid without any further consideration to their nature.[109] Similar statements were repeated in later cases such as *BNIC v Clair*[110] and *Verband der Sachversicherer.*[111] With particular regard to price fixing agreements, the Court applies the same consideration.[112]

Additionally, in the EU *Guidelines on the application of Article 81(3) (currently Article 101(1) TFEU) of the Treaty*, the viewpoint discussed above was explicitly summarised as 'those agreements have the object of restrictions of competition, thus no further inquiry into their actual effects in the market is needed to conclude that those agreements are anti-competitive'.[113]

---

[108] Article 101(1) *TFEU* prohibits and then declares 'void' automatically such agreements which may affect trade between Member States and which 'have as their object or effect the prevention, restriction or distortion of competition within the common market', particularly five particularly forms of agreements described in paragraph 1.

[109] This was observed in *Consten and Grundig*, as the Court stated that '…[t]here is no need to take account of the concrete effects of an agreement once it appears that it has as its object the prevention, restriction or distortion of competition. See *Consten and Grundig v Commission* Joined Cases (C-56-8/64) [1966] ECR 299.

[110] *BNIC v Clair* (C-123/83) [1985] ECR 391.

[111] *Verband der. Sachversicherer v Commission* (C-45/85) [1987] ECR 405.

[112] The ECJ stated '…[i]f an agreement is indisputably intended to restrict competition, … [i]t is unnecessary to show that price competition has in fact been affected in order to establish the infringement'. See *Miller v Commission* (C-19/77) [1978] ECR 131; *BMW v Commission* (C-32/78) [1979] ECR 2435; *Hasseblad v Commission* (C-86/82) [1984] ECR 883.

[113] The European Commission, *Guidelines on the Application of Article 81(3) of the Treaty* (2004) 20-24.

6.1.3.2 De minimis principle[114]

The principle of *de minimis* was first introduced in the EU competition law in *Volk v Vervaecke,*[115] The Court held that 'an agreement falls outside the prohibition in Article 85(1) (now Article 101(1) *TFEU*) where it has only an insignificant effect on the market, taking into account the weak position which the persons concerned have on the market of the product in question'.[116]

The principle of *de minimis* was officially approved in the *Commission's Notice on Agreements of Minor Importance in 1970* based on the Völk's judgment.[117] The recent revision (the *de minimis* Notice of 2001[118]) has retained such exclusions as it had in the 1997 revision, while it has removed the turnover reference and market share thresholds to which the *de minimis* principle will apply to horizontal and vertical agreements has been increased. In particular, a horizontal agreement will be considered *de minimis* where the parties' market share is 10 per cent or less,[119] and it is 15 per cent or less for vertical agreements.[120]

6.1.4 Exemptions under Article 101(3) *TFEU*

Article 101(3) *TFEU* sets 4 forth exemption conditions to which an agreement or decisions may not be declared invalid. The grant of exemption can be undertaken on an individual basis, or by the consideration of the Court for a number of categories of

---

[114] Literally, the expression *de minimis* means *about minimal things*; it is fully known in the phrases *de minimis non curat praetor* or *de minimis non curat lex*, meaning that the law is not interested in trivial matters. See Eugene Ehrich, *Amo, Amas, Amat and More* (Harper and Row, 1985) 100.

[115] The case concerns an exclusive distribution agreement concluded between *Völk*, a German manufacturer of washing machines and *Vervaecke*, a Belgian distributor of electrical appliances, granting Vervaecke the exclusive right to sell Völk's products in Belgium and Luxembourg. The facts showed that Volk's market share was quite small, as Völk only accounted for 0.08% of the market for the production of washing machines Community wide, 0.2% of the market in Germany and 0.6 per cent of the market in Belgium and Luxembourg. See *Volk v Vervaecke* (C-5/69) [1969] ECR 295.

[116] *Volk v Vervaecke* (C-5/69) [1969] ECR 295, 7.

[117] This principle was originally meant to apply to both horizontal and vertical agreements and was revised several times in 1986, 1997 and 2001. Notably, this principle was not applied to a number of certain horizontal agreements such as price-fixing, market sharing, limitation of output or sales, as this was changed in the revision of 1997.

[118] Commission Notice on agreements of minor importance which do not appreciably restrict competition under Article 101(1) *TFEU* (so called the 2001 'De Minimis' Notice (OJ 2001/C 386/07)). This notice will replace the 1997 'De Minimis' Notice (OJ C 372, 9.12.1997).

[119] The 2001 *de minimis* Notice, 7(a).

[120] Ibid 7(b).

agreements (block exemption). In particular, an agreement can be entitled to exemption if it fulfils one of the following criteria:

- It contributes to the improvement of the production or distribution of goods or to promoting technical economic progress;

- It allows consumers a fair share of the resulting benefit;

- It must not impose on the undertakings concerned any restrictions which are not Indispensable to the attainment of these objectives; and

- It must not afford such undertakings the possibility of eliminating competition in respect of a substantial part of the products in question.[121]

Besides, this section also presents two cases where exemption is given undertaking (s) including individual and block exemptions.

6.1.4.1 Individual exemption

According to the *EEC Council Regulation No. 17 of 6 February 1962,*[122] the European Commission will make decisions to grant exemptions individually to agreements that satisfy the conditions set forth in the present Article 101(3) *TFEU* .[123] Such requirements have been changed since 2004 as the new *Regulation No. 1/2003*[124] came into effect. This Regulation has abolished the notification requirement to the Commission for granting

[121] *TFEU* Art 101(3).

[122] *EEC Council Regulation No. 17 of 6 February 1962*, First Regulation implementing Articles 81 and 82 (currently 101 and 102 *TFEU*) of the Treaty, OJ P 013, 21/02/62, P. 0204-0211 <http://www.jura.uni-augsburg.de/fakultaet/lehrstuehle/moellers/materialien/materialdateien/010_europaeische_gesetze/eu_verordnungen/vo_1962_0017_ewg_kartellrecht_en/>.

[123] Such exemption will be granted to agreements, decisions or concerted practices provided that they must be notified to the Commission and once such notifications have been made, no decisions in application of Article 101(3) *TFEU* may be applied. See Article 4(1) of the *EEC Council Regulation No. 17 of 6 February 1962*, First Regulation implementing Articles 81 and 82 (ex 101 and 102 *TFEU*) of the Treaty. More importantly, the absence of notification in accordance with the requirement of the Regulation could lead to the non-application of exemptions under Article 101(3). This was stated in *Distiller* in 1980. See *Distillers Co. Ltd v Commission* (C-30/78) [1980] ECR 2229, 24.

[124] *Regulation No. 1/2003/EC of 16th December 2002* on the implementation of the rules on competition laid down in Articles 81 and 82 (currently 101 and 102) of the *EC Treaty*, OJ 2003 L1/1 (2004) <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:32003R0001:en:NOT>.

exemptions under Article 101(3).[125] To be granted an exemption, the undertaking or association of undertakings in question that claim it must carry the burden of proving that they satisfy the conditions according to Article 101(1).[126] The exemption can be granted without any further consideration.

6.1.4.2 Block exemption[127]

The application of a block exemption system enables the Commission to declare Article 101(1) *TFEU* inapplicable to certain categories of agreements. The block exemption is a system that allows the European Commission to review and weigh up all pro-competitive effects that may exist in agreements, even though such agreements definitely fall within the scope of Article 101(1) *TFEU* . The final decision will rely on the balance between anti-competitive and pro-competitive effects that can make an agreement caught by Article 101(1) valid.[128] However, such agreements must satisfy the conditions set forth in both Article 101(3) and the *Guidelines on the Application of Article 81(3)* (currently Article 101(3) *TFEU*) *of the Treaty.*[129]

The 'block exemption' is used to reduce the number of notifications and the regulatory burden imposed on both the Commission staff and business firms. The Guidelines provide

---

[125] Pursuant to Article 1(2) the Regulation, exemption will be given to agreements, decisions or concerted practices caught by Article 101(1) *TFEU* provided that they satisfy the conditions of Article 101(3) *TFEU* and there will not need any decision to that effect. See *Regulation No. 1/2003/EC of 16th December 2002* art 1(2).

[126] *Regulation No. 1/2003/EC of 16th December 2002*art 2..

[127] Before the adoption of the *Regulation No. 1/2003*, the grant of exemption under Article 101(3) *TFEU* was given through two channels: individual and block exemptions.

[128] This is stated by the European Commission as below:

> The aim of the Community competition rules is to protect competition in the market as a means of enhancing consumer welfare and of ensuring an efficient allocation of resources. Agreements that restrict competition may at the same time have pro-competitive effects by way of efficiency gains. Efficiencies may create additional value by lowering the cost of producing an output, improving the quality of the product or creating a new product. When the agreement outweighs its anti-competitive effects the agreement is on balance pro-competitive and compatible with the objectives of the Community competition rules… This analytical framework is reflected in Article 81(1) and Article 81(3) (currently Articles 101(1) and 101(3) *TFEU*).

See *Regulation No. 1/2003/EC of 16th December 2002* on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty, OJ 2003 L1/1 (2004) 41 <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:32003R0001:en:NOT>.

[129] In particular, four conditions are: (i) efficiency gain; (ii) fair share for customers; (iii) indispensability of restrictions; and (iv) no elimination of competition. See Commission of the European Communities, *Guidelines on the Application of Article 81(3) of the Treaty*, April 27, 2004 (2004/C 101/08) <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2004:101:0097:0118:EN:PDF>.

an analytical framework based on the 'economic approach' providing detailed guidance on the application of the four conditions of Article 101 (3) *TFEU* (ex Article 81(3).

6.2 Anti-competitive agreements conducted by state monopolies

On the basis of the features of anti-competitive agreements under EU competition law described above, this section discusses particularly those agreements concluded by state monopolies. It can be concluded that state monopolies can engage in all types of anti-competitive agreements (hereinafter referred as agreement) like any other firms. This part, therefore, does not intend to argue why they can conclude such agreement, or look at the features of any agreement concluded by them. Rather it observes how they conduct them and how this can affect competition. Among universal forms of agreements, as seen in the competition jurisdictions, price fixing, market division, bid rigging and eliminating of competitors appear to be common.[130]

This part argues that state monopolies can conclude anti-competitive agreements by making use of their advantages in the market. Consequently, it demonstrates that competition rules should apply to them as much as they apply to other firms.

6.2.1 Price fixing agreements

Price fixing agreement is among the most common forms of anti-competitive behaviour and is strictly prohibited under *per se* in many countries.[131] Such an agreement is

[130] This is observed from cases studies of countries which have contributed to some international institutions and are cited in academic works; for example, two reports of the International Competition Network (ICN) regarding refusal to deal practices i.e. ICN, *Cases Annex to ICN Unilateral Conduct Working Group: Report on the Analysis of Refusal to Deal with a Rival under Unilateral Conduct Laws* (2009) <http://www.internationalcompetitionnetwork.org/uploads/library/doc611.pdf >; ICN, *Antitrust Enforcement in Regulated Sector: Report to the third ICN Annual Conference, April 2004* (2004) <http://www.internationalcompetitionnetwork.org/uploads/library/doc379.pdf >. See also, OECD, 'Summary of Cartel Cases Described by Invitees' (Global Forum on competition, CCNM/GF/COMP (2001)4, 2001) <http://www.oecd.org/dataoecd/41/30/2491386.pdf >.

[131] For example, the EU, US, Australia. See also UNTACD, *Model Law on Competition* (TD/RBP/CONF.5/7/Rev.3, United Nations, 2007) <http://www.unctad.org/en/docs/tdrbpconf5d7rev3_en.pdf >; OECD, 'State-Owned Enterprises and the Principle of Competitive Neutrality' (Policy Roundtable, DAF/COMP (2009)37, 2009) <http://www.oecd.org/dataoecd/43/52/46734249.pdf>.

conducted to fix buying or selling prices that will apply to all or some customers.[132] It can be in the form of agreement to increase current prices, to apply a uniform price scheme or discounts, or not to lower prices without notifying the parties to the agreement, etc. An agreement can be reached among state monopolies or between a state monopoly and a former state monopoly with other firms.[133] Fixing provisions can occur in an agreement concluded by a state monopoly with its competitors. In this case, it serves as a means to

[132] In the year 2007, when the Hellenic Competition Commission (HCC) examined the market for air fuel in Greece, it investigated the joint decision adopted by the domestic refineries ELPE and MOTOR OIL. This decision was about the switch to the new aviation fuel price quotation indicator which aimed to meet the oil reserves obligation provided for by the legislative framework. As a resulted, this caused a significant rise in the price of aviation fuel at the wholesale level. As concluded by the HCC, such a simultaneous switch could not be justified by the particular market structure (oligopoly) and was thus not considered as inoffensive parallel behaviour. It also concluded that two refineries applied a common policy and there was mutual communication. Therefore, the HCC held that this was a case of horizontal collusion (price-fixing). A €7,344,421 fine was imposed on ELPE and a €1,591,219 fine on MOTOR OIL. Moreover, ELPE and MOTOR OIL were ordered by the HCC to implement additional obligations such as to calculate the cost of maintaining aircraft fuel security stock, to maintain accounting data of the said cost and to notify all trading undertakings with which they concluded transactions on the Greek market. See HCC Decision 327/V/2007 – *International Air Transport Association (IATA) v ELPE and MOTOR OIL*.; OECD, 'Principle of Competitive Neutrality', above n 131, 309.

In 2008 16 insurance companies, most of them Vietnamese and state –owned companies, agreed upon an increase in car insurance rates. This agreement was implemented within their Insurance Association (Association of Vietnamese Insurers). Vietnam's Competition Authority (VCAD) has completed its investigation step and handed documents to the Vietnam Competition Council (VCC) for a trial. Similarly, steel producers entered into a price fixing arrangement under the auspices of the Vietnam Steel Association (VSA) in 2008. However, the investigation of VCAD in this case was cancelled due to withdrawal of VSA members. See VNEconomy, 'Luat Canh tranh Khoanh tay Nhin Doc quyen' [Competition Law Stands Idly Seeing Monopoly] <http://vneconomy.vn/20090306095723894P0C5/luat-canh-tranh-khoanh-tay-nhin-doc-quyen.htm>; Karen Ellis et al, *Assessing the Economic Impact of Competition: Findings from Vietnam* (2010), 3 <http://www.odi.org.uk/resources/download/4956.pdf>.

[133] In 2002 the OTP Bank Rt. (National Savings Bank, formerly a state-owned bank and the leading Hungarian commercial bank) and two ex-monopolist telecommunications: the MOL Rt. (Hungarian Oil Ltd.) and the Matáv Rt. (Hungarian Telephone Ltd.) entered into an agreement which set up a customer fidelity system with the issuance of a Multipoint Card. It was found by the Competition Council that the Multipoint Card in fact was a co-branded bankcard with fidelity customer functions for the customers of the OTP. The Council considered this would have a rather deleterious effect on competition in the long run. See OECD, *Annual Report on Competition Development in Hungary* (2002) <http://www.oecd.org/dataoecd/22/3/2509542.pdf >.

end price wars in the market.[134] It may appear in an agreement with firms that are not directly competing with that state monopoly in a particular market but that aim to impose fixed prices of the products or services it provides.[135]

An agreement can be made through the proposal of one or a number of state monopolies providing certain products or services on the market.[136] Besides, these agreements are made under the form of a memorandum of understanding or decisions of industrial association in which state monopolies are members or play a foremost role. It can be in the form of 'self-disciplinary' rules imposed by the association and can be financially

[134] 12 airlines, of which Garuda Indonesia Airways (a State-owned enterprise) is the largest one, are member of the Indonesian Airlines Association (INACA). Before 1999, INACA's members applied a pricing mechanism which was introduced with the consensus of all of its member and consultation with the Ministry of Transportation and became the reference for its members to set their own airline's tariffs. As the consequence of the economic crisis, this mechanism was no longer binding on INACA's members and could not prevent them from conducting price wars or predatory pricing strategies aimed at gaining market share. Later in 1999 a new agreement was suggested to INACA members, under which a new tariff was agreed upon to apply two kinds of airline tariff: the floor price and the ceiling price, with different pegging rates for the lowest price (US$ 1 = Rp 4000) and highest one (US$ 1= Rp 7500). This new agreement was examined by the Indonesian Commission for the Supervision of Business Competition (KPPU) and considered as a cartel. See Sutrisno Iwantono, *Economic Crisis and Cartel Development in Indonesia* <http://www.jftc.go.jp/eacpf/01/iwantono_cartels_workshop.pdf>.

[135] In 2003 ČESK TELECOM a.s., a former state monopoly that still dominates the telecommunications market in the Czech Republic, had its General Contracts for the supply of ADSL modems with JOYCE ČR, s.r.o. and Lucent Technologies Česk· republika, v.o.s., under which the purchasers were not allowed to sell goods, specified in Annexes to the contracts, to other companies in the territory of the Czech Republic for prices lower than those stated in these contracts. The Czech Office for the Protection of Competition concluded that these agreements (contracts) could have led to the distortion of competition on the market with supplies of modems and equipment for connecting to the internet through ADSL technology, because competitors of ČESK› TELECOM could not have obtained better prices for ADSL modem supplies if they entered into contracts with JOYCE ČR, s.r.o. and Lucent Technologies Česk· republika, v.o.s. It was also concluded that this could have resulted in a situation where the competitors of ČESK› TELECOM would have been obliged to purchase ADSL modems through ČESK TELECOM, a.s.. See OECD, *Annual Report on Competition Policy Developments in the Czech Republic* <http://www.oecd.org/dataoecd/55/19/37008264.pdf>.

[136] For example agreement on setting lending and borrowing interest rates by state-owned commercial banks in Vietnam, mentioned in chapter 4. In Romania in 1997 the state corporation National Company of Mineral Waters (NCMW) participated in a price fixing with members of the Employers' Association 'APENIM' relating to the bottling of mineral water in the country. Under this agreement, NCMW and APENIM members agreed on price proposals given by NCMW. The Romanian Competition Council concluded that this agreement indirectly affected the decision-making independence of companies which were non-members of 'APENIM'.

sanctioned by them.[137]

It can be observed that an agreement concluded within an industrial association to which state monopolies are members is easily achieved because of the considerable influence of these state monopolies in the operation of associations. In transitional countries like Vietnam and China[138] trade associations are traditionally seen as 'the economic extension' of the government, despite their legal autonomy,[139] and the majority of their members are large and powerful state firms.[140] Industrial associations led by state firms not only serve as interest groups which can have a strong impact on the law making and policy decision process, but also play a positive role in price adjustment in the market.[141]

---

[137] In 1997, *La Lactaria Española S.A.*, a Spanish public enterprise attached to the Ministry of Agriculture, led a cartel of industrial dairy firms consisting of 48 manufacturers of milk products within the Spanish National Federation of Milk Industries (FENIL). It was found that there were a number of activities such as preparation and distribution of a price recommendation, the subsequent monitoring of that recommendation and the consequent application of the same base prices and identical discounts and penalties for milk quality in the purchases of cow's milk. The firms were fined by the Spanish Competition Authority (CNC) with a fine of €1.01 million. See OECD, 'Competition, State Aids and Subsidies: Contribution from Spain' (Global Forum on competition, DAF/COMP/GF/WD(2010)49, 2010), 8 <http://www.oecd.org/dataoecd/19/21/44530819.pdf>; Comision Nacional de la Competencia (CNC), *Report on Competition and the Agrifood Sector* (2010) 54 <http://www.cncompetencia.es/Administracion/GestionDocumental/tabid/76/Default.aspx?EntryId=43418&Command=Core_Download&Method=attachment>.

[138] China and Vietnam share similar characteristics of industrial associations. In China after 1978, government ministries in some 'non-essential' industries such as machinery, electronics, chemicals and textiles, were converted into industrial associations, representing various interests in those industries. See Leiming Wang, Lutao Shen & Sheng Zou, 'Five Comprehensive Government Restructures 1982-2003' *Xinhua News Agency* (Online) http://www.people.com.cn/GB/shizheng/252/10434/10435/20030306/937651.html cited in Bruce M Owen, Su Sun and Wentong Zheng, 'Antitrust in China 2006: The Problem of Incentive Compatibility' in Belton M Fleisher et al, *Policy Reform and Chinese Markets: Progress and Challenges* (Edward Edgar Publishing, 2008) 76-77. This transformation raised concerns about administrative monopolies because in these associations anti-competitive practices by their members were often permitted or encouraged. The reason was that their major participants were still SOEs and heads of association were formerly government officials. As a result, many industrial associations were just organised like the government ministries in disguise. The so called 'self-disciplinary' prices agreement applied industry-wide since 1990 functioned as prices cartels. In other forms of industrial associations where the government maintained its regulatory presence, government ministries and regulatory agencies had 'affiliate companies' to which they granted preferential treatment. See Bruce M Owen, Su Sun and Wentong Zheng, 'Antitrust in China 2006: The Problem of Incentive Compatibility' in Belton M Fleisher et al, *Policy Reform and Chinese Markets: Progress and Challenges* (Edward Edgar Publishing, 2008) 76-77.

[139] Lucas Niedolistek, China's State Administration for Industry and Commerce adopts its first cartel decision under the Anti-Monopoly Law in the concrete production sector, January 2011, e-Competitions, No34955, <www.concurrences.com>.

[140] Economic groups in Vietnam which operate in a wide range of business areas and consist of many subsidiaries can, to some extent, carry out similar functions to an industrial association. Hence they may act as 'interest groups'.

[141] In January 2011 the local branch of China's State Administration for Industry and Commerce

There are two cases involving the making of anti-competitive agreements. The first one is when state monopolies exist in crucial industries and there are no other participating firms.[142] In these cases, an agreement for fixing selling/buying prices among state firms can be made easily and may not be affected by competitive pressure from other firms.[143] In the second case, when most goods and services are provided by a few state monopolies, price agreements are still easily achieved because of the close relationship among state firms.[144]

Anti-competitive agreements can be simply made in a vertical manner among state

(SAIC) fined the Concrete Committee of Lianyungang's Construction Materials and Machinery Association (Concrete Committee) and some of its members for making an anti-competitive agreement under China's *Anti-Monopoly Law* (*AML*). It was discovered that on 3 March 2009 based on negotiations among the Concrete Committee, a 'Self-discipline Rules' was adopted. Under these Rules, the Concrete Committee standing members would deal with every ready-mixed concrete order and then decide which member should enter into supply agreements with the building companies. Such a decision would be made based on an assessment of the members' production lines, concrete mixers and pumping equipment. Also on the basis of such assessment, exclusive supply territories were allocated to each member. The Concrete Committee even financially sanctioned members who did not comply with the Self-discipline Rules. The Jiangsu AIC held that such agreement could restrict the producer's freedom to supply construction sites of their choosing and importantly increased the price of the ready-mixed concrete in the Province. It further held that the Rules aimed at dividing up the sales market, which is prohibited by Article 13(1), (3) of the *AML*. See Lucas Niedolistek, 'China's State Administration for Industry and Commerce Adopts its first cartel decision under the Anti-Monopoly Law in the concrete production sector' January 2011, e-Competitions, No34955, <www.concurrences.com>.

[142] Some countries like Vietnam have reserved some important areas (state monopolized domains) where only state firms have monopoly rights to provide products or services. See, for example, *Decision No. 38/2007/QĐ-TTg* dated 20-3-2007, there are 19 industries and sectors in which the state will hold 100 per cent of registered capital and another 27 industries and sectors in which the state will possess more than 50 per cent of total shares of state equitized firms.

[143] In response to uncontrolled sugar importation that affected local sugar farmers, the government of Indonesia released an imported sugar management policy in September 2002 aimed at ending freedom to undertake sugar importation. This policy set out special criteria to be fulfilled by importers, under which there were only five institutions (mostly State-owned enterprises) eligible to import sugar. The implementation of this policy, however, was examined by the Indonesian Commission for the Supervision of Business Competition (KPPU). The final conclusion by the KPPU was that such a policy could give rise to unfair business practices. The reason was that the five importers were dominating the sugar market and tended to carry out cartel activities among themselves in order to maximize profit. See Iwantono, above n 134.

[144] TravelSky Technology Limited, a state owned company whose 65 per cent of shares are held by other Chinese SOEs, such as China Southern Airlines Group Corporation, China Eastern Air Holding Co., China National Aviation Holding Company, etc. TravelSky currently monopolizes the booking and departure system in China. In March 2009 it was alleged that TravelSky adjusted its discounting policies, causing an increase in air ticket prices offered by all airlines in TravelSky's network and this was conducted at the request of several major SOE airlines which were TravelSky shareholders. An investigation of price fixing agreement was commenced by the National Development and Reform Commission (NDRC) in May 2009. See Jin Huang 'Industrial Policy and Enforcement of Antimonopoly Law in China in a Time of Crisis <http://www.asiancompetitionforum.org/download/091207_ACF_ppt/SB2-2_Industrial%20Policy%20and%20Enforcement%20of%20antimonopoly%20in%20a%20time%20of%20crisis-%20Jin%20Huang.pdf >.

entities in the same organizational system, for example among subsidiaries within the scope of a general corporation or state conglomerate. Price fixing collusions can be made between two firms that have a major shareholder involved in the operation of the firms through its representative on the Executive Board. This shareholder can act as an intermediary in price policy coordination and facilitate price fixing collusion among firms where it has majority shares.[145] In Vietnam, this has raised concern because the law governing state corporations and state economic groups has not been fully developed.[146] For those state monopolies which are formed as a result of consolidation or equitization, member entities still maintain dependence on higher entities or dependent economic entities. Agreement can then be made in the form of directions or guidelines proposed by the parent company, or the parent company can act as coordinator.

6.2.2 Market division agreements

State firms holding a monopoly position can also divide the supply market through mutual agreements. They can also use this kind of agreement to allocate their operations, creating a geographically divided market and limiting the product accessibility of consumers. This may result in monopoly price maintenance and limit the entry of other

[145] For example, the Bulgarian Telecommunications Company (BTC) was a state-owned monopoly that owned and operated Bulgaria's fixed-wire national public telephone network and enjoyed exclusive rights in this sector until 2002. It was a major shareholder in two other firms in this sector, namely Bulphone Bulgarian Corporation for Telecommunications and Informatics J.- St. Co. and Radio and Telecommunications Ltd. In 2001, these two companies participated in a price fixing conspiracy relating to sales of phone cards that kept equal the prices offered by the two companies. It was later found out that there was a price fixing agreement coordinated by BTC during their regular meetings. This was because both companies had BTC as a common shareholder which acted as an intermediary in price co-ordination. The Commission on Protection of Competition made a prohibiting order and imposed fines on both companies of a total amount of BGL18,000 (approximately EUR 9,000). See contribution of Bulgaria in OECD, 'Summary of Cartel Cases', above n 130; CUTS, *Competition Regime in the World – Bulgaria* (2006) <http://competitionregimes.com/pdf/Book/Europe/65-Bulgaria.pdf>; *Contribution of Bulgaria in OECD Policy Roundtable*, (CCNM/GF/COMP/WD(2001)9, 2001) <http://www.oecd.org/dataoecd/40/62/2491675.pdf>.

[146] For example, in a Vietnamese multi-sector state economic group, the concern is whether the relationship between a group and its member entities can be considered a form of agreement, united in action and regulated by competition law. The problem becomes complicated when their legal personality is not recognized or has not yet been recognised.

firms into that market.[147] Market division agreement can aim to divide a product/service consumption market or supply sources.[148]

In developing or transitional countries such as Vietnam, market division originates from the fact that state entities are usually formed according to geographic region.[149] The restructure and consolidation of state firms during the 1990s led to a considerable reduction in the number of state firms. However, the former geographical division among them remains as a market division when newly formed/consolidated firms continue to operate in traditional markets. Hence, an agreement for dividing the market is made to maintain dominant position of state firms in formerly allocated areas.[150] This also leads to a situation where no other firms can participate in such divided markets.

---

[147] In 1999, the Latvian state-owned joint-stock company Latvia Post (Latvijas Pasts) and DHL International Limited concluded an agreement containing restrictive terms that potentially threatened competition. Under this agreement, from 01/10/1999, Latvijas Pasts was appointed as DHL's agent and enabled DHL to offer its services through post outlets within Latvian territory. Latvijas Pasts was also to stop the then provision of services by S.MS International Courier. The agreement also included exclusive obligations under which Latvijas Pasts would not be involved either directly or indirectly in the sale of any companies that competed with DHL, unless expressly otherwise agreed by DHL. After an investigation commenced by the Latvian Competition Council, both parties terminated the violation by excluding the competition restrictive clauses. See OECD, 'Summary of Cartel Cases', above n 130.

[148] Ibid. On August 1, 1998 the Latvian company 'Airbaltic', a flag aviation carrier of Lavia in which the Latvian State holds 52,6 per cent of shares (http://www.airbaltic.com/public/basic_company_information.html?&doc_print=1) and the Russian company 'Transaero' concluded an agreement on co-operation in the organisation of passenger flights between Riga and Moscow. The 10 year valid agreement provided that no party to the agreement should operate regular flights between Latvia and Russia, except for the flights provided in the agreement. It was also provided that Airbaltic should make certain payments to Transaero and in return Transaero agreed not to compete with Airbaltic by offering regular transportation to/from Latvia and inside Latvia. 'Airbaltic' was later fined by the Competition Council to the amount of 0.7 per cent of the total turnover of 1998.

149 For example in Vietnam state firms were formed according to provincial, regional and central divisions, which created market divisions among them. Two Food Corporations were established in the north and the south respectively. The Vietnam Northern Food Corporation (VINAFOOD1) was established by the *Decree 312/TTg* dated 24/5/1995 and later was transformed into a wholly state-owned company in 2009. The Vietnam Southern Food Corporation (VINAFOOD2) was established by the *Decree 979/QĐ-TTg* dated 25/6/2010. The same thing can be seen through Electricity Corporations before the birth of Vietnam Electricity Group (EVN), there were the Power Corporation No.1 in the North, the Power Corporation No.2 in the South and the Power Corporation No.3 in the Central in the 1990s. They became members of Vietnam Electricity Group in 2006.

[150] In 2001the Regional Office of the Russian Competition Authority in Primorsk commenced a proceeding for violation against two state unitary enterprises: 'Water Supply Services of the South of Primorsk Territory' and municipal unitary enterprise 'Plumbing-Sewering Facilities' in Vladivostok City. The two enterprises were accused of having an agreement with the purpose of dividing the market of water supply services in Vladivostok by categories of consumers. The Commission has requested to cancel this agreement. See OECD, *Annual Report by the Russian Federation* (2001) <http://www.oecd.org/dataoecd/33/56/2488929.pdf>.

6.2.3 Bid rigging

Bid rigging is a particular form of collusive price-fixing behaviour and is one of the most widely prosecuted forms of collusion.[151] Bid rigging agreements often occur in government contracts such as infrastructural projects or essential construction,[152] and sometimes involving public procurement.[153] These fields are often entrusted to state monopolies to operate i.e. monopolised domains. A number of areas that have 'natural monopoly' characteristics also have more state firms than others, due to requirements of capital, infrastructural settings and technology.

A bid rigging collusion can be undertaken in one of the following forms. First, bid participants can submit a bid that is higher than the bid of the designated winner or is known to be too high to be accepted, or contains special terms that are known to be unacceptable (cover bidding). Second, one or more bid participants agree to refrain from bidding, or to withdraw a previously submitted bid, so that the designated winner's bid will be the successful one (bid suspension). Third, they can negotiate among themselves to take turns at being the winning bidder (bid rotation). Fourth, they may agree on bids according to an allocation of certain customers or in a certain geographic area, so that a firm may not compete in a bid related to specific customers or types of customers that are allocated to another specific firm (market allocation).[154]

---

[151] OECD, *Glossary for Industrial Organisation Economics and Competition Law* (1993),16 <http://Www.Oecd.Org/Dataoecd/8/61/2376087.Pdf>.

[152] See contributions of countries in OECD, 'Collusion and Corruption in Public Procurement' (Competition Policy Roundtable, DAF/COMP/GF (2010)6, 2010) <http://www.oecd.org/dataoecd/35/19/46235884.pdf>.

[153] Public procurement serves as an important part of government expense. Public Procurement of goods and services typically accounts for 10-15 per cent of GDP for developed countries and up to as much as 20 per cent of GDP for developing countries. In OECD countries public procurement accounts for approximately 15 per cent of GDP. See OECD, *Bribery in Procurement, Methods, Actors and Counter-Measures* (OECD Publishing, 2007) <http://www.oecd.org/dataoecd/47/11/44956834.pdf>; Summary of Public Procurement at Global Trade Negotiations Hompage at Harvard University; <http://www.cid.harvard.edu/cidtrade/issues/govpro.html>. Bid-rigging in public procurement markets accounts for a striking percentage of prosecutions by competition authorities in jurisdictions where such authorities are well established. See <http://www.oecd.org/dataoecd/12/1/44456320.pdf> 19. According to the South African Competition Commission, bid rigging in public tenders in such markets as construction and civil engineering are considered as important priority areas. See OECD, 'Competition Policy, Industrial Policy and National Champions' (2009) (Competition Policy Roundtable, DAF/COMP/GF (2009)) 195, 230 <http://www.oecd.org/dataoecd/12/50/44548025.pdf>.

[154] OECD, 'Collusion and Corruption in Public Procurement' above n 152; OECD, *Glossary*, above n 151,16; William Kovacic and Robert Anderson, contribution to OECD Forum on 'Collusion and Corruption in Public Procurement'(2010) <http://www.oecd.org/dataoecd/12/1/44456320.pdf>; OECD, *Guidelines for Fighting Bid Rigging in Public Procurement* <http://www.oecd.org/dataoecd/27/19/42851044.pdf >.

Bid rigging agreements become popular when there is a collusion which allows a state firm to win the bid.[155] Collusion among bidders that are state firms is likely to happen, because bid rigging tends to occur in markets where competitors know each other well through social connections, industrial associations or business contacts.[156] Another issue related to bid rigging agreements is the close relationship between state management organizations which are in charge of the bid and state firms participating in the bid. This normally happens in tenders of projects funded by government budget and sometimes not publicly announced.[157] Bid rigging agreements can also happen in those projects where all the stages are performed by firms belonging to the same organization; horizontal bid rigging agreements are easy to arrange.[158]

6.2.4 Refusal to deal agreement

This kind of agreement is often based on a prescribed course of action employed to compel firms that are not members of a group (group boycotts). This kind of agreement

[155] For example, see the collusion for winning a bid in Van Lam-Son Hai II Road Construction project in 2002 in Vietnam as mentioned in chapter 4, when four state construction firms, in fact all of them belonging to the Company 98, were the winning companies. There was obviously an example of bid rigging practice. Similarly, in 1998, two Chinese companies (Jiangxi Lichuan County Construction Company and Jiangxi Desheng Construction Company) were prosecuted by the Jiangxi Province's municipal administration for industry and commerce for colluding on their bids in response to public tenders. It was stipulated in the agreement that Lichuan Company would act as the authorized agent of Desheng Company to exercise the operating right of construction engineering businesses and project management within the region of Lichuan County. In return, Lichuan Company would pay Desheng Company management fees of RMB40,000 per year. See contribution of China in OECD, 'Summary of Cartel Cases', above n 130.

[156] OECD, 'Collusion and Corruption in Public Procurement', above n 152, 317.

[157] Consequently, only state firms can enter tenders, or tenders are just open to limited state firms which are 'affiliate' companies to ministries/local authorities. SOEs also have more advantages than private firms in participating in this kind of tendering. First, in terms of eligibility to enter the tendering, there are certain barriers such as preferential margins, quota restrictions, pre-tender qualification requirements. Special consideration is often given to domestic/provincial/local enterprises or SOEs, where the government procurement entity is a provincial or local authority. It can be given to businesses with which leaders and senior officials have an association themselves or through family and friendship. Second, SOEs are able to draw upon government funding when necessary and the favour from the banks to write off their nonperforming loans, making it possible for them to out-bid private sector competitors with low bids. 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) 207-224, David S Jones, 'Procurement in South East Asia: Challenge and Reform (2007) 7 (1) in *Journal of Public Procurement* 9-10. For example, in Vietnam only 32 per cent of public bidding for goods and public projects was subject to open tender in 2002. And in 2002 in many tenders it was noted that access was confined to, or special consideration was given to, SOEs. See World Bank, 'Vietnam: Country Procurement Assessment Report: Transforming Public Procurement' (Report No. 25144-VN, 2002).

[158] This kind of tendering may be called 'closed tendering' (*Dau thau Khep kin* in Vietnamese). It refers to a situation, mostly in government infrastructure projects, where all operational stages of the project, i.e. design and survey, construction and supervision, are in the hand of a ministerial body, e.g. Ministry of Transportation. Projects are then run by companies belonging to that body or affiliated to it.

can be horizontal (i.e. members of this group may agree among themselves not to sell to or buy from certain customers). It can also be vertical (firms at different levels of the production and distribution stages agree to refuse to deal with competitors of the firms involved in the agreement).[159]

Refusal to deal (or boycott) agreement seems to appear in areas related to essential facilities such as telecommunications, airports, transportations, etc.[160] These areas were previously reserved for state monopolies and they continue to maintain them even after privatisation.[161] Such agreement can particularly occur in countries where state-owned enterprises have been separated into smaller firms under the privatisation process, such as in the case of China.[162] In this case, post-privatised firms are still strong and continue to have market dominance.[163]

An agreement aimed to foreclose markets to new potential competitors is easily

[159] UNTACD, *Model Law*, above n 131.

[160] See, for example, two reports of the International Competition Network (ICN) regarding refusal to deal practices i.e. ICN, above n 130. See also OECD, 'Summary of Cartel Cases', above n 130.

[161] From the mentioned summaries of significant cases, it appears that in such areas, both current and former state monopolies were involved in a number of anti-competitive agreements which they coordinated actively and played leading roles in.

[162] The development of China's airline provides a good example which is traced back to 1987, when the State Council ratified the Report on Civil Aviation Reform Measures and Implementation. The roles of the Civil Aviation Administration of China (CAAC) in terms of administrative and regulatory roles were separated from the direct management of the day-to-day operations of commercial airlines and airports. Consequently, between 1987 and 1991, six airlines based in the regional capital cities were formed, namely: Air China (Beijing), China Eastern (Shanghai), China Northwest (Xi'an), China Northern (Shenyang), China Southwest (Chengdu) and China Southern (Guangzhou). CAAC became the nominal owner of these airlines, in the name of the state. In 2002, under the Civil Aviation System Reform Programme ratified by the State Council, nine airlines were consolidated to become the 'big three': Air China Group, China Eastern Group and China Southern Group. See Yahua Zhang and David K Round, 'China's Airline Deregulation since 1997 and the Driving Forces behind the 2002 Airline Consolidations'(2008) 14 (3) *Air Transport Management* 130–142. The mergers, however, brought about competition concern regarding a monopoly situation in this sector, because these mergers conferred on China's big three airlines a joint dominant status in domestic Chinese markets, in which three of them accounted for a combined 83.7 per cent market share. See Yahua Zhang and David K Round (2009) 'The effects of China's airline mergers on prices' (2009) 15 (6) *Air Transport Management* 3; Inaki Berenguer, Cai Shijun, Li Liang, Liu Jing, Ningya Wang, *E-commerce at Yunnan Lucky Air* (2008) <https://mitsloan.mit.edu/MSTIR/GlobalEntrepreneurship/EcommerceYunnan/Documents/08-076%20Ecommerce%20at%20Yunnan%20Lucky%20Air%20-%20Lehrich.pdf>.

[163] This can be seen through the case of former state monopolies in Eastern Europe after privatization, when they continued to hold market dominance in the relevant markets.

concluded between state firms, even though they are competing with each other[164] It is motivated by the desire to maintain a monopoly or dominant position of state monopolies and the wish to keep exclusivities in key areas.[165] Besides, it is likely to be easier because they all share the same objectives and benefits.

6.3 The application of competition law to anti-competitive agreements of state monopolies in Vietnam

6.3.1 Anti-competitive agreements of state monopolies in Vietnam: some background

Agreements in restraint of competition of state firms in Vietnam were common before the Competition Law 2004 came into effect. First such agreements were arguably inherited from the previous economic management mechanism. Second, it was due to the absence of a competition law and the lack of knowledge about its potential impact on competition.[166] Hence, such agreements could neither be considered as anti-competitive

---

[164] In 2007 an anti-competitive agreement were found between two Polish petroleum companies: Grupa Lotos (state-owned) and PKN Orlen (state-controlled). After examining documents gathered from the headquarters of both companies, The Polish Office for Consumers and Competition (OPCC) discovered that PKN Orlen wanted to withdraw its universal petrol U-95 (containing lead and used with older cars) from the market because of decreasing demand for U-95 petrol and the consequent unprofitability of its production. However, PKN Orlen considered that it should make this withdrawal simultaneously with another petroleum company, the Lotos Group, in order to avoid customer dissatisfaction and possible defection. Later an agreement between them was made. A special addition called blended-fuel, supported by Grupa Lotos, was mixed with unleaded petrol to substitute for U-95. The agreement also aimed to prevent either of the firms from dominating the market for U-95 in the case one of them withdrew from the distribution of the fuel. The OCCP found that the agreement had as its explicit objective to prevent competition in the U-95 market and thus it imposed fines on both companies. See OECD, 'Principle of Competitive Neutrality', above n 131, 198. See also Energy Business Review, *PKN Orlen and Grupa Lotos Slapped with Fine – Report* (2008) <http://www.energy-business-review.com/news/pkn_orlen_and_grupa_lotos_slapped_with_fine__report >.

[165] For example, until 2003, only Vinaphone and Mobiphone, both subsidiaries of the present-day VNPT Group, were the providers of mobile services using the Global System for Mobile Communication (GMS) technology in Vietnam. In 2003, S-Fone, a joint venture between Saigon Postel Corporation and Korea SK telecom SPT, launched its S-phone network using the Code Division Multiple Access (CDMA) technology. While connection between GMS and CDMA networks was available in many countries, SPT subscribers could not send messages to Vinaphone and Mobiphone or *vice versa.* Many technical reasons were given, by both Vinaphone and Mobiphone, to explain the delay in providing interconnection facilities to the new market players. This caused a difficulty for S-Fone, as a new comer, in entering the mobile market. At that time there was no competition law and no competent authority to initiate an investigation into an agreement between VInaphone and Mobiphone, even though this was clearly a practice of refusal to deal. See CUTS, *Competition Scenario in Vietnam* (2005), 23 <http://www.cuts-ccier.org/7Up2/pdf/7Up2_Vietnam.pdf>. See also USAID, *Competition Review of the Vietnamese Telecom Sector* (2005), 16-17 <http://pdf.usaid.gov/pdf_docs/Pnade784.pdf>.

[166] Vo Duy Thai, *Xu huong Thoa thuan Han che Canh tranh o Vietnam* [Trends of Anti-competitive Agreements in Vietnam] (2009) < http://www.vcad.gov.vn/Web/Content.aspx?distid=2243&lang=vi-VN>.

nor legally prohibited.

The autonomy of state firms was limited during the centralized planning economy, because the price setting and the allocation of product/service supply were carried out under state direction.[167] Although there existed mutual cooperation among state firms operating in particular fields, they were implemented under the uniformly centralized directions of line ministries.[168] Examples could be found in many agreements for setting up distribution markets and arrangement of market division and product supply among state firms within an industry. Agreements were even considered as a positive factor to enhance cooperation and protect the interests of a certain group of state firms.[169] After Doi Moi, there were two possible sources of such agreements, namely corporation-wide ones and those made within a trade/industrial association.

First of all the number of state firms was considerably reduced, purely resulting from a reconstruction to form general corporations (GC). As mentioned in Chapter 3, constituents of a GC still operated under direction of the general corporation. The formation of GCs did not remove completely the direct management functions of line ministries and this resulted in the popular practice of intervention and direction by ministries. Hence, agreements among state firms in GC (later economic groups) were often influenced by state management agencies, which clearly distorted competition.

In particular, business relationships among state firms under the management of their ministries still existed for a long time in the form of a 'closed circle'. As in the previous time, this phenomenon refers to the situation where member firms of a GC must be responsible for supplying other members of that GC, by purchasing products and services offered by them.[170] The ministry to which a GC belongs might ask its member firms to

[167] This has been pointed out in chapter 2 (part 2.2.1) and chapter 3 (part 3.2).

[168] Le Viet Thai, 'Hanh vi Thoa thuan Han che Canh tranh' [Agreements in Restraint of Competition] Working Paper on Competition Law (2005) 21. During the central planning economy, there were some forms of agreements among state enterprises, in the form of so-called 'economic contract' (*Hop dong kinh te* in Vietnamese*)* with regard to the purchase of products of a state enterprise from another. However, they were restricted among state enterprises within an industry, or a ministry might direct its state enterprises only to purchase products or services provided by industry-owned ones. See also Thai, above n 166.

[169] 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).

[170] Thai, 'Hanh vi Thoa thuan Han che Canh tranh', above n 168, 21.

conclude contracts/agreements only with the firms under the ministry's auspices or its affiliate firms.[171] There were two common types of agreements among state firms. The first was 'forced agreement', referring to the above type. The second, which was often seen as a more voluntary kind, referred to agreements for sources for supplying products or purchasing material. These types were considered as negative practices and had a negative impact on a competitive environment because such agreements were mostly made among state firms. It restricted the participation of private firms in the relevant markets and limited the choice of customers.

Besides, member companies of a GC could also form similar 'cartels' among themselves to win tenders for any government funded projects and exclude other competitors. For example, they could all enter a bid and then collude to select the winner among themselves. Such collusions may have also been involved with state agencies in charge of tenders. Secondly, anti-competitive agreements (cartels) of state monopolies could occur within a trade/industrial association.[172] There was a conception that a cartel was a form of either an official or unofficial 'association'.[173] Since 1957 the law had recognised the right to form associations. However, an 'industrial association' in Vietnam, in fact, arose from the deregulation of government ministries in a number of industries in which the members comprised companies previously run by the ministries in question. An association became important because it could coordinate members' activities, promote the collection and exchange of information and technical standards and lobby the government for legislative gains.[174] This could be observed in a number of industrial associations formed in areas where state firms played an important role, including in petrol supply, automobile manufacture and export of materials such as rubber, coffee,

[171] Thai, *Xu huong Thoa thuan Han che Canh tranh*, above n 166.

[172] Historically, the right to form an 'association' in Vietnam was recognition by the *Law on the Right to Form Associations* (Law No. 102/SL/L004 on 20/5/1957 and *Decree No. 258/TTg* giving details for implementation.

[173] Thai, *Xu huong Thoa thuan Han che Canh tranh,* above n 166.

[174] As in the case of the Vietnam Steel Association mentioned earlier, the Sugar Association provides a good example. Around 2005 the sugar price in Vietnam was much higher than in several neighbouring countries, while the government maintained support to this sector. There were complaints about the constantly high price and requests for importing sugar to stabilize local prices. The Sugar Association persuaded government, convincing it that there was no lack of sugar and promising that they would offer reasonably lower prices. When the government allowed firms to import sugar from overseas, there was reportedly evidence that there was collaboration among sugar producers to manipulate output. See Thai, 'Hanh vi Thoa thuan Han che Canh tranh', above n 168, 27-28. See also VN Express, 'Mo cua Thi truong, Nganh duong keu kho' [Opening Market, Sugar Industry Claims Difficulties] <http://vnexpress.net/gl/kinh-doanh/2005/08/3b9e17f6/>.

sugar, etc.[175]

A government decree (*Decree No. 88/ND-CP*), enacted before the implementation of the *Competition Law 2004*, gave a general definition of an association,[176] but it did not mention any activities harmful to competition that an association was not allowed to perform, i.e. the organising or coordinating cartels. The state management of associations was not stipulated in detail and thus did not cover their activities.[177] For that reason negotiations concerning fixing the prices of products and services offered by an association's members were normally made publicly, unless these products or services were on a list the state would decide.[178] It is also noted that state firms, with their strong influence in those associations, participated actively in the making of agreements in restraint of competition and for coordinating activities among the members themselves in terms of fixing prices,[179] market allocation, preventing competitors from outside associations from accessing markets and so forth.[180]

In addition, it was not until 2002 that the first legislation (the *Ordinance of Prices 2002*) was adopted, which prohibited 'pricing cooperation' practices. According to Article 21(1), the state agency in charge of pricing regulation can suspend the implementation of a price of goods or services determined by organizations or individuals which entered into price monopoly co-operation. However, such terms as 'price monopoly co-operation' and 'monopoly price' set forth in Article 4(4) and (5) were general and lacking quantitative measurement. Hence, until 2005 there had not been any cases e handled with regard to this matter.

In conclusion, before the adoption of the *Competition Law 2004* (hereinafter referred as

---

[175] Stoyan Penev et al, *Informality and the Playing Field in Vietnam's Business* (World Bank and IMF, 2003) 53-54.

[176] According to *Decree No. 88/ND-CP* art 2, an association is a voluntary body of Vietnamese citizens and organisations that have the same business, interest, gender. An association has a common purpose to assemble and unite members, conduct activities on a regular and non-profit basis and to protect the legitimate rights and interests of its members and support effectively each other in business and to contribute to the socio-economic development of the country.

[177] *Decree No.88/ND-CP* art 32 stipulates generally the function of carrying out the management of association activities, such as guiding associations in the implementation of law, making laws and sub-laws regarding association, handling of complaints and accusations regarding violations, etc.

[178] Thai, *Xu huong Thoa thuan Han che Canh tranh*, above n 166.

[179] For example, fixing selling/buying prices, maintaining prices and offering prices for services or goods provided by associations.

[180] Thai, 'Hanh vi Thoa thuan Han che Canh tranh', above n 168, 23.

the Law), anti-competitive agreements were common, particularly in the state sector. These agreements, even though they might be regulated by some specific legislation, were not covered by competition rules. Consequently they remained as legal arrangements among state firms and, to some extent, were considered a favoured form of cooperation, such as in the case of corporation-wide agreements. The concerns about this remain up to the present, despite the fact that the Law provides prohibitions against anti-competitive agreements. This is because of the existence of state monopolies in various areas of the economy, the continuance of the GC model and the development of state economic groups (EGs), while regulations concerning their institutional aspects and operation appear not to be sufficient.

6.3.2 The application of competition law to anti-competitive agreements conducted by state monopolies in Vietnam

This section consists of two parts. The first is concerned with the current legal regime which regulates competitive practices in Vietnam. It discusses the regulations laid down in the Law and reviews regulations stipulated in other legal documents. Competition law and other regulations are applied to regulate anti-competitive practices, with competition law providing the prohibitions, the principles to determine practices and the grant of exemptions. At the same time, a number of other laws apply in particular fields such as pricing, tendering or the activities of associations. In this case, competition law acts as a general law while regulations are specific laws.[181] Since both can be applied, it is possible for gaps to exist between regulations of competition law and regulations in other documents related to anti-competitive agreements in particular fields.

The second part studies issues relating to the application of competition law to certain anti-competitive agreements. Detailed contents are considered as the ground used to determine what practices are considered ‘agreements’; criteria to consider the restraints to competition of these agreements; competition authorities in charge of supervision and investigation of these practices; and processes/procedures to investigate and apply fines for these practices. Issues arising in the process of applying the regulations of competition law to anti-competitive agreements are also investigated, both as they are covered by the

[181] Le Hoang Oanh, *Binh luan Khoa hoc Luat Canh tranh* [Critical Comments on the Law on Competition] (National Political Publishing House, 2005) 33. Article 5 of the *Competition Law 2004* clearly mentions this: ‘Where there is any disparity between the provisions of this Law and those of other laws on competition restriction acts or unfair competition acts, the provisions of this Law shall apply’.

law and in practice and the limitations and inadequacies of the current law.

6.3.2.1 Competition regime for the prohibition of anti-competitive agreements in Vietnam

- **Agreement in restraint of competition: definition**

Article 8 of the Law does not offer an exact definition of an agreement in restraint of competition. Rather, a list of particular practices in which firms collude with the others that satisfy the provision of Article 3(3) is stipulated.[182]

This is different from other competition laws of countries where such an agreement is clearly defined in the law as 'any arrangement or understanding performed by enterprises to reduce, distort and prevent competition on the market'.[183] Such an agreement is deemed to be anti-competitive no matter what forms the agreements take, as in the case of Australia.[184] Similar examples can be found in the laws of India, South Africa, Poland and Russia.[185] In the practice of European Union competition law, the term 'agreement' is broadly interpreted through a series of case laws.

There are debates on the question whether 'collusion' is such, regardless of whether it is in written form or not. It is easy to determine that if such stipulated agreements are performed expressly in the form of contractual agreements (written form), they will be totally covered by the law. By contrast, in the case of no formal agreements being concluded, but enterprises in questions having some 'collusion' and cooperating to conduct activities to determine their market policy or attain a dominant position in the market, the law can hardly be applied. If the law does not describe explicitly how to define the existence of 'collusion' in an agreement, it is a challenge for competition

[182] It is argued that the indication of 'collusion' of participants involved in a monopolistic agreement is essential to define an agreement in restraint of competition. See Chen Lijie, 'The Current State and Problems of Anti-Monopoly Legislation in the People's Republic of China' (2004) 3 (2) *Washington Global Studies Law Review* 310.

[183] *Ordinance on Monopolies and Restrictive Trade Practices (Control and Prevention)* of Pakistan 1970 (amended as of 1983) s 2(1)(a).

[184] Under Part 4 section 45 of the Australian *Competition and Consumer Act 2010* (Cth) (formerly the *Trade Practices Act 1974* (*Cth*)), an agreement is deemed to be an anti-competitive one regardless of what forms the agreements take, in so far as they may 'restrict dealings or affect competition'.

[185] See notes 43-47 of the UNCTAD, 'Model Law on Competition: Draft Commentaries to Possible Elements for Articles of a Model Law or Law' (TD/RBP/CONF.5/7, 2000), 15 <http://www.unctad.org/en/docs/tdrbpconf5d7.en.pdf>.

authorities to prove that such acts have taken place and constitute a restriction to competition.

Although trade and professional associations are subject to competition law,[186] decisions made by such associations that have the effect of distorting or restricting competition are not included in the interpretation in Article 3. In fact, most anti-competitive agreements are in the form of writing, or conducted by decisions of industrial associations.[187] It is more difficult to make judgments when there are not many cases that have been settled since the law came into effect in 2005,[188] and the application of legal precedence is still not considered as one source of law in Vietnam.

Thus, a lack of clear definition of what an 'agreement' is and in what forms such agreements are made, will cause difficulties for the competition authority in the handling of cases involving collusion among competitors. The vagueness of the definition of 'agreement' can also give rise to difficulty for a competition authority when coordination among competitors has the character of a 'concerted practice' and there is no written agreement found.

- **The prohibition of anti-competitive agreements**

As designated in Article 9(1) of the Law, only agreements stipulated in Article 8(6), (7) and (8) are absolutely prohibited. Agreements prescribed in sections from (1) to (5) will only be prohibited if parties in such agreements have a combined market share of 30 per cent or more in the relevant market.[189] For that reason, in considering an anti-competitive agreement it is important to define these two elements: 'relevant market' and 'market share'. As the proportion of 30 per cent is based on the market share of the parties in the relevant market, if the term 'relevant market' is not defined properly it can exclude agreements other than those between oligopolies.[190]

---

[186] *Competition Law* 2004 art 2.

[187] Recent cases have been reported regarding collusion of competitors in which decisions are made by industrial associations such as those of the Steel Association or Association of Insurance companies.

[188] There are around 30 cases that have been tried in 4 years since the *Competition Law 2004* was adopted. Of note is that only one case involved restrictive competition practice and the rest involved unfair competition practices. <http://forum.vinamap.vn/showthread.php?t=33545>.

[189] Article 9(1).

[190] CUTS, *Competition in Vietnam: A Toolkit* (CUTS International, 2007) 96.

As the main focus of this thesis is about anti-competitive practices conducted by state monopolies, this section mainly discusses those kinds of anti-competitive agreements that state monopolies mostly engage in. As analysed previously in this chapter, anti-competitive agreements with the participation of state monopolies include agreements on monopoly price fixing or other selling conditions; customer or market division; preventing the participation of competitors; and bid rigging.

- ***Per se* and *rule of reason*[191] approaches in defining the illegality of agreements**

According to the *per se* approach, some agreements in restraint of competition are considered anti-competitive practices, or can be held as illegal by themselves without further defence.[192] On the other hand, based on the *rule of reason* approach, competition authorities may consider some types of agreements as having a restrictive nature to competition on the grounds that they may have both restraining effects on competition and dynamic efficiency benefits. It is up to the competition authority to decide whether to prohibit them. If the positive consequences of such agreements (dynamic efficiency benefits of business behaviour) override the negative ones, they may be allowed to pass the scrutiny of competition statutes.[193]

The Law separates two cases in which agreements are considered as restrictive to competition and will be prohibited, using both *per se* and *rule of reason* approaches. This is on the ground that restrictive competition practices may have different impacts to competitive conditions in the market and different impacts on consumers as well.[194] In particular:[195]

---

[191] *Per se* and *Rule of Reason* principles have been discussed in Chapter 5.

[192] CUTS, above n 190,107. For example, in Korea after the February 1999 Amendment, rules about restrictive agreements have become stricter, in which the defence on the grounds that they may have relatively little actual effect has been no longer accepted, hence they will be treated as illegal *per se.* See Hyun-Hoon Lee, 'Korea's Competition Policy and Its Application to Other Asian Economies' in Tran Van Hoa (Ed) *Competition Policy and Global Competitiveness in Major Asian Economies* (Edward Elgar Publishing, 2003) 95.

[193] CUTS, above n 190, 109.

[194] Le Thuy Tran, *Introduction to Regulation of Competition in South East Asia: A Comparativr Study of Antimonopoly Laws in Vietnam and Indonesia and Their Models* (2007),188 <http://www.gsid.nagoya-u.ac.jp/bpub/research/public/forum/34/12.pdf >.

[195] *Competition Law 2004* art 9.

(i) Agreements prescribed in clauses 1, 2, 3, 4, 5 of Article 8[196] are prohibited. A 'rule of reason' is applied here is that the parties must have a combined market share of 30 per cent or more on the relevant market.[197]

(ii) Agreements prescribed in clauses 6, 7 and 8 of Article 8 are subject to *per se* prohibition.

The separation into two cases is described as necessary and corresponding to Vietnam's economic development. Besides, such separation is in accordance with the OECD recommendation for a framework for competition law which holds the view that not all restrictive competition agreements are harmful to competition, but that they can, in some circumstances, generate efficiencies that make them beneficial on balance.[198]

- **Types of anti-competition agreements**

Unlike in other competition laws and commonly applied rules, the law does not divide agreements that are in restraint of competition into horizontal and vertical agreements. However, types of agreements stipulated in Article 8 themselves include both horizontal and vertical agreements.[199]

The distinction between the regulation of horizontal and vertical agreements in anti-monopoly law is important. Most vertical agreements are considered legal because they involve positive factors that promote economic development. If a vertical agreement does not constitute market dominance, it remains legal.[200] However, Vietnam's approach seems to be a little different. Rather than being divided by horizontal and vertical

[196] Agreements on preventing, restraining, disallowing other enterprises to enter the market or develop business; agreements on abolishing from the market enterprises other than the parties of the agreements; and conniving to enable one or all of the parties of the agreement to win bids for supply of goods or provision of services.

[197] Agreements on directly or indirectly fixing goods or service prices; agreements on distributing outlets, sources of supply of goods, provision of services; agreements on restricting or controlling produced, purchased or sold quantities or volumes of goods or services; agreements on restricting technical and technological development, restricting investments; and agreement on imposing on other enterprises conditions on signing of goods or services purchase or sale contracts or forcing other enterprises to accept obligations which have no direct connection with the subject of such contracts.

[198] OECD, *A Framework for the Design and Implementation of Competition Law and Policy* (WB and OECD, 2004) 144.

[199] Tran, above n 194.

[200] Wang Xiaoye, 'Issues Surrounding the Drafting of China's Anti-Monopoly Law' *Washington University Global Studies Law Review* (3) 285; OECD, *A Framework*, above n 198, 8.

agreements, the law distinguishes beteen those that are directly and those that are indirectly impacted by them.[201] Thus it does not matter whether such agreements are vertical or horizontal: if the agreements are categorised in the paragraphs 6-8 of Article 8, they will be totally prohibited. Agreements are prohibited if the combined market share of the parties participating in the agreements makes up 30 per cent or more of the relevant market.[202]

Exemptions provided in the UNTACD model, the EU Law and even the *EC Treaty* are similar to those in Vietnam's *Competition Law 2004* (Article 10).[203] Competition restriction agreements which do not fall under *per se* prohibitions defined in Article 9(2) can be subject to exemption for a definite term if they meet one of the following conditions pursuant to Article 10 in order to reduce costs and to benefit consumers. As a result, those agreements in restraint of competition can still be valid if they meet as above conditions after a consideration process conducted by the Ministry of Trade and the Vietnam Competition Authority.[204]

6.3.2.2 The application of competition law to anti-competitive agreements

This section deals particularly with the application of competition law to certain anti-competitive agreements. Four kinds of agreements are discussed, namely those on fixing prices, bid rigging, elimination of competitors and market sharing. These agreements are the ones that are most commonly entered into by state monopolies.

- **Agreements on fixing prices**

Price fixing agreements on goods and services which can be made directly or indirectly are considered one of the most popular anti-competitive practices.[205] This issue is dealt

[201] Nguyen Nhu Phat, 'Phap luat Canh tranh o Viet Nam Hien nay' [Current Provisions on Competition in Vietnam], Material at Training Course on Competition Law Organised by Vietnam Industry and Commerce Chamber on May 2008 (2008) 24.

[202] *Competition Law 2004* art 9(2).

[203] Tran, above n 194.

[204] Ibid. *Competition Law 2004* arts 25, 30.

[205] Oanh, above n 181, 41.

with in Article 8(1) of the Law.[206] This kind of agreement can occur at any stage in the production and distribution process and can involve many aspects relating to price, such as increasing or decreasing price, uniformly applying a product/service price and applying the same price calculating formula and price exchange information. As in the competition law of other countries, price agreements can be made in horizontal form among competitors that manufacture and provide the same products or services or in vertical form among firms at different stages of the production and distribution process.[207]

It can be observed that price fixing agreements will mostly occur among firms that manufacture or supply one or a number of particular goods/services and will be carried out through the decisions of industrial associations. Firms participating in the market will tend to adjust their supply price on the basis of their own balance of production cost and price of products. Price-related agreements are often hard to achieve among direct competitors because there is less possibility that competitors will cooperate to negotiate and agree on prices. In that case the role of associations is important in promoting agreements and achieving unity in price-related decisions. As mentioned earlier in this chapter, state monopolies find it easier to make agreements through their leading role in industrial associations.[208]

Furthermore, directives and decisions may be imposed from upper levels of authority,

---

[206] This issue is discussed in detailed manner in Article 14 of *Decree No. 116/2005/ND-CP* on 15/09/2005, providing detailed guidance for the implementation of a number of articles of the law on competition as below:

> Article 14: *Agreements either directly or indirectly fixing the price of goods or services*
>
> An agreement either directly or indirectly fixing the price of goods or services means reaching an agreement to take joint action in one of the following forms:
>
> 1. To apply uniformly a price to some or all customers.
> 2. To increase or reduce the price by a fixed amount.
> 3. To apply a uniform pricing formula.
> 4. To maintain a fixed ratio for the price of related goods.
> 5. Not to grant any discount or to apply a uniform rate of discount.
> 6. To restrict credit available for customers.
> 7. Not to reduce prices without notification to other members of the agreement.
> 8. To use a uniform price at the commencement of negotiations on prices.

[207] See, eg, Oanh, above n 181, 40; Huan, above n 169, 75.

[208] Examples can be seen through recent collusions of the Steel Associations regarding an increase in steel prices, or agreements on applying a common fee among insurance firms belonging to the Association of Insurance Companies.

such as in general corporations and state economic groups. This is noticeable in cases where state monopolies operate within the hierarchy of state economic groups which manufacture and supply many products and services in different fields, because such agreements among members of these state economic groups will be hard to control. The issue also becomes more complicated in cases where an industrial association headed by state enterprises will conclude agreements on monopoly price fixing related to their fields on the grounds of protecting the benefits of their industries, or to act on the basis of guidelines of line ministries.

Anti-competitive agreements in price have also been covered by another specific document, the *Ordinance on Price 2002*.[209] Price monopoly cooperation is defined as 'an arrangement between production or business organizations and individuals to fix a price aimed at controlling the market or causing damage to the legal interests of other production or business organizations and individuals and of consumers and interests of the State'.[210] Collusion practice to fix monopoly prices is considered a violation of competition law and the state authority in charge of pricing may have the right to suspend the pricing of goods/services set by monopoly organizations or individuals.

- **Agreements on bid rigging**

A bid rigging agreement is described in Article 8 of the Law as a collusion practice to allow one of the sides in an agreement to win bidding in providing goods/services.[211] This can be understood as collusion among enterprises participating in bidding to remove competition and is relatively popular in a market economy.[212] Bid rigging practice is considered an anti-competitive agreement practice which always causes a possibly high,

[209] The *Ordinance on Price* is concerned with practices involving cooperation among individuals and organisations.

[210] *Law on Prices 2002* art 4(4).

[211] Prior to the adoption of the *Competition Law 2004*, bid rigging practice was stipulated by a separate document concerning bid rigging, called the *Statute on Tendering*, issued together with *Decree No. 88/1999/ND-CP* on 01/09/1999. According to this Statute, bidding will be canceled if there is any evidence showing that there has been collusion among parties which leads to a lack of competition in bidding (Article 55 (5) (c) of the *Statute on Tendering*). Bidders violating the statute will be judged based on the degree of violation, with penalties which range from clearing the bidding list, to not returning the bidding deposit, not being allowed to participate in bidding for a period of time, being administratively processed, or being prosecuted. (Article 60 (2) the *Statute on Tendering 1999*).

[212] Oanh, above 181, 49.

negative impact on the business environment of enterprises[213] and hence this practice is completely prohibited in many countries.[214] Currently, bid rigging practice is explained in the *Decree No. 116/2005/ND-CP*, providing detailed guidance for the implementation of a number of articles of the Law.[215]

It can be observed that Article 8 of the Law itself limits the scope of regulation of this practice to when the bid rigging is 'collusion behaviour among parties in a tender' in order for one or more parties to agree to win the tender for supply of goods and services.[216] This can be understood to mean that collusion agreements in bidding only occur among bidders (horizontal agreement). In other words, engaging in collusion agreement in bidding are 'bidder' firms.[217] Agreements made between bidding organisers and bidders, or other forms of promises among them that can give priority or special treatment to one bidder will be excluded from the meaning of 'bid rigging' according to competition law.[218] Therefore, practices like collusion between the bidding organisers and one or a few bidders to reveal information; or the unilateral behaviour of individuals in charge of organizing bidding such as arranging for relatives to win bidding, are considered as violating the law in bidding, but falling within the scope of competition law. Collusive behaviour in bidding, in reality, are organised and are found in a mixture

---

[213] Ibid, 52.

[214] *Competition Law 2004* art 9(1).

[215] Article 21 of the *Decree No. 116/2005/ND-CP* explains bid rigging as:

> 1. One or more of the parties to the agreement withdraws from participation in tendering or withdraws a tender which has already been lodged in order for one or more of the parties to the agreement to win the tender.
>
> 2. One or more of the parties to the agreement causes difficulties for others not being parties to the agreement to participate in tendering by refusing to supply raw materials, by refusing to sign sub-contracts, or by causing difficulties in other ways.
>
> 3. All of the parties to the agreement agree to set non-competitive prices or a competitive price with conditions which the party calling for tenders will not be able to accept in order to pre-determine the one or more of the parties which will win the tender.
>
> 4. The parties to the agreement determine in advance the number of times each of the parties will win a tender within a fixed period.
>
> 5. Other practices which are prohibited by law.

[216] *Competition Law* 2004 art 8(8) and the *Decree No. 116/2005/ND-CP* art 21.

[217] Nguyen Ngoc Son, 'Co che Canh tranh va Su Thong dong trong Dau thau theo Luat Canh tranh' [Competition Mechanism and Collusion in Bidding under Competition Law] (2006) (2) (33) *Legal Sciences* [Khoa hoc Phap ly] <http://www.hcmulaw.edu.vn/hcmulaw/index.php?option=com_content&view=article&id=360:ccctvsttttlct&catid=104:ctc20062&Itemid=109>.

[218] Ibid.

of many collusion types, such as both vertical and horizontal collusions.[219]

With regard to collusion in bidding of state monopolies, two issues are involved. Firstly, state monopolies have advantages in terms of capital, their monopoly position and their relationship with other state enterprises to carry out collusive behaviour in bidding. This is not surprising because most bidding activities are infrastructure construction and public procurement matters which use a great deal of state capital. At the same time state firms have normally been given higher priority and they have often been assigned to carry out these projects. This is due to the inheritance of the previous central planning system, when state firms were always entrusted to carry out such tasks; the favouring of and protectionism for the state sector still exist in the thinking of state management bodies.[220] Besides, necessary conditions for a fair environment in bidding have not been guaranteed, such as transparency and the possibility of participation of the non-state sector in bidding. This is also explained by the lack of belief in market regulation and the distribution regime of competitive activities.[221] Secondly, state enterprises are able to deploy their relationship with state officers in charge of carrying out bidding activities to gain advantage, or to win in bidding.

- **Agreements aimed at eliminating competitors**

The possibility that enterprises participating in markets which may involve collusion to eliminate competitors is covered in Articles 8(6)[222] and (7)[223] of the Law.[224] Agreement

[219] Ibid.

[220] Ibid.

[221] Ibid.

[222] Article 8(6) prohibits 'Agreements on preventing, restraining, disallowing other enterprises to enter the market or develop business'.

[223] Article 8(7) prohibits 'Agreements on abolishing from the market enterprises other than the parties of the agreements'.

[224] Under Article 19(1)(a), 19(2) and Article 20 of the *Decree No. 116/2005./ND-CP*, agreement aimed at eliminating competitors is clearly defined as follows:

- Requiring, encouraging or enticing one's own customers not to conduct purchase and sale of goods with or use the services of enterprises not being parties to the agreement;
- Requiring, encouraging or enticing distributors or retail sellers which are working with [*enterprises being parties to the agreement*] to be discriminatory when purchasing or selling goods of enterprises not being parties to the agreement by causing difficulties for the sale of the goods of such enterprises;
- Conducting purchase or sale of goods and services at prices sufficient to ensure that enterprises not being parties to the agreement will not be able to expand their business scale.

behaviour stipulated in Article 8(6) consists of two different types of behaviour: preventing or strangling the market participation of competitors. According to Le Hoang Oanh, 'prevention' is regarded as creating barriers so that new firms cannot be created to produce or provide the same product or group of products which enterprises taking part in agreement are manufacturing or offering and making other enterprises unable to penetrate the corresponding market. 'Strangling' is understood as creating barriers which delay or lead to additional costs for competitors in order to take part in the market.[225]

The practice stipulated in Article 8(7) is considered as one that is able to cause harmful effects on a 'healthy' competitive environment. Hence it is completely prohibited according to Article 9(1). There is a difference between this practice and that provided in Article 8(6). In particular, the agreement behaviour covered in the Article 8(6) aims to prevent the market participation of firms which have not yet participated in the market and this type of collusion agreement is aimed at preventing potential competitors. Meanwhile, practices mentioned in the Article 8(7) are agreements to eliminate competitors who have already participated in that market.[226]

As discussed above, state monopolies in Vietnam have been mainly formed from state enterprises which existed from the centralized planning economy period. They currently possess large amounts of capital and assets, operating businesses and holding key sectors of the economy. These state monopolies have the characteristics of both 'natural monopoly' and 'profit-seeking' enterprises. The advantages of these state enterprises allow them to find ways to eliminate competitors (similar to prevention behaviour stipulated in Article 8(6)) in order to continue holding on to the benefits of their monopoly position.

In terms of 'prevention' practice stipulated in Article 8(6) of the Law, 'strangling' behaviour towards other enterprises can be carried out in the form of lobbying in the law and policy making process to create barriers to other competitors.[227] State monopolies are perfectly able to perform this activity because of their close relationship with state offices and lobby activities through trade and industrial associations in which they take the leading roles.

[225] Oanh, above 181, 47.

[226] Ibid 49.

[227] Oanh, above n 181, 48.

- **Agreements involving market sharing**

This kind of agreement is stipulated in Article 8(2) of the Law and consists of two types of agreement: agreements on distributing outlets and agreements on allocating sources of supply of goods and provision of services.[228] These regulations are relatively similar to the UNCTAD Model Law on Competition.[229]

State monopolies in Vietnam, as previously shown, were not only formed from state enterprises in important fields, but also from those created in the centralized planning period at both central and provincial levels. The equitisation and consolidation of SOEs resulted in the fact that state firms were created and had close connections to products and services markets, as well as material sources. State enterprises can therefore, it seems, easily carry out agreements that aim to continue maintaining traditional market divisions. Besides, it is understandable that when state general corporations and state economic groups are merely formed by merging previous state enterprises, it leads to the fact that member enterprises continue to operate in their markets and geographical areas as they previously had, making it possible for them to conduct agreements for sharing the market among themselves.

- **Conclusion**

The chapter has described an overall framework for the application of competition law to state monopolies' behaviour in Vietnam. It confirms that such a necessary regulatory framework has been set up. It can be seen that provisions concerning anti-competitive agreement in the Competition Law 2004 are identical to Article 101 *TFEU and* more generally, to most competition jurisdiction. Obviously this will allow Vietnam to learn lessons from European competition law to deal with state monopolies. Therefore, the issue of how to address anti-competitive agreements lies in implementation. This chapter has also pointed out serious concerns regarding the implementation, as the application of

[228] Article 15 of the *Decree No. 116/2005/ND-CP* explains this kind of agreement as follows:

> 1. An agreement to share consumer markets means reaching agreement on the quantity of goods or services, the location of purchase and sale of goods and services, or the group of customers for each of the parties participating in the agreement.
>
> 2. An agreement to share sources of supply of goods and services means reaching agreement that all parties participating in the agreement will only purchase goods and services from one or more specified sources of supply.

[229] Oanh, above n 181, 43.

competition law is exposed to a number of difficulties, including the characteristics of state monopolies in Vietnam, flaws in the existing legislation and the limitation of competition authority in terms of human resources, expertise and experience.

Chapter 7

THE APPLICATION OF COMPETITION RULES TO THE ABUSE OF DOMINANT POSITIONS BY STATE MONOPOLIES

This chapter focuses on the application of competition rules to the abuse of market dominance by state monopolies. It starts with a study of fundamental issues in EU competition law concerning the concept and the abuse of market dominance. As in the approach in chapter 6, this part relies considerably on Article 102 *TFEU* (ex Article 82 *TEC*)[1] and on ECJ case law.[2] The next part discusses abuses of market dominance by state monopolies. It focuses on common forms of abusive practices by state monopolies and establishes how they commit these practices. The last part is a study of the application of Vietnam's anti-monopoly law to such behaviour. Problems and shortcomings in Vietnam's current legislation regarding this question are also discussed.

7.1 The abuse of dominant position under the EU competition law

This part starts with an introduction to the market dominance concept. Then it describes the concept of abuse of market dominance. Both concepts have been interpretated in cases settled by the ECJ. Finally, it presents certain abusive conduct as listed in Article 102 *TFEU* .

[1] As mentioned earlier, the draft of Vietnamese competition law was heavily relied on the EU competition law, which is principally embodied in Articles 101 and 102 *TFEU*(ex Articles 81 and 82). See US – Vietnam Trade Council (USVTC), *Competition Law Update* (2006), 7 <http://www.usvtc.org/updates/legal/PhillipsFox/CompetitionLawUpdate-July2006.pdf>.

[2] Most of the substantive contents of the first part of this chapter rely extensively on the book by Alison Jones and Brenda Suffrin, *EC Competition Law – Text, Cases and Materials* (Oxford University Press, 3rd ed, 2008) and Lennart Ritter and Braun W David, *European Competition Law: A Practitioner's Guide* (Kluwer Law International, 2005). It refers to academic works of other prominent scholars, such as Ivo Van Bael and Jean-Francois Bellis, Mark R Joelson, Lennart Ritter and Braun W David, Barry J Rodger and Angus MacCulloch, Piet Jan Slot etc. This chapter widely uses OECD materials and cases involving a number of its relevant Policy Roundtables, including country contributions of OECD members, as well as UNTACD publications such as the UNTACD Model Law on Competition of 2007.

7.1.1 The concept of market dominance

EU competition law and others do not preclude firms from attaining a dominant position.[3] However, any abuse of such a dominant position that can affect competition within the common market is prohibited.[4] Besides, the actions of a dominant firm in the market will be judged more seriously than those of other firms that do not hold such a position because the objective of competition law is to ensure fair opportunities for all competitors in the market.[5]

A number of cases[6] contributed to the interpretation of the concept 'dominance of a substantial part of the market'. An undertaking has its legal monopoly in a substantial part of the market when it occupies a dominant position within the meaning of Article 102 *TFEU* .[7] If the monopoly extends to the territory of a member state, the dominance will be regarded as taking place over a substantial part of the common market.[8] A series of cases

---

[3] This viewpoint was expressed in *N V Netherlands Banden Industrie Michelin*as:

> An undertaking having a dominant position is not a recrimination but simply means that irrespective of the reasons for which it has such a dominant position, the undertaking concerned has a special responsibility not to allow its conduct to impair genuine undistorted competition in the common market.

See *N V Netherlands Banden Industrie Michelin v Commission* (C-322/81) [1983] ECR 3451 10.

[4] Article 102 *TFEU* declares that 'any abuse by one or more undertakings of a dominant position within the common market or in a substantial part of it shall be prohibited as incompatible with the common market in so far as it may affect trade between Member States'.

[5] The reason is that abusive conducts of a dominant firm are considered to influence the structure of the market, causing a reduction of opportunities for other firms to compete in the market and that competition will be affected by the use of other devices than the performance of firms under normal conditions. See Piet Jan Slot and Angus Johnson, *An Introduction to Competition Law* (Hart Publishing, 2006) 103.

In *Hoffmann-La Roche*, it was said that:

> Such a position does not preclude some competition, which it does where there is a monopoly or a quasi-monopoly, but enables the undertaking which profits by it, if not to determine, at least to have an appreciable influence on the conditions under which that competition will develop and in any case to act largely in disregard of it so long as such conduct does not operate to its detriment.

See *Hoffmann-La Roche* (C-85/76) [1979] ECR 461,38-39.

[6] *Merci Convenzionali Porto di Genova SpA v Siderurgica Gabrielli SpA* (C-1 79/90) [1991] ECR I-5889, *Régie des Télegraphes et des Téléphones v GB-Inno-BM SA* (C-18/88) [1991] ECR 5941; *N V Netherlands Banden Industrie Michelin v Commission* (C-322/81) [1983] ECR 3451.

[7] *Convenzionali Porto di Genova SpA v Siderurgica Gabrielli SpA* [1991] C-1 79/90 ECR I-5889 ; GB-Inno-BM [1991] C-18/88 ECR I-5941. The concept 'dominant position' mentioned in Article 102 *TFEU* does not include 'monopoly position', but when a firm holds 100 per cent of the market, it is regarded as having a monopoly position and 'monopoly' in this case itself contains 'dominant position' because there will be naturally no competition. See Slot and Angus, above n 5, 112.

[8] *N V Netherlands Banden Industrie Michelin v Commission* (C-322/81) [1983] ECR 3451.

have confirmed the meaning of the 'dominance' concept, such as *Michelin* (1983),[9] *Hilti* (1985),[10] *Aéroports de Paris* (2002),[11] *AAMS* (2001),[12] *Van den Bergh* (2003)[13], etc.

The term 'dominant position' is explained as:

> A position of economic strength enjoyed by an undertaking which enables it to prevent effective competition being maintained on the relevant market by affording it the power to behave to an appreciable extent independently of its competitors, its customers and ultimately of the consumers.[14]

It is noted that the market share of the firm concerned is the starting criterion to determine whether or not the firm is holding dominant position. The threshold of 50 per cent of market share established in *AKZO* is used for presuming a firm is in a dominant position.[15] In the case of a collective dominance, a threshold of 60 per cent is applied.[16]

In sum, the concept of 'dominance' in the EU competition law consists of three elements.[17] Firstly, there must be a position of economic strength in a market. The economic strength implies that an undertaking or a group of undertakings holds a leading position on the market compared to its competitors. Secondly, this position enables the undertaking(s) in question to prevent effective competition being maintained in that market. Lastly, this position makes it possible for the undertaking (s) in question to behave independently to an appreciable extent.[18]

---

[9] Ibid.

[10] *Hilti v Commission* (T-30/89) [1991] ECR II-1439.

[11] *Aéroports de Paris v Commission* (C-82/01) [2002] ECR I-9279.

[12] *Amministrazione Autonoma dei Monopoli di Stato* (AAMS) *v Commission* (T-139/98) [2001] ECR II-3413.

[13] *Van den Bergh Foods Ltd v Commission* (T-65/98) [2003] ECR II-4653.

[14] *N V Netherlands Banden Industrie Michelin v Commission* (C-322/81) [1983] ECR 3451, 6.

[15] This was summarized by the ECJ in *AKZO* as 'With regard to market shares the Court has held that very large shares are in themselves and save in exceptional circumstances, evidence of the existence of a dominant position (*Hoffmann-La Roche v Commission* (C-85/76) [1979] ECR 461, 41). That is the situation where there is a market share of 50 per cent such as that found to exist in this case'. See *AKZO Chemie B.V v Commission* (C-62/86) [1991] ECR I-3359.

[16] *Kali and Salz v Commission* (C-68/94 and C-30/95) [1998] ECR I-1453.

[17] ICN, *Response of the European Commission to Unilateral Conduct Working Group Questionnaire* (2007) <http://www.internationalcompetitionnetwork.org/media/library/unilateral_conduct/questionnaire/EuropeanCommissionQuestionnaireResponse.pdf>.

[18] Ibid.

Where two or more undertakings act together in a particular market, the concept of 'collective dominance' is introduced. This concept was observed in a number of joined cases, such as *Compagnie Maritime Belge.*[19]

7.1.2 The concept of abuse of market dominance

There is no explicit definition of 'abuse of dominant position' included in the *EC Treaty*, rather, Article 102 *TFEU* provides a list of certain conducts that are used to determine whether or not a firm commits an abuse of its dominant position.[20] This is also the interpretation in a number of landmark cases.[21] Notably, the list of abusive practices contained in Article 86 (currently Article 102) is not an exhaustive enumeration.[22] The Court addresses this issue in a number of cases where other forms of abusive practices are determined by general principles and objectives of the Treaty, especially in light of Article 3(g), stressing the need for maintaining effective competition in the Market,[23] and in the light of Article 3(g), where the concepts of 'dominant position' and 'abuse' 'were

[19] *Compagnie Maritime Belge Transports SA, Compagnie Maritime Belge SA and Dafra-Lines A/S v Commission,* Joined Cases (C-395-6/96 P) [2000] ECR I-1365, 36.

[20] In particular, abusive practices listed in Article 102 *TFEU* are:

- Directly or indirectly imposing unfair purchase or selling prices or other unfair trading conditions;
- Limiting production, markets or technical development to the prejudice of consumers;
- Applying dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage;
- Making 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 the contracts.

[21] For example, in *Hoffmann-La Roche & Co. AG v Commission*, the concept of abuse of dominant position was viewed as:

> … [a]n objective concept relating to the behaviour of an undertaking in a dominant position which is such as to influence the structure of a market where , as a result of the very presence of the undertaking in question , the degree of competition is weakened and which , through recourse to methods different from those which condition normal competition in products or services on the basis of the transactions of commercial operators , has the effect of hindering the maintenance of the degree of competition still existing in the market or the growth of that competition.

See *Hoffmann-La Roche & Co. AG v Commission* (C-85/76) [1979] E.C.R. 461, 6; *N. V. Netherlands Banden Industrie Michelin v Commission* (C-322/81) [1983] ECR 3461, 70.

[22] Slot and Johnson, above n 5, 120; Jones and Sufrin, above n 2, 318. See also *Tetrapak Interational SA v Commission* (C-333/94P) [1996] ECR I-5951, 6; *Compagnie Maritime Belge Transports SA v. Commission* (C-395/96) [2000] ECJ P 112 quoting from *Europemballage and Continental Can v Commission* (C-6/72) [1973] ECR 215, 26.

[23] Ritter and Braun, above n 2, 419; *Continental Can* (C-6/72) [1973] ECR 215, 23-26; *Commercial Solvents* (C-7/74) [1974] ECR 223, 25; *CEWAL* Joined Cases (C-395-6/96 P) [2000] ECR I-1365, 112.

not too vague to justify the imposition of fines', as stated in *Hoffmann-La Roche.*[24]

In practice, there are many other forms of abusive conduct that have been alleged and held to have been committed.[25] Some authors[26] argue that there is a distinction among the abusive conduct listed in Article 102 *TFEU* , by which they can be grouped into 'exploitative', 'exclusionary' and 'structural' abuses.

'Exploitative abuse' refers to such practices as a firm making use of high pricing and other unfavourable conditions (e.g. concluding long-term exclusive purchasing contracts).[27] In some cases, both vertical trading partners and competitors are affected by exploitative abuses.[28] The concept of 'exclusive abuse' was mentioned in *Hoffmann-La Roche,* which principally concerned fidelity rebates.[29] It also refers to some forms of refusal to supply,[30] the effect on competition caused by a refusal to supply being referred to by the Court in *Commercial Solvents.*[31] Exclusive abuse can cause both direct and

[24] *Hoffmann-La Roche & Co. AG v Commission* (C-85/76) [1979] ECR 461 128-136.

[25] Slot and Johnson, above n 5, 120.

[26] See, for example, Lennart Ritter, David W Braun and F Rawlingson, *European Competition Law* (3rd, 2004) chapter V; Jonathan Faull and Ali Nickpay, *The EC Law of Competition* (1999) 151; Ritter and Braun, above n 2, 419-420; Barry J Rodger and Angus MacCulloch, *Competition Law in the EC and UK* (Routledge-Cavendish, 4th ed, 2009) 97.

[27] In *United Brands*, the Court considered 'exploitative abuse' as conduct by a dominant firm that 'made use of the opportunities arising out of its dominant position in such a way as to reap trading benefit which it would not have reaped if there had been normal and sufficiently effective competition'. See *United Brands v Commission* (C-27/76) [1978] ECR 207, 249. It was further argued by the Court that exploitative abuse mainly harms parties with whom the dominant firms deal, such as its customers or suppliers. See *BRT/SABAM II* (C-127/73) [1974] ECR 313, 15.

[28] Ritter and Braun, above n 2, 420.

[29] *Hoffmann-La Roche & Co. AG v Commission* (C-85/76) [1979] ECR 461 128-136.

[30] For example, it is the refusal of a firm that is the sole or a dominant source of supplies of a product or the refusal to grant access to certain facilities. See Lennart Ritter and Braun, above n 2, 421; Slot and Johnson, above n 5, 120.

[31] The effect on competition caused by a refusal to supply was described by the Court as follows:

> … [a]n undertaking which has a dominant position in the market in raw materials and which, with the object of reserving such raw material for manufacturing its own derivatives, refuses to supply a customer, which is itself a manufacturer of these derivatives and therefore risks eliminating all competition on the part of this customer, is abusing its dominant position within the meaning of Article 82 (currently Article 102 *TFEU*).

See Commercial Solvents (C-7/74) [1974] ECR 223, 25; *CEWAL* Joined Cases (C-395-6/96 P) [2000] ECR I-1365, 25.

indirect injuries to competitors.[32] 'Structural abuse'[33] is so called due to its intermediate radical effect on market structure.[34] This involves the practice of acquisition of a firm in order to strengthen the dominant position of the firm in question. It can also be in the form of taking over a patent licence aimed at removing the participation of any competitors in the relevant market.[35] In some cases, these forms of abuses can be overlapping, as an exploitative abusive conduct may be a means for a predatory purpose.[36]

7.1.3 Certain abusive conduct under Article 102 *TFEU* (ex Article 82 *TEC*)

7.1.3.1 The imposition of unfair prices or other conditions (Article 102(a))

There are typically three possible conducts which are considered as abuses of market dominance, namely: the imposition of unfairly high prices on its customers; the extortion of unfairly low prices from its suppliers[37] and the imposition of other unfair terms or

[32] It is a direct injury when a firm holding a dominant position in the supply of an input for a product refuses to supply the input to a competitor in the product market (as in Commercial Solvents), or when a firm controlling access to a technology necessary for manufacturing the products refuses to grant its competitors a licence to the technology. It is an indirect injury when the effects caused by an exclusive abuse are not intermediately detrimental to competitors of the dominant firm concerned. See Ritter and Braun, above n 2, 421.

[33] An interpretation of such abuse was seen in *Continental Can* as follows:

> The restraint of competition which is prohibited if it is the result of behaviour falling under Article 81 currently Article 101), cannot become permissible by the fact that such behaviour succeeds under the influence of a dominant undertaking and results in the merger of the undertakings concerned. In the absence of explicit provisions, one cannot assume that the Treaty, which prohibits in Article 81 (Article 101) certain decisions of ordinary associations of undertakings restricting competition without eliminating it, permits in Articles 82 (Article 102) that undertakings, after merging into an organic unity, should reach such a dominant position that any serious chance of competition is practically rendered impossible…

Abuse may therefore occur if an undertaking in a dominant position strengthens such position or enlarges such position in related markets in such a way that the degree of dominance reached substantially fetters competition, i.e. that only undertakings remain in the market whose behaviour depends on the dominant one. See *Continental Can* (C-6/72) [1973] ECR 215, 25-26.

[34] Ritter and Braun, above n 2, 419.

[35] 'Structural abuse' was mentioned in *Continental Can v Commission* (C-6/72) [1973] ECR 215 and *Tetra Pak Rausing SA v Commission* (Tetra Pak II) (T-51-89) [1990] ECR II-309. See Slot and Johnson, above n 5, 120.

[36] Ritter and Braun, above n 2, 419.

[37] The imposition of unfair prices or other conditions is grouped in the first category in Article 102 *TFEU*. The concept 'unfair pricing' normally refers to the imposing of unfairly high prices, as in the case of a selling power, but it also involves an excessive low price in the case of a buyer.

conditions on its customers or suppliers.[38]

- **The imposition of unfairly high prices**

An unfairly high price (overpricing) means an excessive price is charged, which is either unfair or disproportionate, because it has no reasonable relation to the economic value of the product or service supplied,[39] or it exceeds the average economic value of a service.[40] In other words, it contradicts the principle of proportionality.[41] The conclusion, if there is an overpricing charge, is based on a comparison of the selling price of the product in question with its cost of production,[42] although such determination is quite complicated in reality, particularly in the case of multi-product firms or multinational firms.[43]

- **The imposition of unfairly low prices**

While unfairly high prices are often intended to exploit the competitive advantages of a dominant firm, unfairly low prices are designed to eliminate competitors.[44] If an unfairly low price is charged by a dominant purchaser it is regarded as an abuse of buying power.[45] It is also regarded as 'predatory pricing',[46] which is one of the most common

[38] Ritter and Braun, above n 2, 425.

[39] *United Brands v Commission* (C-27/76) [1978] ECR 207, 250; *General Motors v Commission* (C-26/75) [1975] ECR 1367, 1; *Deutsche Bahn v Commission* (T-229/94) [1997] ECR 1689, 70-86.

[40] *Deutsche Post AG* [2001] OJ L 331/40 155-167.

[41] *United Brands v Commission* (C-27/76) [1978] ECR 207, 190.

[42] Ibid 251-57; Commission of the Europea Communities, 'The XXVIIth Report on Competition Policy 1997 (Published in conjunction with the General Report on the Activities of the European Union – 1997) (1998) <http://ec.europa.eu/competition/publications/annual_report/1997/broch97_en.pdf>.

[43] Ritter and Braun, above n 2, 426-427. It is not always easy to prove that putting too high prices is an abuse of a dominant firm. For example in *United Brands*, the Commission did not prove whether unfair pricing were established as the proof of an abuse of dominant position. See *United Brands v Commission* (C-27/76) [1978] ECR 207, 248-68.

[44] In *AKZO*, it was held that 'prices below average variable costs by means of which a dominant firm seeks to eliminate a competitor must be regarded as an abusive behaviour'. As the Court observed, when applying such prices, a dominant firms aims to eliminate competitors so as to enable it subsequently to raise its prices, by taking advantage of its monopolistic position. Such prices when being imposed can drive from the market firms that could not compete effectively with the dominant firm in question, because of their smaller financial resources and are incapable of withstanding the competition waged against them. See *AKZO* [1991] ECR 2585.

[45] The European Court of Justice in *CICCE* declared that extracting unfairly low prices from suppliers constituted an abuse of dominant position by a dominant purchaser (or monopsonist, the only buyer in a market) or a group of dominant purchasers. See *CICCE v Commission* (C-298/83) [1985] ECR 1105 (C-298/83) [1985] ECR 1105 22-25.

[46] *CICCE v Commission* (C-298/83) [1985] ECR 1105.

issues and most of the cases and decisions in the EU competition law involve with pricing policies.[47] The notion of predatory pricing is based on the assumption that short term profits will be sacrificed in order to regain them in the future.[48] When its competitors are excluded from the market, it enables a firm to raise prices to monopoly levels and recover its losses.[49]

Another specific type of such behaviour is the imposition of unfairly low prices through cross-subsidization.[50] The term 'cross-subsidisation' means the allocation of all or part of the costs of an undertaking in one geographic or product market to its activities in another geographic or product market.[51]

The sharing of markets is another form of abusive practice provided in the first category of Article 102 *TFEU* (ex Article 82 *TEC*). Normally, this kind of practice falls within the scope of Article 101 *TFEU* (ex Article 81 *TEC*), involving anti-competitive agreements. However, a dominant firm or a group of firms holding a collective dominant position can employ this practice. It can occur by means of contracts in which a prohibition of exports or the selling of products in certain markets is included.[52]

7.1.3.2 The limitation of production, markets or technical development (Article 102(b TFEU))

- **Limitation of production**

Article 102(b) *TFEU* prohibits dominant firms from performing behaviour to limit production, markets or technical development. In this case the direct loss of customers is considered a requirement for the application of Article 102(b). The issue lies in the difficulty of determining the evidence, especially in cases where infringing firms can

[47] Jones and Sufrin, above n 2, 440.

[48] Ibid 459.

[49] Ibid 443.

[50] For example, the German monopoly Deutsche Post was found to use cross-subsidisation in 2001, following an investigation by the European Commission. See Commission Decision 2001/354/EC of 20 March 2001 relating to a proceeding under Article 102 *TFEU* (Case COMP/35.141 – Deutsche Post AG), OJ 2001 L 125

[51] 'Cross-subsidisation can distort competition and lead to competitors being beaten by offers which are not made possible by efficiency (including economies of scope) and performance, by cross-subsidies'*Notice on the Application of the Competition Rules in the Postal Sector* (1998) OJ C 39/2 3.1

[52] Slot and Johnson, above n 5, 123.

justify for this behaviour for commercial or technical reasons.[53]

The abuse of dominant position to limit production is clarified through cases judged by the ECJ and the European Commission, even though not many such cases have been settled.[54] Although Article 102(b) only mentions production limitation behaviour in a general sense, these cases have revealed that there are different forms of violation. Production limitation can be carried out through the unilateral behaviour of a dominant firm and it is imposed on a certain third party.[55]

There are two situations in this regard which considered consisting a breach of Article 102(b). First, the limitation or termination of production or provision of dominant firm's production is performed in order to raise price or increase sales of another product.[56] Second, a dominant firm, through its licensing contracts, limits production to a particular field; limits the use to a certain geographical area and limits product quantity.[57] In this type, the limitation is set to serve the exploitative goal of monopoly advantages to create a monopoly in providing a particular product and eliminating participation in the supply of similar products of rivals.[58] Another form of the second case is the limitation of production serving exclusionary purposes. This limitation will create the privilege of the dominant firm in providing a particular kind of product.[59]

---

[53] Ritter and Braun, above n 2, 432.

[54] Ibid 433.

[55] Ritter and Braun, above n 2, 433.

[56] An example of these is that firms (for example, car equipment manufacturers) stop manufacturing certain car parts of old car models which are no longer manufactured. Cases involving car manufacturers can be found in *Maxicar v Renault* (C-53/87) [1988] ECR 6039, 16-17; *Volvo v Veng* (C-238/87) [1988] ECR 6211, 9 and *P&I Clubs* [1999] OJ L 125/12.

[57] A particular example of this case is *ICR Stereo Television*, where an association of TV manufacturers agreed to grant a patent to stereo TV products only to competitors outside Europe, which included the regulation of fixing time lag limitations and permitting the imposition of production limitation. This negotiation was objected to by the European Commission. See *ICR Stereo Television*.

[58] Ritter and Braun, above n 2, 433. An example of this type can be seen in the cases where dominant firms providing telecommunication terminals restrict the supply of products manufactured by them in order to eliminate other competitors, as analysed by Commission in *IBM*, when IBM refused to provide product information in advance to defer the provision of products compatible with IBM equipment. See Commission of the European Communities, 'The XIVth Report on Competition Policy (Published in conjunction with the Eighteenth General Report on the Activities of the European Union – 1984) (1984) <http://bookshop.europa.eu/uri?target=EUB:NOTICE:CB4184822:EN:HTML>.

[59] For example, in *Racal Decca*, the European Commission held that such behaviour constituted an abuse of dominant position where providers intentionally made changes in technical designs such as the appearance of the navigation system, making the receiver devices of other competitors unusable. See *Racal Decca* [1988] OJ L 43/27 43.

- **Limitation of markets**

Limitation of market can be considered an infringement of Article 102(b) *TFEU* when a dominant firm or a group of dominant firms limits production or goods/services supply to a certain geographical area. This behaviour is considered to be anti-competitive behaviour because it eliminates the participation of other competitors. The limitation of market can be carried out through horizontal negotiation among competitors, vertical constraint agreement or the unilateral behaviour of dominant firms.

The first case can be seen in agreements made by a dominant firm to obtain exclusive distribution rights or an exclusive licence from smaller competitors who are currently trying to participate in the market where the firm in question is doing business.[60] In several cases, the European Commission has argued that this behaviour has constituted an infringement of Article 102(b), because dominant firms often tend to give priority to selling their own products. However, that leads to conflict of interests and limited competition from smaller firms providing the same product as the dominant firm does.[61]

The second case occurs when there are agreements made to stipulate market limitation, according to which a firm is only permitted to sell/buy from another firm. This case is different from the anti-competitive agreement of market division subject of Article 101 *TFEU* in the way that this type of agreement is fixed by dominant firms. In the case provided in Article 101, the parties to the agreement are non-dominant firms.[62] Such imposition according to Article 102(b) is mostly in the form of restriction or prohibition as below:

- Restrictions on export[63] or contractual obligations that are similar to export

[60] *Carlsbrg v Interbrew*, Commission of the European Communities, 'The XXIVth Report on Competition Policy (Published in conjunction with the General Report on the Activities of the European Union – 1994) (1994) <http://bookshop.europa.eu/uri?target=EUB:NOTICE:CM9095283:EN:HTML>; *Swedish Match Sverige v Scandinavisk Tobaksckompagni*, See Commission of the Europea Communities, 'The XXVIIth Report on Competition Policy 1997 (Published in conjunction with the General Report on the Activities of the European Union – 1997) (1998) <http://ec.europa.eu/competition/publications/annual_report/1997/broch97_en.pdf>.

[61] *France v Commission* (Terminal Equipment) (C-327/91) [1991] ECR I-1223, 40-43; *Greek Television* (C-290/89) [1991] ECR I-2925, 22-23; *RTT v GB-INNO* (C-18/88) [1991] ECR I-5941, 25; *Ministère Public v Decoster* (C-69/91) [1993] ECR I-5335, 18.

[62] *Deutsche Bahn v Commission* (T-229/94) [1997] ECR II-1689, 79.

[63] *United Brands v Commission* (C-27/76) [1978] ECR 207-88, 154.

limitation.[64]

- Restrictions on the uses for which a product may be resold,[65] or selling agreements which include non-monopoly products/services with the monopoly ones of that firm.[66]

- Fixing exclusive buying/selling obligations.[67]

- Restrictions in granting licence agreements to customers.[68]

- Agreements for reselling products imported through distribution channels of monopoly firms.[69]

In the third case, monopoly firms perform unilateral actions to limit markets or customers, or to cut off supplies to certain purchasers.[70] Unilateral refusal to deal in this case affects customers in the market where this dominant firm is doing business, or in other words, the secondary market. This case is different from unilateral refusal to access technologies, networks or application infrastructure, because behaviour of the dominant firm has a direct effect and aim at eliminating competitors from the market where the dominant firm is operating.[71] In *Commercial Solvent*[72] and *Telemarketing*[73], refusal to supply a customer

[64] Such as the prohibition of selling green bananas or unroasted coffee. See *United Brands v Commission* (C-27/76) [1978] ECR 207-88, 159.

[65] For example, it was stated that sugar is necessary for direct human consumption, confectionery products, or intermediate metal product denatured for processing. See *Sugar* (C-40/730 [1975[ECR 1663 396-401; *Billiton v M&T,* Commission of the European Communities, 'The VIIth Report on Competition Policy (Published in conjunction with the Eighteenth General Report on the Activities of the European Union – 1977) (1977) <http://ec.europa.eu/competition/publications/annual_report/ar_1977_en.pdf>.

[66] For example products in telecommunications (including long distance service (non-monopoly) with local service)). See Commission's *Telecomunication Guidelines* (1991) OJ C 233/2 89, 95-97.

[67] *British Plasterboard* (C-310/93) [1993] ECR II-389, 68, 120; *Industrial Gases*, Commission of the European Communities, 'The XIXth Report on Competition Policy (Published in conjunction with the Eighteenth General Report on the Activities of the European Union – 1989) (1989) <http://bookshop.europa.eu/uri?target=EUB:NOTICE:CB5890546:EN:HTML>.

[68] *British Plasterboard* (C-310/93) [1993] ECR II-389, 68, 120; *Soda Ash I*, Commission of the European Communities, 'The XIth Report on Competition Policy (Published in conjunction with the Eighteenth General Report on the Activities of the European Union – 1981) (1981) <http://ec.europa.eu/competition/publications/annual_report/ar_1981_en.pdf>.

[69] Like the case of the Italian tobacco monopoly firm. See *AAMS* [1998] OJ L 252/47; *Irish Sugar* [1997] OJ L 258/1 124-126.

[70] Ritter and Braun, above n 2, 435.

[71] Ibid.

[72] *Commercial Solvent v Commission* (C-6-7/73) [1974] ECR 223.

with whom it competed in a secondary market was considered as constituting an abuse of dominant position which aimed to exclude competitors and enhance a dominant position in this secondary market.[74]

The refusal to supply has two different goals: limiting competition by existing competitors and the prevention of market participation of new (potential) competitors. However, whether refusal to supply can be considered abuse or not will depend on the behaviour's purpose. If a refusal to supply is aimed at current competitors, it is definitely an abuse.[75] When the purpose of refusal to supply is to prevent the participation of potential competitors in a market, it is considered an abuse if it leads to a restriction of competition in that market. However, several reasons can be given as exceptions, such as the choice of customers according to objective qualitative criteria.[76]

The issue raised is whether, if a dominant firm unilaterally decides to terminate the supply of products, it will always be considered a breach of Article 102(b). In *United Brands*[77] and a number of other cases it was held that a dominant firm can freely choose competition policies and its customers based on certain objective criteria, such as technical skills[78] and the independence level of customers. Besides, firms can freely renew or terminate contracts or review their entire distribution system and stop cooperating with their customers, provided that such decisions are reasonably notified in advance. Therefore, the European Commission confirms that a refusal to supply is only considered an anti-competitive abuse if it is given without appropriate reasons or pre-notification.[79]

Besides, this type of behaviour is also clarified through a number of cases such as:

- Putting pressure on distributors, forcing them not to export,[80] or preventing

---

[73] *Telemarketing* (C-311/84) [1985] ECR 3261, 19-27.

[74] Ritter and Braun, above n 2, 436.

[75] *Commercial Solvent v Commission* (C-6-7/73) [1974] ECR 223.

[76] *IBM v Commission* (C-60/81) [1981] ECR 2639.

[77] *United Brands v Commission* (C-27/76) [1978] ECR 207.

[78] Ibid, 152-160.

[79] Ritter and Braun, above n 2, 438.

[80] *Hilti* [1987] OJ L 65/14 36; aff'd CFI 1991 ECR II-1439 99-101; *Sugar* [1975 ECR 1663. 396-399; *United Brands v Commission* (C-27/76) [1978] ECR 207, 151-161.

exports by only supplying enough quantities to meet local demand.[81]

- Cutting off supplies to distributors if they disagree to follow the sale policies of the dominant firm, or cutting off supplies to those who promote competing brands, or[82] to dealers who advertise rival brands,[83] with the goal of preventing the sale of the rival products of rivals.[84]

- Refusal to grant licences to others to manufacture and market spare parts, demanding unfairly high prices, or stop the manufacture of a particular model although vehicles of that type are still in use.[85]

- **Limiting technical development**

Article 102 (b) prohibits dominant firms from restricting access or using or developing new technologies which cause damage to customers. The basis for dominant firms being able to perform such behaviour is their market power, as they hold control over access to technology, such as the ownership of intellectual property rights or as the result of the accumulation of capital and assets in a longstanding commercial and technological success and having market power as state firms.[86]

Limiting technical development is mentioned in several cases of the European Commission.[87] It can occur in a case where the firm refused to disclose important information, leading to the difficulty of competitors in supplying products compatible

[81] *Sandoz* [1987] OJ L 222/28; aff'd ECJ [1990] ECR I-45; *Polaroid v SSI Europe*, Commission of the European Communities, 'The XIIIth Report on Competition Policy (Published in conjunction with the Eighteenth General Report on the Activities of the European Union – 1984) (1984) <http://bookshop.europa.eu/uri?target=EUB:NOTICE:CB3883823:EN:HTML>.

[82] *United Brands v Commission* (C-27/76) [1978] ECR 207, 163-203.

[83] Ibid 189-202.

[84] *British Sugar* [1998] OJ L 284/41 61-64; *Boosey and Hawkes* [1987] OJ L 286/36 40-41.

[85] *Maxicar v Renault* (C-53/87) [1988] ECR 603916; *Volvo v Veng* (C-238/87) [1988] ECR 6211, 9.

[86] Ritter and Braun, above n 2, 440-441.

[87] For example, in 1985 the European Commission found that British Telecommunications (BT) had abused its dominant position in the telecommunications market when it had taken measures to prevent certain private message-forwarding agencies from offering a new service at that time, which would allow messages to be received and forwarded on be half of third parties at lower prices than those applied to BT's international telex service. See *British Telecommunications* (C-41/83) [1985] ECR 873. Another example is the refusal to sell advertising broadcast time on TV to advertising firms, while this did not apply to similar firms from its own group in *Telemarketing*. See *Telemarketing* (C-311/84) [1985] ECR 3261.

with IBM computers, to compete with the next new IBM products.[88] Similarities are found in the cases of *Microsoft*[89] and *Sabena.*[90]

7.1.3.3 The application of dissimilar conditions to equivalent transactions (Article 102(c) TFEU (ex Article 82(c) TEC))

The third type of abuse of dominant position is the application of dissimilar conditions to equivalent transactions with other trading parties.[91] Article 102(c) *TFEU* aims to prevent discrimination against different trading partners which cause them competitive disadvantage.[92] Discrimination can be caused by the application of either dissimilar conditions to equivalent transactions[93] or of similar conditions to unequal transactions.[94]

The abuse of dominant position in this sense is employed by discriminating trading partners (either customers or suppliers) through their terms and conditions of trading. The result of such discrimination is that some of the partners in question are likely to experience disadvantages.[95] Discrimination can be directed at maximizing profits by overcharging customers who do not have alternative sources of supply. This is also one of a wider pattern of monopolizing conduct which is designed to share markets, or to exclude rivals from the market in order to take advantage of market power in the longer

---

[88] *IBM v Commission* (C-60/81) [1981] ECR 2639; Commission of the European Communities, 'The XIXth Report on Competition Policy (Published in conjunction with the Eighteenth General Report on the Activities of the European Union – 1989) (1989) <http://bookshop.europa.eu/uri?target=EUB:NOTICE:CB5890546:EN:HTML>.

[89] In this case, Microsoft asked to keep the use of per processor and per system licences and to apply a minimum royalty and licence period in agreements of this company and PC manufacturers. See *Microsoft v Commission* (T-201/04 R1) [2004] ECR II-2977.

[90] In this case, the refusal to connect to the computer reservation system of the Belgium national airline to a cheap airline, London European, was concluded as constituting an abuse of dominant position by the European Commission. See *London European v Sabena* [1988] OJ L 317/47.

[91] *TFEU* art 102(c). The purpose of Article 102(c), as argued by the European Court of Justice, is to guarantee the equality of opportunity for all economic operators in various member states, which will contribute to the creation of a system ensuring that competition in the Common Market is not distorted, as stipulated in Article 3(g) . See Terminal Equipment (C-202/88) [1991] ECR I-1223, 51; *Tetra Pak II* (T-83/91) [1994] ECR II-755, 160; aff'd ECJ [1996] ECR I-5951; *Alpha Flight v Aéroports de Paris* [1998] OJ L 230/10 83.

[92] *Tetra Pak II* (T-83/91) [1994] ECR II-755, 160; aff'd ECJ [1996] ECR I-5951; *Deutsche Bahn v Commission* (T-229/94) [1997] ECR II-1689, 78-93; *Deutsche Post* [2001] OJ L 331/40 133.

[93] *Deutsche Bahn v Commission* (T-229/94) [1997] ECR II-1689 78-93; *Deutsche Post* [2001] OJ L 331/40 133.

[94] *Imports of Refrigerators* [1963] ECR 105; *Italy v Commission* (C-13/63) [1963] ECR 165, 177-8.

[95] Ritter and Braun, above n 2, 443

term.[96]

Two issues can arise when applying Article 102(c). The first issue is to determine if commercial transactions are alike or equivalent. This is done through comparing these transactions, while observing relevant differences, such as marketing and transportation costs,[97] the size of the customer's purchases, promotions, warehouses, customer service and other duties.[98]

The second issue is whether dominant firms are under obligation to treat every transaction equally or not. Through some cases of the ECJ, Article 102(c) is explained as meaning that dominant firms are not forced to offer identical prices and conditions, because transactions are rarely completely the same. However, it is stipulated that prices or fees applied to customers should not be arbitrary.[99] The ECJ in *Aéroports de Paris*[100] held that different prices and fees can be justified based on objective criteria, such as the existence of objectively different situations or circumstances capable of justifying any disparity in treatment. The Court also argued that the application of pricing difference will only be considered as an abuse of dominant position if a certain tolerance level is exceeded and it becomes disproportionate and unjustifiable.[101]

Such abuse of dominant position is shown through a number of typical cases, in which a discrimination practice is usually associated with other forms of abuse,[102] such as in the cases of *United Brands,*[103] *GEMA,*[104] *Hoffman-La Roche*[105] and *Aéroports de Paris.*[106]

---

[96] *Irish Sugar* [1997] OJ L 258/1 123, 151-4.

[97] *Deutsche Bahn v Commission* (T-229/94) [1997] ECR II-1689, 86.

[98] *Corsica Ferries Italia Sri v Corpo dei Piloti del Porto di Genova* (C-18/93) [1994] ECR I-1783; *HOV-SVZ v Deutsche Bahn* [1994] OJ L 104/34 191-248; aff'd CFI [1997] ECR II-1689, 202-3.

[99] *Aéroports de Paris v Commission* (T-128/98) [2000] ECR II-3929, 202.

[100] Ibid.

[101] *United Brands v Commission* (C-27/76) [1978] ECR 207, 298 227; *Deutsche Bahn v Commission* (T-229/94) [1997] ECR II-1689, 86; P&I Clubs [1999] OJ L 125/12 134-136.

[102] Ritter and Braun, above n 2, 445

[103] In particular, the application of different prices to the same bananas imported from the same port in *United Brands* is considered as an abuse of dominant position aimed at dividing the local consumer market to exploit market power and eliminate other competitors. See *United Brands v Commission* (C-27/76) [1978] ECR 207.

7.1.3.4 Tying (Article 102(d) TFEU (ex Article 82(c) TEC)

Tying is the fourth example listed in Article 102(d) *TFEU* .[107] It is considered as a typical form of exclusionary abuse and can cause loss directly or indirectly to competitors.[108] It is different from tying behaviour subject to Article 101 *TFEU* (where parties to agreements are non-dominant firms). In this case, market power (due to the dominant position for a particular product) makes it possible for dominant firms to force customers to buy their other products, or to use their services, although customers could buy these from other manufacturers or service providers with better terms or conditions.[109]

The European Commission in *Hoffman–La Roche*[110] and *Microsoft*[111] introduced an important interpretation related to tying behaviour by stating that 'illegal tying can occur

---

[104] In *GEMA*, the discrimination between German tape recorders and those imported from overseas and the discrimination between recording tapes provided by manufacturers and those imported by dealers are regarded as parts of the policy aimed at protecting the German market from parallel imports. See *GEMA* [1971] OJ L 134/15 25-26.

[105] In this case, the discrimination shown through a scheme of rebates was considered not only a discriminatory practice but also one aimed at the elimination of competitors, as the highest rebate was offered to dealers who were able to switch to selling this trade group's products. See *Hoffmann-La Roche* (C-85/76) [1979] ECR 461.

[106] The application of different prices to ground services to different service providers or service users at the same airport was considered as a breach of Article 102(c) *TFEU* because it created inequality between self-servicing companies and companies which did not pay these fees. See *Aéroports de Paris v Commission* (T-128/98) [2000] ECR II-3929.

[107] Article 102(d) *TFEU* reads: 'marking the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which, by their nature or according to their commercial usage, have no connection with the subject of such contracts'.

[108] *Belgian Post* [2001] OJ L 125/27 47.

[109] An example of this case is that while Microsoft tied Windows Media Player software to its Windows operating system, customers can use similar programs competing with Windows Media Players. *See Microsoft v Commission* (T-201/04 R1) [2004] ECR II-2977; Commission of the European Communities, 'The XXIVth Report on Competition Policy (Published in conjunction with the General Report on the Activities of the European Union – 1994) (1994) <http://bookshop.europa.eu/uri?target=EUB:NOTICE:CM9095283:EN:HTML>.

Tying behaviour is clearly explained through the *Notice on Access Agreements in the Telecommunication Sector* in which tying (in IT products) is regarded as a dominant firm of the vertically integrated network operators asking customers requiring to access that system to buy one or several other products/services without adequate justification. That behaviour results in an exclusion of competitors of the tying firm from offering tied products/services independently. See *Notice on Access Agreements in the Telecommunication Sector* (1998) OJ C 265/2 103.

[110] *Hoffmann-La Roche v Commission* (C-85/76) [1979] ECR 461.

[111] *Microsoft v Commission* (T-201/04 R1) [2004] ECR II-2977; Commission of the European Communities, 'The XXIVth Report on Competition Policy (Published in conjunction with the General Report on the Activities of the European Union – 1994) (1994) <http://bookshop.europa.eu/uri?target=EUB:NOTICE:CM9095283:EN:HTML>.

only where the two products by their nature or according to commercial usage need not to be sourced from the same supplier, although they may be closely related'.[112] The ECJ also emphasized that tying is considered as violating Article 102 because it significantly reduces competition in this market.[113] A dominant firm in the market of the tying product does not necessarily acquire a dominant position in the market of the tied product.[114]

Although tying is only stipulated briefly in Article 102 (d), detailed examples of tying behaviour are clarified through many cases of the ECJ. Examples are the tying of IT products and software in the cases *IBM,*[115] *Microsoft I*[116] and *Microsoft II,*[117]delivery service in *British Sugar*[118] and *Digital,*[119] using only a licensed brand in *Tetra Pak II,*[120] obtaining a license to do business with an operating dominant firm in *Belgian Post,*[121] or even the offering of a rebate scheme based on customers' total purchases of different products in *Hoffmann – La Roche.*[122]

---

[112] *Hoffmann-La Roche* (C-85/76) [1979] ECR 461, 547 111; *Microsoft v Commission* (T-201/04 R1) [2004] ECR II-2977; Commission of the European Communities, 'The XIVth Report on Competition Policy (Published in conjunction with the Eighteenth General Report on the Activities of the European Union – 1984) (1984) <http://bookshop.europa.eu/uri?target=EUB:NOTICE:CB4184822:EN:HTML>; *Digital*, Commission of the Europea Communities, 'The XXVIIth Report on Competition Policy 1997 (Published in conjunction with the General Report on the Activities of the European Union – 1997) (1998) <http://ec.europa.eu/competition/publications/annual_report/1997/broch97_en.pdf>.

[113] *Microsoft v Commission* (T-201/04 R1) [2004] ECR II-2977.

[114] Ibid.

[115] *IBM* [1981] ECR 2639, Commission of the European Communities, 'The XIVth Report on Competition Policy (Published in conjunction with the Eighteenth General Report on the Activities of the European Union – 1984) (1984) <http://bookshop.europa.eu/uri?target=EUB:NOTICE:CB4184822:EN:HTML>.

[116] *Microsoft v Commission* (T-201/04 R1) [2004] ECR II-2977.

[117] *Microsoft II* [2004] D.Comm. IP/04/382 1061-67.

[118] *British Sugar* [1988] OJ L 283/41 69-73.

[119] *Digital*, a dominant firm, imposed provision of delivery service with discriminatory prices based on whether customers were ready to buy computer hardware from the same supplier or not. See *Digital*, Commission of the European Communities, 'The XXIVth Report on Competition Policy (Published in conjunction with the General Report on the Activities of the European Union – 1994) (1994) <http://bookshop.europa.eu/uri?target=EUB:NOTICE:CM9095283:EN:HTML>.

[120] It is a tying behaviour when the company asks customers to use only licensed Tetra Pak filling machines. See *Tetra Pak II* (C-333/94P) [1996] ECR I-5951.

[121] In this case, *Belgian Post*, a dominant firm, granted preferential tariffs to business-to-private mail service if its customers also accepted its business-to-business mail. See *Belgian Post* [2001] OJ L 125/27.

[122] The European Commission in *Hoffmann – La Roche* also widened the concept of tying when taking the view that the discount based on customers' total purchases of different products from it also had the same direct effect as a stipulation of tying. See *Hoffmann-La Roche* (C-85/76) [1979] ECR 461, 547 [111].

7.2 The abuse of dominance by state monopoly firms

Areas where market dominance usually occurs and abusive behaviour of dominant position are often found are those which provide necessities for life and community (e.g. electricity, transportation, telecommunications, aviation); those that are natural monopolies; and those relating to high technology, advanced techniques, or intellectual property (such as health, pharmaceuticals, computers, etc.).[123] State firms usually hold dominant position in the important fields mentioned above, especially in natural monopoly fields, the ones relating to security and defence, or fields which need the large investment of capital and technology.[124]

On the basis of the described features of abuse of market dominance under EU competition law, this section discusses particularly abusive behaviour conducted by state monopolies. Again, it can be concluded that state monopolies can conduct any forms of abuse, like any other firms. This section, therefore, does not intend to argue why they can commit such abuses, or examine features of any abusive behaviour that they have committed. Rather, it observes how they commit them and how they affect competition. This part focuses on two common categories of abusive behaviour, i.e. exploitative and exclusive behaviours. As state monopolies are more common in developing and transitional countries, examples from these countries are considered. Finally, it sets out to demonstrate that competition rules should apply to them as much as they apply to other firms.

7.2.1 Exploitative behaviour

This section is mostly concerned with pricing behaviour, including the utilisation of

[123] See UNCTAD, *The Effects of Anti-competitive Business Practices on Developing Countries and their Development Prospects* (United Nations, 2008), 587-588 <http://www.unctad.org/en/docs/ditcclp20082_en.pdf>. See also UNCTAD, *Model Law: The Relationship between a Competition Authority and Regulatory Bodies, including Sectoral Regulators* (2001) <http://www.consumer.org.hk/website/wrap_en2/20020416/unctad/webpage/backdoc/molawnew.pdf> 4; G Sivalingam, *Competition Policy in Asian* 2 <www.incsoc.net/asean-rep.doc>. This is true in the case of public utilities, as they provide most of the essential services for the society. See Owen E Hughes, *Public Management and Administration: An Introduction* (Palgrave Macmillan, 3rd, 2003).

[124] OECD, 'State-Owned Enterprises and the Principle of Competitive Neutrality' (Policy Roundtable, DAF/COMP(2009)37, 2009) <http://www.oecd.org/dataoecd/43/52/46734249.pdf>; ICN, *Report on the Objectives of Unilateral Conduct Laws, Assessment of Dominance/Substantial Market Power and State-created Monopolies* (2007) <http://www.icn-moscow.org/page.php?id=7>; OECD, 'Competition Policy, Industrial Policy and National Champions' (Competition Policy Roundtable, DAF/COMP/GF(2009)9 , 2009) <http://www.oecd.org/dataoecd/12/50/44548025.pdf>.

unfairly high or low prices. Both are categorised as exploitative behaviour. The utilisation of pricing policies aims either to maximize profits, or to eliminate competitors. In the same way as with private firms, charging high prices or imposing low prices below the total production cost can be done by state monopolies. This is because the other firms, which do not have dominance in the relevant market, are in a disadvantageous position.

7.2.1.1 Overpricing

In a market where there is no other competitor, such a monopoly position obviously makes it possible for state monopolies to set a high price for their products/services and to maintain that price or to adjust prices that consumers have to accept.[125] Even when there are a few competitors competing with them in fields related to public utilities,[126] there is still the possibility of applying or adjusting prices, especially when necessary information is limited.[127] In such areas, state monopolies can be the main or the largest producers or

[125] For example, state monopolies providing electricity can use the fluctuations in raw oil prices in the world market as a reason to increase electricity prices while consumers cannot easily estimate the rates and the review the adjustment of state monopolies in this field to determine whether or not such increase is reasonable.

[126] For example, the Greek Public Power Corporation Société Anonyme (PPC SA) is the sole provider of electricity to Eligible High Voltage Customers in the Greek market, with a market share of almost 100 per cent. The Chinese Petroleum Corporation (CPC) in Chinese Taipei is a dominant firm in the provision of aviation fuel for both international routes (the second company operating in this area, the Formosa Petrochemical Corp., having just entered in the market in 2000) and domestic routes (together with three other companies. See OECD, 'Principle of Competitive Neutrality', above n 124.

Accounting for over 75 per cent of total power generation capacity, the Vietnam Electricity Group undoubtedly dominates the electricity generation sector, with the rest of market share being divided among smaller electricity companies. See UNTACD, *Investment Policy Review of Vietnam, Chapter 3: Attracting FDI in Electricity* (2009) 96 <http://www.unctad.org/en/docs/iteipc200710_en.pdf>. In the aviation sector, accounting for 85 percent of its domestic passenger traffic, Vietnam Airlines definitely holds a dominant position in this sector, despite the participation of some other airlines such as Jetstar Pacific, Indochina Airways, Mekong Air. See Aerospace Exports Website, *Market Research Identifies Solid Prospects* <http://www.ita.doc.gov/exportamerica/NewOpportunities/no_aeroex_1002.html>.

[127] The Hellenic Telecommunications Organization (OTE) is the incumbent telecommunications provider in Greece, which was controlled by the Greek State until 2008. In 2007, it was investigated by the Hellenic Telecommunications and Post Commission (EETT), based on consumers' complaints regarding OTE's practices and invoicing policy in the broadband services market. It was found that OTE retained a small margin between the wholesale price and the retail price. This had impeded other operators from covering their costs to maintain competition with OTE. As they were compelled to sell their services at the same retail price as OTE, alternative operators had to exit from the market or suffered significant losses. It was finally ascertained that OTE had infringed national competition law by abusing its dominant position in the broadband market in the form of a margin squeeze, and OTE was imposed a fine of €20,000,000. See contribution of Greece in OECD, 'Principle of Competitive Neutrality', above n 124, 167-168.

importers.[128] In some cases, they also carry out certain management functions while conducting economic activities and competing with other firms.[129]

In these cases, the application of overpricing constitutes a breach of consumers' rights, because they must accept a high fee to use those products/services without, or with few, choices.[130] Firms that compete directly with state monopolies and distribution firms could also endure losses because they have to increase their investment to cope with the excessive prices of state monopolies, which consequently lead to an increase of their

[128] For example, Vietnam National Petroleum Corporation (Petrolimex) is the main gasoline importer. Petrolimex is also the leading petroleum company with market shares of 60 per cent and in competition with a number of companies in this domain such as PetroVietnam Oil Corporation, PetroVietnam Gas Corporation.

[129] For example the British Telecommunications (BT) before 1984 had exclusivity in running the telecommunications system (http://www.btplc.com/Thegroup/BTsHistory/History.htm); *Amministrazione Autonoma dei Monopoli di Stato* (AAMS) in 1998 was a body forming part of the financial administration of the Italian State engaging in the production, import, export and wholesale distribution of manufactured tobaccos (*AAMS v Commission* (T-139/98) [2001] ECR II-3413 <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:61998A0139:EN:HTML>).

The state-owned umbrella company for cement in Vietnam (Vietnam Cement Industry Corporation), has a dominant market share and benefits from some specific advantages. It acts as the decision making body on the clinker import quota for other producers, which are also its competitors, suggesting a conflict of interest. It also controls almost all domestic resource exploitation and only SOEs are allowed to excavate mines or extract raw materials, while others have to sign contracts through the SOEs. Its control of inputs, to some degree, can be seen as a barrier to entry in the market. See Karen Ellis et al, *Assessing the Economic Impact of Competition: Findings from Vietnam* (2010) <http://www.odi.org.uk/resources/download/4956.pdf>. Similarly, there are the 'State Forest' or PP Lorty Lotnicze in Poland, Societatea Nationala TUTUNUL ROMANESC SA (SNTR) in Romania. See further OECD, 'Principle of Competitive Neutrality', above n 124.

[130] PPC SA, an undertaking by which the Greek Government holds 51 per cent of market share, is the sole provider of electricity to Eligible High Voltage Customers (EHVC) in the Greek market, with a market share of almost 100 per cent. On 28.03.2003, a decision was made by its Board of Directors regarding the amendment of the contractual terms for electric power supply concluded between PPC and EHVC. This decision provided for the possibility to redefine the contractual maximum and minimum power within medium or minimum load zones. Whenever PPC was informed that Eligible Customers wished to shift to a different provider, it would proceed to amend the terms of supply contracts concerning the calculation of the power consumed. This practice was said by the Hellenic Competition Commission to damage the right of customers to choose an alternative supplier, hence was constituted an abuse of PPC's dominant position, infringing Article 2(a) of Law 703/1977 and Article 82(a) *TEC* (currently Article 102(a)(c) *TFEU*). PPC was ordered to cease and desist from committing the above infringement in the future. See contribution of Greece in OECD, 'Principle of Competitive Neutrality', above n 124, 167-168.

product price.[131]

Both cooperation and competition among state monopolies can lead to concerns. First, when a certain market is dominated by a group of state firms formed by cooperation among themselves (so that the total market share of this group becomes the majority),[132] not only does this augmentation of market power allow them to apply a price strategy and consolidate the position of the firms concerned in the market, but it also enables them to conduct more activities harmful to competition, such as the application of discriminatory prices and fees and the imposition of unfair conditions on their customers, leading to greater costs for them.

Second, there is another concern when a market is affected by competition among state monopolies, because their business activities are interrelated, or their subsidiaries may compete with each other in a certain market.[133] An increase in the price of products/services provided by a firm may consequently cause a corresponding adjustment of prices relating to other product/services offered by another firm, especially when these products are necessary, being related to such as fuel/coal/and electricity; fuel and

[131] In 2002, there was a case against the line telecommunications operator and monopolist Türk Telekom, formerly Turkish Telecommunication (a state owned company until 2005 before it was privatised) for its abusive behaviour. The Turkish Competition Authority (TCB) found that Türk Telekom, had abused its dominant position in the network market for broadband internet access by applying tariffs for access to the network which were so high that its rivals could not compete in the relevant market, while determining the tariffs to be very low for internet access. The TCB considered this was an abuse of market dominance in the form of both predatory and squeezing prices. (According to the TCB, even if pricing below cost could not be detected, Türk Telekom would have abused its dominance via squeezing prices). The TCB finally imposed a fine on Türk Telekom. See ICN, *Cases Annex to ICN Unilateral Conduct Working Group: Report on the Analysis of Refusal to Deal with a Rival under Unilateral Conduct Laws* (2009) 59-60 <http://www.internationalcompetitionnetwork.org/uploads/library/doc611.pdf >.

[132] In 2002 there was a complaint regarding abuse of collective dominance made by three Greek Travel Agents' Associations against OLYMPIC AIRWAYS (at that time a state owned company) and AEGEAN/CRONUS. These two companies obviously dominated the domestic flights market. According to the plaintiffs, these companies had abused their market dominance to jointly and simultaneously impose abusive measures i.e. reduction of the commission payable to travel agents on issuance of air tickets to all domestic destinations and abolition of all categories of reduced fares. As a result, this caused a considerable reduction in the plaintiffs' profits. The Hellenic Competition Commission (HCC) ascertained that there was a concerted practice by the two airlines, thus infringing Article 1 of Law 703/1977. The HCC imposed fines on the airlines and its decision (HCC Decision 249/III/2003) was upheld by the Athens Administrative Court of Appeals. See Contribution of Greece in OECD, 'Principle of Competitive Neutrality', above n 124, 163.

[133] For example, in Vietnam's telecommunication market, the provision of mobile services is competed for among firms, of which there are firms belonging to state economic groups such as EVN Mobile (a EVN subsidiary), Vinaphone and Mobiphone (VNPT subsidiaries). In the petroleum market, Petrolimex (the largest importer) iscompeting with PetroVietnam Oil Corp. and PetroVietnam Gas Corp. (subsidiaries of Petro Vietnam, one of the 8 economic groups). In the electricity generation market, Vietnam Electricity Group (EVN) is competing with PetroVietnam Power Corp. which is also a Petro Vietnam subsidiary.

transportation, etc.[134] It can then ignite an increase in prices in a wide range of products/services for the whole society in a *domino* effect. More seriously, when a state monopoly employs price to counterattack the utilisation of pricing policy of another state monopoly, this may lead to a subsequent increase of prices of products/services.[135] In these cases, losses endured by consumers become considerable.

To deal with these problems, countries may set a ceiling price for a certain number of crucial goods/services, or establish a mechanism for the settling of disputes. However, this is not simple in practice. First, state monopolies may argue that they are firms seeking profits and the setting of sale prices should be a normal behaviour for any firms.[136] Second, an investigation to determine whether the charge is too high and if such a high charge leads to consumers' losses requires a complicated procedure including investigation, information collection and data assessment. This may exceed the capability of a competition authority, especially when an appropriate regulation of this issue is absent.[137] The issue becomes even more complicated when such an abuse of monopoly receives support from management agencies to which state monopolies previously

[134] There has been recently a case in Vietnam in early 2011 when EVN asked for an increase of electricity prices, alleging the fact that there was a claim for increasing prices for petroleum and gas from the largest state importer Petrolimex and another price increase proposal from Vinacomin, a monopolist in the production and supply of coal. Nong nghiep Vietnam, 'Dien, Than, Xang dau Dong loat Xin Tang gia' [Electricity, Coal, Petroleum Industries Collectively Ask for Price Increases] (2011) <http://nongnghiep.vn/nongnghiepvn/vi-VN/61/158/1/15/15/64566/Default.aspx>.

[135] In 2010, there was an unresolved debate between two state monopolies in Vietnam in relation to the rental for power poles to hang telecommunication cables. When EVN proposed to increase the fee for the power posts on which telecommunication cables hung and EVN's largest customer is VNPT, it faced objection from the most powerful state economic group. This controversy led to a concern about the use of fundamental facilities and impacts to social and business life. See VN Economy, 'Bung nhung cot dien va Dung dang Trach nhiem' [Unsolved conflict regarding electric posts and Responsibility] (2010) <http://vneconomy.vn/201012593636230P0C5/bung-nhung-cot-dien-va-dung-dang-trach-nhiem.htm>; VN Economy, 'EVN Tang Gia Thue Cot dien, VNPT 'Cau cuu' [EVN Proposed a Increased Rent for Hanging Telecommunication Cable, VNPT Sought for Help] (2010) <http://vneconomy.vn/2009122512054628P0C9920/evn-tang-gia-thue-cot-dien-vnpt-cau-cuu.htm>.

[136] For example in the case cited above, EVN claimed its business status and cited its costs to maintain power poles as the grounds for the increase in pole rental. See Phap luat TP.HCM, 'Tai sao Cot dien Phai Cong Ong Vien thong?' (2010) <http://phapluattp.vn/247687p1015c1074/evn-tai-sao-cot-dien-phai-cong-ong-vien-thong.htm>; VN Economy, 'Tang Gia Treo Cap, 'Moi VNPT Khong chiu' [Increase of Hanging Cable Fee, Everyone Agreed, except VNPT] (2010) <http://vneconomy.vn/20091230082334969P0C16/tang-gia-treo-cap-moi-vnpt-khong-chiu.htm >.

[137] In the hanging-poles for telecommunication cables issue between EVN and VNPT, based on the arguments of both sides it was found that the case was neither regulated by an appropriate provision in the *Competition Law 2004* nor in the *Ordinance on Fees and Charges of 2002*. See VN Economy, above n 135.

belonged.[138]

In the fields relating to natural monopoly and necessities for social life where there are a few or even no other providers, competition is extremely unbalanced because firms cannot compete with state monopolies because of a deficiency in long-term and large-scale investment. This makes it possible for state monopolies to impose arbitrarily high charges. Although the participation of private firms into these fields can limit the excessive exploitation of the monopoly advantage of state monopolies and bring more choices for consumers, it still seems difficult to frustrate their abuses of pricing.

7.2.1.2 Low pricing

First of all a low price can be offered when state monopolies are the buyers. This often occurs in the purchase of agricultural products or raw materials,[139] when sellers (farmers) have to accept low buying prices because of the fear of having few buyers.[140]

The second and more commonly found case, involves the use of extremely low prices aimed at eliminating competitors, known as 'predatory pricing'.[141] 'Predatory pricing' is regarded as a practice whereby a firm prices its products at such a low rate that other

[138] Again, after the debate concerning hanging-poles for telecommunication cables arose, each Ministry to which either EVN or VNPT belongs expressed its view so as to justify the proposals and objections of its company. The same story arose back in the conflict between EVN and VNPT, Viettel and VNPT concerning interconnection mentioned earlier in Chapter 3.

[139] Le Hoang Oanh, *Binh luan Khoa hoc Luat Canh tranh* [Critical Comments on the Law on Competition] (National Political Publishing House, 2005).

[140] In the case study of EVN mentioned in Chapter 3, Vietnam Electricity was a sole-buyer of electricity plants. There are some other plants participating in power generation, but they could only sell to EVN. There were some complaints about EVN's refusal to buy their offers while it bought from outside sources.

[141] The *Deutsche Post* case from 2001 is widely cited as a landmark case for applying anti-trust law to public monopolies. The European Commission's analyses of the conduct of Deutsche Post showed that this German portal monopoly had abused its dominance by using a predatory strategy, in violation of Article 102 *TFEU*. Especially, it was concluded in response to a complaint by UPS, a private operator in the business parcel sector, that there was a subsidisation of Deutsche Post to its sales of parcel delivery services, where it competed with private enterprise, by profits it gained from its state-granted letter mail monopoly (cross-subsidisation). After investigating the situation, the Commission determined that Deutsche Post's parcel delivery services could be offered at prices that were below its incremental costs and could persist with the below cost for very long. The Commission held that this activity constituted a violation of the predatory pricing rule laid down earlier by the European Court of Justice in *AKZO Chemie BV*. Therefore, the Commission imposed a fine of €24 million on Deutsche Post. See Commission Decision 2001/354/EC of 20 March 2001 relating to a proceeding under Article 102 *TFEU* (Case COMP/35.141 – *Deutsche Post AG*), OJ 2001 L 125, 27. See also contribution of the European Commission in OECD, 'Principle of Competitive Neutrality', above n 124, 453.

firms cannot compete with this price and thus are driven from the market.[142] After the period of predation, a state monopoly is able to charge prices above the competitive level and profits can be even greater than compensation for the previous losses.[143]

Unlike dumping (selling price is lower than the total price), this strategy aims to place potential competitors in a difficult position because they have to consider their ability to make a profit t the current lowered price.

As analysed earlier, with significant advantages such as easy access to financial sources, support from government subsidies and less concern about losses state monopolies are able to apply low price to their products/services. Unlike the first case, which is mostly related to a maximisation of profits, this situation is employed as a means to exclude competitors from the market in which state monopolies are operating.[144] This strategy is normally similar to that applied by foreign invested firms to occupy a local market.[145]

7.2.2 Exclusive behaviour

This section presents the second category of abusive behaviour. Monopolistic behaviour of state monopolies can occur in many different forms. They include the refusal/obstruction of access to essential facilities (refusal to deal); limitation of production, market, technology development; discrimination in applying different

[142] Paul L Joskow and Alvin K Klevorick, 'A Framework for Analyzing Predatory Pricing Policy' (1979) (89) 2 *Yale Law Journal* 213. It was held in Deutsche Post that 'Predatory pricing occurs when a dominant firm sells a service below cost with the intention of eliminating competitors or deterring entry, enabling it to further increase its market power...'. See *Deutsche Post* [2001] CMLR 99. In other words, when the dominant firm offers a price below cost price, its competitors are forced to offer lower prices that will cause them loss. See Slot and Johnson, above n 5, 121.

[143] Jones and Sufrin, above n 2, 459.

[144] In 2008, the UK Office of Fair Trading found a predatory behaviour engaged by a publicly-owned bus company (Cardiff Bus) designed to eliminate a competitor. The OFT considered that the Cardiff Bus competed directly with commercial bus providers, thus satisfying the criteria of an 'undertaking' for the purposes of the Competition Act 1998 (engaging in an 'economic activity'. When another bus company, 2 Travel, introduced a new 'no-frills' bus service, Cardiff Bus in response, launched its own no-frills bus services which ran on the same routes, at similar times as 2 Travel's services and made a loss for Cardiff Bus. Shortly after 2 Travel's exit from the market Cardiff Bus withdrew its own no-frills services. The OFT held that the launch of this service was an intention of diverting prospective customers away from 2 Travel and thereby forcing 2 Travel out of the market, thus protecting Cardiff Bus' dominant position. It then concluded that Cardiff Bus had infringed the prohibition imposed under the Competition Act 1998 by engaging in predatory conduct which amounted to the abuse of its dominant position in the relevant markets. See Decision of the Office of Fair Trading No. CA98/01/2008 (Case CE/5281/04) <http://www.oft.gov.uk/advice_and_resources/resource_base/ca98/decisions/cardiffbus>.

[145] Examples for this can be taken from the predatory strategy applied by Coca-Cola when it came to Vietnam in 1990s, thus successfully excluding local beverage companies mentioned in Chapter 4.

conditions to transactions of the same type; and the imposition of obligations irrelevant to contracts. This behaviour can be utilised as 'strategic barriers' to prevent market participation by new competitors.[146] State monopolies can prevent new competitors from joining the market by boycotting their customers from performing transactions with the new competitors, establishing vertical barriers towards their distributors and retailers and using predatory prices.

7.2.2.1 Refusing or obstructing access to essential facilities

Because of the significance of 'essential facilities' in society, this kind of refusal to deal is discussed separately in this section. There is a common perception that essential facilities[147] must be able to be accessed equally and conveniently facilitated for all competitors, even though essential facilities doctrines vary significantly among legal regimes.[148] For this reason the owner(s) of an 'essential' or 'bottleneck' facility must provide access to that facility, at a reasonable price.[149] This comes from the fact that competitors need access to these essential facilities and should not have to invest too much money to build their own system.

State monopolies can generally charge a high price for access to essential facilities under

---

[146] Barrier to entry is regarded as elements causing difficulties for businessmen to join the market and compete with current enterprises on that market. See Bryan A Garner, *Black's Law Dictionary* (Thomson West, 7th ed, 1999) 144. Barriers are normally divided into two types. The first one, 'structural barrier', consists of elements which prevent the participation of potential enterprises and do not depend on subjective thinking of enterprises on that market. Such barriers are inherent from conditions of the market which require participants must satisfy. In particular, they are economic conditions as the result of economics of scale and absolute advantage in cost or legal stipulations to choose market participants such as the stipulations of conditions to do business and the protection of essential industries of economy. The second one, 'strategic barrier', refers to strategic behaviour of enterprises operating on the market to prevent the participation of potential enterprises such as strategies of setting price to obstruct competitors or establishing vertical barriers. See further OECD, *A Framework for the Design and Implementation of Competition Law and Policy* (WB and OECD, 2004) 229-276.

[147] Normally, essential facilities include systems of harbours, airports, telecommunication infrastructure, electricity transmission, gas, or online system for booking reservation. The concept of essential facilities can be found in a number of OECD Policy Roundtable Reports and Contributions of OECD members. These works discuss different essential facilities doctrines that apply in OECD countries such as the US, the EU and Australia. For example, OECD, 'The Concept of Essential Facilities' (Policy Roundtable, OCDE/GD (96)113, 1996) <http://www.oecd.org/dataoecd/34/20/1920021.pdf>. See also, Brenda Marshall, 'Regulating Access to Essential Facilities in Australia: Review and Reform of Part IIIA of the Trade Practices Act' (SJD Thesis, University of Queensland, 2004).

[148] The essential facilities doctrines vary from country to country depending on such important criteria as types of facilities, ownership and market structures to which they may apply. It may vary according to who indentifies a facility is 'essential'. See OECD, 'The Concept of Essential Facilities', above n 147.

[149] Ibid.

their management. This is a form of exclusivity because other firms, that is, those doing business in this field, or those relying on these facilities,[150] will mostly have no choice but accept a high charge.[151] A unilateral termination to the access, or a threat of termination, is sometimes employed by state monopolies as a way to extract higher fees, or to require tougher conditions.[152]

There are two causative issues related to a refusal or obstruction of access to these essential facilities of state monopolies, i.e. the intention to eliminate their competitors and the restriction of market entry of other firms.[153] Fixing high fees and other obstructions

[150] For example, companies providing services at ports, airports or railways, are those doing business in essential facilities. Mobile companies, internet providers or telecommunication service companies are those that must rely on access to essential facilities.

[151] In 2006, depots for railways in Romania were in the possession of the two State-owned railway operators, namely CFR Marfa and CFR Calatori (passengers transport). With a duopoly structure in the market, clients had the possibility of deciding on the services provided by either of the two operators. At that time, CFR Calatori was charging much lower tariffs than CFR Marfa. In examining the behaviour of the two undertakings operating in the same product market, the Romanian Competition Council (RCC) found that CFR Calatori was applying the same tariffs to all its beneficiaries, while CFR Marfa was charging differentiated tariffs. CFR Marfa's tariff scheme was laid down in an internal order, based on ownership of its beneficiaries, i.e. state-owned or private railway operators. The RCC used CFR Calatori's non-discriminatory tariffs scheme as a benchmark for the relevant market. In comparison with this benchmark, it was found that private operators were charged tariffs by CFR Marfa which were from 5 to 20 times higher. They were also much higher than those applied by the former SNCFR (the state-owned national railway carrier until 1990, to which CFR Marfa is a successor). The private operators, as competitors of CFR Marfa, were exposed to disadvantages in the market and could not compete aggressively with CFR Marfa as they did before. RCC's Plenum finally decided that CFR Marfa infringed the provisions of art. 6(a) and (c) of the Romanian *Competition Law*, abusing its dominant position in the relevant market. See contribution of Romania in OECD, 'Principle of Competitive Neutrality', above n 124, 271.

[152] The unilateral termination of aviation fuel supply by Vietnam's monopoly aviation fuel supplier VINAPCO gives a clear example. A similarly case is the rejection of interconnection to the telecommunication system by VNPT as mentioned in Chapter 3.

[153] In 2003, AB Lietuvos telekomas (a public join stock company) was investigated by the Competition Council for its abuse of its monopoly position in two cases. In one case, investigation was undertaken in response to the claim of UAB Interprova, which alleged that AB Lietuvos telekomas blocked the ISDN flow and terminated provision of telephone voice services. This foreclosed UAB Interprova from the provision of internet telephony services and the company incurred a loss of about LTL 1 million (EUR 289 620). With its dominant position in the fixed public telecommunications network market and the market for the lease of the telecommunications networks, AB Lietuvos telekomas not only blocked the lines leased by UAB Interprova, but also of 30 more undertakings providing the internet telephony services. The Lithuania Competition Council concluded that AB Lietuvos telekomas abused its dominant position, ordered the company to resume the provision of services to UAB Interprova and fined it LTL 2,077,000. See OECD, 'How Enforcement against Private Anti-competitive Conduct Has Contributed to Economic Development: Contribution from Lithuania' (OECD Global Forum on competition, CCNM/GF/COMP/WD (2004)1, 2004) <http://www.oecd.org/dataoecd/26/7/21670702.pdf>.

such as the related procedures likely become barriers[154] against firms, because this faces them with higher costs to carry on their business. This indirectly eliminates competitors of state monopolies who are often weaker in terms of financial capacity and technology. The high fee will also obstruct potential competitors by creating many difficulties before they participate in these markets.[155]

It is more complicated when state monopolies may conduct both state management and business operations in essential facilities.[156] In this case, discrimination between state and private firms or even among state firms can easily take place. There are some situations in which preference is given to one firm, such as an imposition of advantageous prices, a removal of fees, or a relaxation of payment method.[157] This also faces them with another difficulty as whenever they want to use or upgrade their systems, they must ask the state monopolies for permission.[158]

---

[154] In 2005, the Antimonopoly Office of the Slovak Republic assessed the conduct of the company M. R. Stefanik Airport – Airport Bratislava, a.s. (LMRS), a company of which 49.7 per cent was held by the Ministry of Transport, Construction and Regional Development of the Slovak Republic and 50.3 per cent was held by the National Fund of the Slovak Republic. LMRS a.s., operates the Bratislava airport, which is its sole owner, having a dominant position in the market in the provision of access to the check-in area of the Bratislava airport. LMRS was accused of denying access to the company Two Wings, s.r.o. to the check-in area of the Bratislava airport to carry out activities such as transporting, loading and unloading of refreshments onto/from aircraft. According to its complaint, LMRS did not permit Two Wings to access this area, while LMRS was the only entity that could allow it to do so. The Office concluded that LMRS, a.s. abused the ownership of an essential facility with the aim of maintaining and/or strengthening its position in the above market. The denial to access of LMRS restricted competition in the vertically connected market, resulting in the elimination of competitive pressure from other competitors like Two Wings and preventing effective competition in this market. See ICN, *Cases Annex to ICN*, above n 131, 52.

[155] In 2005, the Turkish Competition Authority (TCB) examined whether Türk Telekom, holding monopoly rights in supply of the infrastructure for broadband internet services, abused its dominant position by blocking cable networks to rival internet operators. According to the TCB, the blockage by Türk Telekom would impede competition in the supply of broadband internet services while securing the return of its investments in DSL infrastructure. The TCB also found that neither technical necessities nor any reasonable objective justification could be accepted. The TCB finally concluded that Türk Telekom's behaviour constituted an abuse under Art. 6 of the Act and thus it ordered Türk Telekom to open its cable network to other operators immediately. See ICN, *Cases Annex to ICN,* above n 131, 62.

[156] For example, the of power company can both control the electrical transmission system and have subordinate state enterprises to do business in buying/selling electricity or telecommunications (for the use of electric poles to hang telecommunication cables …).

[157] For example, in the case against VINAPCO discussed in Chapter 3, Jestar Pacific claimed there was unfair treatment against them in terms of fuel charge and payment method, as compared with its competitor Vietnam Airlines. VINAPCO, a monopolist in the provision of aviation fuel, is also a Vietnam Airlines subsidiary.

[158] See the dispute between Vietnam's VNPT and two mobile providers Viettel and EVN Telecom in Chapter 3.

7.2.2.2 The limitation of production, markets and the development of technology

A monopoly position enables state monopolies to limit either production or markets and to impose a limitation on technology development. As with any other monopoly firms, this behaviour is generally intended to reinforce the monopoly position of the state firms, to create an imbalance between supply and demand in the market, forcing other firms to depend on them and to enable them to perform other exploitative acts aimed at maximizing their profits. Finally, it restricts the market entry of new participants, thus contravening the liberalisation of trade and services.[159]

A limitation of production is understood as the reduction of the goods/services supply in the related market, which leads to a shortage of supply. It can also mean the limitation (speculation/hoarding) at a level which is enough to cause a scarcity of goods in the market.[160]

There are two concerns with regard to state monopolies' limitation behaviour. First, in the case of a monopoly in the supply of public utilities for economic and social life, or the supply of input sources for other industries such as electricity, coal, gas and petrol, such a limitation can easily cause a major loss to consumers and the economy as a whole.[161] In such a case, a limitation can be used as justification for these monopoly firms to increase prices later. The second issue is that such behaviour may be supported by the state's policies such as import limitation or saving and also justified for other reasons, such as the role of state firms in coordinating the market against the fluctuation of economic

[159] In 2003, AB Lietuvos telekomas (a public join stock company) was investigated by the Competition Council for abuses of its monopoly position in another case. Investigation was undertaken after several Internet service providers (ISPs) complained about AB Lietuvos telekomas for its instalment of filters that restricted the available frequency of leased analogue lines. It was concluded that such filters substantially reduced available bandwidth and made the lines unsuitable for high speed data transmission. It was concluded that AB Lietuvos telekomas abused its dominant position in the market of leasing of lines used for the transmission of data and restricted competition. The Lithuanua Competition Council therefore imposed a fine of LTL 150,000 on AB Lietuvos telekomas and obligated the company not to install its filters in the leased analogue dedicated lines. See OECD, 'How Enforcement against Private Anti-competitive Conduct', above n 153.

[160] For example, a firm operating in the production and importation of fuel may limit its quantity, manipulate fuel products or even stop producing or importing.

[161] For example, a limitation in selling petrol and gas will lead to the consumers' loss and will affect the production of firms in the economy.

conditions and the market.[162]

The limitation of markets is considered as an abuse of a monopoly position. It is different from an agreement involving market division. In such agreements, participating firms are competitors and they agree to divide product consumption or the supply market among themselves, which then brings dominance for each participant in the divided markets as agreed by them.

In this case, the limitation of markets, as an abuse of a monopoly position, is regarded as behaviour of a state monopoly that targets its customers, for example, its distributors. There are several situations in which state monopolies can commit an abuse by limiting markets. First, they may limit themselves with regard to the quantity of their production or supply, or limit buying products in specific areas or sources to create a scarcity of goods in such areas. This can be serious when a state monopoly also makes uses of regulatory exclusivity, i.e. the grant of licences in a number of assigned areas.[163] Second, a limitation of markets can be imposed in the form of a restrictions or prohibitions and is often included in exclusive agreements/contracts with distributors. There is a wide range of such limitations that may be employed by monopoly firms.[164] There can be a restriction on the provision or supply of certain goods or service or prohibition of selling at a specific geographical area. It can also be a limitation of the supply of goods/services to particular customers. It can be a refusal to buy goods/services from specified sources, or a refusal to supply to competitors. It can be a refusal to deal with other firms who want to offer or supply products/services that may compete with the monopoly firm.

The limitation of technology development can also be carried out by state monopolies and is considered one form of abusive behaviour. It can happen when a state monopoly refuses to disclose important information, causing difficulty for competitors to develop

[162] For example, the limitation of electricity output can be justified by the need for guaranteeing an energy reserve; or the limitation of petrol in the market can be justified as preserving energy safety, etc.

[163] For example, the grant of licenses for the importation of particularly important products to trading partners.

[164] Examples of market limitation restrictions/prohibitions can be found in many EU cases which have been mentioned in the previous part of this chapter.

competing products/services,[165] or blocking access to technology, such as to a computer system.[166] This serves to maintain the dominance of the state monopolies.

7.2.2.3 The application of different terms and conditions to similar transactions (discrimination in trade)

A monopoly position makes it possible for state monopolies to apply different conditions, including purchase, pricing, time for payment, etc. to different firms.[167] This distorts fair competition by placing one firm in a more advantageous position than others.

There are two cases of concern. The first case, which is less likely to happen, is where firms are among competitors of the state enterprise concerned. Thus, the application of different terms and conditions may put all or some firms in a disadvantageous position, so

---

[165] For example, in 1985 the ban on certain private message-forwarding agencies with regard to relaying telex message services that competed with those being offered by the British Telecommunications (BT) was concluded to be an abuse of BT's dominant position. See *British Telecommunications* (C-41/83) [1985] ECR 873.

[166] London European Airways PLC (London European), a private British airline company, alleged that Sabena Belgian World Airlines (Sabena), had infringed Article 86 (currently Art.102 *TFEU*) of the *EEC Treaty* by abusing its dominant position in the computerized ticket reservations market in Belgium. Sabena, whose authorized capital was owned by the Belgian State, had as its main activity the provision of air transport services. Additionally, it provided other services, such as the aircraft ground handling service and the Saphir computerized reservation service. According to London European's complaint, Sabena refused to grant London European access to its Saphir computer reservation system. By this refusal, Sabena had used its power on the ticket reservations market to impose minimum air fares on London European. It was also claimed to have asked London European to accept services which had no connection with the reservation system as the condition for entry to the Saphir system. The European Court of Justice concluded that there was an infringement of Article 86 of the EEC Treaty (abuse of market dominance) by Sabena in refusing to grant London European access to the Saphir system. See Commission Decision 88/589/EEC of November 4, 1988, relating to a proceeding under Article 82 of the EEC Treaty (currently Article 102 *TFEU*) (IV/32.318, *London European v Sabena*) OJ 1988 L 317 <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:31988D0589:EN:HTML>.

[167] The state-owned Chinese Petroleum Corporation (CPC) monopolised the supply of LPG to the downstream distribution market before the large-scale liberalization of the LPG industry. In early 1999, other than the CPC, Formosa Petrochemical Corp., Le Chung Lung and Pei Yi Hsing Co., Ltd. were given permission by the Bureau of Energy under the Ministry of Economic Affairs to import LPG. However, CPC still dominated the LPG market (accounting for 89,15 per cent of market share in the relevant market). This meant that most LPG dealers still had to rely on the CPC. In 1999 CPC began to impose discriminatory treatment on dealers who imported the LPG by themselves, or who traded with Formosa Corp., its competitor in the petroleum market. Making use of its dominance and the lack of the necessary information to access LPG price information by the other dealers, it then no longer provided LPG to all dealers at a uniform price. In addition, in September CPC refused to renew its dealership agreement with any dealer who traded with the Formosa group. The Fair Trade Commission considered that CPC had taken advantage of its dominant position in the LPG market to apply price discrimination against dealers who still had to rely on its supplies. Further, it tried to exclude competitors from the market. Thus, it was concluded that there was a violation of the Fair Trade Act. In 2002, the Fair Trade Commission decided to order CPC to cease its discriminatory practices and imposed an administrative fine of NT$8 million on it. See contribution of Chinese Taipei in OECD, 'Principle of Competitive Neutrality', above n 124, 285-286.

that they cannot compete with the state monopoly.

The second case occurs where there is a discriminatory policy applied to different firms to which a state monopoly is the only or the main supplier. Here, such discrimination will affect competition among customers of the state monopoly.[168] Consequently, two issues arise. The first is, when private and other state firms are customers of the state monopoly in question such discrimination is possible because the state monopoly can easily reserve preferential treatment or exemptions for state firms.[169] The second is, when one or several of the subsidiaries of the state monopoly engage in competition with private firms, there is a greater concern because preferences and exemptions will be easily given.[170] In both cases, the state firms in question will undoubtedly have more advantages than the other firms and fair competition will be affected.

7.2.2.4 Abuse of monopoly position with regard to contracts

The first form of this abuse is the imposition of conditions on other firms when concluding contracts relating to the selling or purchasing of goods and services or coercing them to accept terms and conditions that are not relevant to the object of the contracts.

Unlike the agreement concluded among competitors to impose terms and conditions of contract discussed in Chapter 6, this is a case where state monopolies, by virtue of their monopoly position, impose on their trading partners terms and conditions that are not

[168] Societatea Nationala TUTUNUL ROMANESC SA (SNTR), in 1999 was an entirely state-owned company, representing the most important tobacco producer on the Romanian market and its products were being distributed in the entire territory of Romania through 42 exclusive distributors . In 1999 there was a complaint submitted to the Romanian Competition Council (RCC) by TOTAL DISTRIBUTION GROUP SRL (TDG), a SNTR distributor, regarding abusive activities of SNTR. SNTR was concluded by RCC in 2003 to have abused its market dominance in the imposition of resale prices at all the levels of the distribution chain and the application of dissimilar conditions to equivalent transactions with trading partners. These activities thereby placed some of them at a competitive disadvantage. Besides, SNTR violated competition law when it applied non-transparent selection procedures for distributors in 1999. See contribution of Romania in OECD, 'Principle of Competitive Neutrality', above n 124, 270.

[169] For example, the member firms of a state monopoly operating in the telecommunication domain can benefit from a number of advantages i.e. lower fees, easy interconnection into the telecommunication infrastructure system and technical support.

[170] A good example can be found in the earlier mentioned dispute between VINAPCO, a state monopoly in supplying aviation oil and Jetstar Pacific, a joint – venture airliner.It was claimed by Jetstar Pacific that there was discrimination in the supply of aviation oil as Vietnam Airlines, a member of Vietnam Airlines Corporation, to which VINAPCO was a member company, could enjoy relaxed treatment in payments and a lower charging fee. As Vietnam Airlines is a major rival, it placed Jetstar Pacific in a disadvantageous position in the aviation domain.

relevant to the object of the contract. It can happen in areas where a state monopoly dominates input sources or necessities for other industries, such as coal, petrol and gas and electricity, etc, or is the single provider of products/services in specific fields such as ground service at airports and harbours.[171] There may be two cases of concern that are discussed below.

In the first case, such imposition is purely intended to exploit state monopolies' profits.[172] This case may be found in some contracts such as the purchase or supply of goods/services. A state monopoly can force its partners (customers) to accept the main terms in a contract without negotiation. In this case, tying is the most common form.[173] Apart from the main terms as negotiated in the contract, its trading partner must also agree to buy tied products or agree to additional services, which are aimed to bring extra profits to the state monopoly.

A state monopoly can impose contractual conditions on its re-sellers or re-buyers

[171] Again, an example can be found in the case of VINACOMIN when it included a delivery service as a condition of contract for supply of coal to cement producers. In this case, cement producers had no choice and had to accept the high charge for delivery fee as VINACOMIN was a monopoly in supplying coal. Another example is found in the claims of Pacific Airlines (currently Jetstar Pacific) and other airlines operating in Vietnam against ground service providers in Vietnam's airports (belonging to Vietnam Airlines Corporation) as they imposed excessive charges for ground services and increased the fees without prior notice.

[172] A Polish state-owned airport operator (PP Porty Lotnicze) was investigated for its imposition of discriminatory airport charges. The proceeding was initiated upon a complaint from IATA. The airports operator was accused of abusing its dominance in the market of 'paid services related to making infrastructure of the airports available'. It was found that airports had been groundlessly imposing different kinds of airport charges, such as those for landing, passengers, parking and special services charges and navigation charges on the national and international carriers. The practice was discontinued in the course of the proceedings.

In the postal services market, anti-monopoly proceedings were initiated against the Polish Post (Poczta Polska), a public enterprise still holding a dominant position, for its imposition of onerous agreement terms and conditions yielding unjustified profits. It was shown that Poczta Polska obliged senders to pay an additional monthly fee in the form of a credit for handling operations of paid postal services. The fees were calculated arbitrarily by the Post, citing the lack of definition of 'handling fees'. It was also shown that the Polish Post's additional/optional charges were imposed without proper analysis. Therefore a fine was imposed on the Polish Post by the Polish Competition Authority. See contribution of Poland in OECD, 'Principle of Competitive Neutrality', above n 124, 197.

[173] In 2009, České dráhy, a.s. (the Czech Railways Company), was investigated by the Czech Office for the Protection of Competition for an abuse of its dominant position in the market for the rail freight transport of large volume substrates. It was accused of charging its customers dissimilar prices for provision of comparable services. Moreover, it was alleged to discriminate against competing providers of rail freight transport and to reject their attempts to negotiate prices. Its pricing policy also affected other rail transport providers in the market. The Office concluded that that behaviour of České dráhy, a.s infringed the Czech Competition Act and imposed a fine of CZK 252 million (approx. EUR 9.8 million) on České dráhy, a.s with no exemption was given. See contribution of the Czech Republic in OECD, 'Principle of Competitive Neutrality', above n 124, 117.

regarding prices, markets or the amount of supplied goods. Although these conditions do not directly bring the state monopoly benefits or affect the price of goods/services provided by it, they have effects on the supply of goods/services or sources in demand, which can then maximise profits for the state monopoly concerned.

Second, such imposition can aim to create barriers to market entry if a state monopoly forces customers to carry out particular requirements when signing contracts.[174] Terms imposed on firms may include conditions of market limitation, limitations on manufacturing or supplying products, or the requirement for customers to accept providers assigned by the firm. This is designed to cause difficulties for its current competitors or create barriers for potential competitors. The second form of this kind of abuse is the unilateral modification or termination of a contract. Such behaviour can be committed arbitrarily with partners without prior notification and appropriate reason. It can be in the form of a warning given to its partners. This can occur when a state monopoly wants to increase the price of their goods/services or include additional terms which are beneficial for it. With its market power, such a request for modification of contracts forces its partners to accept or otherwise exposes them to difficulties. When a state monopoly controls essential sectors of the economy, any changes are likely to bring disadvantages to many other partners.[175] The unilateral termination of contracts without prior notification or appropriate reason is usually regarded as a violation of contract obligation. The concern is that when state monopolies terminate contracts unilaterally, it

[174] The NACF (National Agriculture Cooperative Federation) enjoys dominant status in the Korean chemical fertilizer distribution market including fertilizers for food grain (100 per cent) and for gardening (47 per cent). In 2006, NACF was accused of abusing this dominance. In particular, it restrained other fertilizer manufacturers from entering the food grain fertilizer distribution market. The contracts signed with food grain fertilizer manufacturers provided that these manufacturers could not sell fertilizers directly via agencies or dealers, but only supply to NACF. Manufacturers that broke these terms had their contracts terminated. . Finally, while some manufacturers were allowed to sell directly to their agencies, they had to apply the prices set by NACF. As a result, the NACF effectively restrained its rivals from entering the food grain fertilizer distribution market, maintaining its 100 per cent market share. The Korea Fair Trade Commission (KFTC) considered this was an abuse of market dominance in the form of excluding rivals and imposed corrective orders and a surcharge of some USD1,500,000. The KFTC' sanction was confirmed by the Supreme Court. See contribution of Republic of Korea in OECD, 'Principle of Competitive Neutrality', above n 124, 172-173.

[175] For example, after the EVN's notice for an increase in leasing fees for its post, telecommunications firms claimed that they would have to accept the leasing fee offered by EVN at a high price. The intention of increasing fees was claimed to be an abuse of a monopoly position. See Manh Chung, 'Dung dang ...Cot dien' [Undecided Electric Poles] VN Economy (Online) (2010) <http://vneconomy.vn/20100116111037588P0C5/dung-dang-cot-dien.htm>.

can lead to much higher losses than in other cases.[176]

7.3 The application of Vietnam's competition law to state monopolies' abusive behaviour

This part is concerned with the application of Vietnam's current competition law to abuses of market dominance by state monopolies. It starts with a discussion of the concept of the abuse of market dominance (stipulated separately as abuse of dominant and monopoly positions under the *Competition Law 2004*). It then describes particular behaviour in the form of exploitative and exclusive abuses under the Law and its Decree giving guidance. The last section discusses how competition rules apply to these types of behaviour, with a focus on the criteria to consider market dominance and how to determine the abuse of market dominance.

7.3.1 Concept of abuse of dominant and monopoly position[177]

Generally, abuse of dominant position is the 'abusive or improper exploitation' practice of a dominant firm,[178] aimed at gaining or enlarging a position in the market and restricting competition.[179] Countries may have different views about the nature and impacts of market dominance on competition.

The *Competition Law 2004* (hereinafter referred as the Law) introduces two types of abusive behaviour: the abuse of dominant position and the abuse of monopoly position in the market.[180] However, it does not give any definition of the different concepts. Rather, it

[176] For example, in 2008 VINAPCO, an aviation oil monopoly supplier unilaterally cut off supply to its customer, Jetstar Pacific Airlines, causing delays for international and domestic flights and losses for JPA. This was found to be an abuse of a monopoly position.

[177] Although the *Competition Law 2004* uses two separate concepts concerning the position of a firm (firms) on the market - dominant and monopoly positions – 'market dominance' is used collectively in this chapter to encompass both concepts. This corresponds to the practice in many countries.

[178] According to the UNTACD Model Law on Competition, a firm is regarded as holding a dominant position when it accounts for a significant share of a relevant market and has a significantly larger market share than its next largest rival. See UNTACD, 'Model Law on Competition: Draft Commentaries to Possible Elements for Articles of a Model Law or Law' (TD/RBP/CONF.5/7, 2000)' (TD/RBP/CONF.5/7, 2000), 35 <http://www.unctad.org/en/docs/tdrbpconf5d7.en.pdf>.

[179] CUTS, *Competition in Vietnam: A Toolkit* (CUTS International, 2007) 36.

[180] Article 3(3) of the *Competition Law 2004* reads asfollows:

> 3. Competition restriction acts mean acts performed by firms to reduce, distort and prevent competition on the market, including acts of competition restriction agreement, abusing the dominant position on the market, abusing the monopoly position and economic concentration.

provides criteria to define a firm or a group of firms that are considered to be holding such positions.

As the above definition is unclear, the concept of abuse of dominant/monopoly position in Vietnam can be viewed either from the purpose or from the consequence of behaviour. From the 'purpose' viewpoint, Dang Vu Huan regards 'abusive' as behaviour by which a dominant firm attempts to maintain or enhance its current position in the market.[181] From the other viewpoint, the 'consequence' of the abuse to competition, is the main point and such behaviour must be prohibited in the competition law. For example, Nguyen Ngoc Son defines the abuse of dominant and monopoly positions as 'behaviour stipulated in the competition law conducted by a firm or a group of firms with dominant or monopoly positions in the relevant market, which reduces, deviates and obstructs competition on the market'.[182]

The definition of abuse of dominant/monopoly positions inferred from Article 3(3) of the Law appears to be more abstract than that of the UNCTAD Model Law, thus making it difficult for the determination of whether there is such an abuse. It is not easy to determine what such concepts as deviating, reducing, or obstructing competition mean. As competition is a concept reflecting a rival relationship in the market, there are no objective measures to determine accurately the level of a competition relationship. By contrast, determining the capability of a firm in maintaining and reinforcing its position is much simpler, because it is possible to achieve a fairly accurate conclusion based on economic and technical parameters in the related market, such as the number of firms,

[181] 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) 86. A similar definition can be found in a working paper of CUTS and the UNCTAD Model Law of Competition, in which the purpose of a dominant firm in conducting 'abuse of dominant position' is to maintain or increase its position in the market. See CUTS, above n 179, 36. In the UNCTAD Model Law on Competition, the abuse aims to maintain and reinforce the position of violating firm by preventing other firms from participating in the market or over-restraining competition. See UNTACD, 'Model Law', above n 178.

[182] Nguyen Ngoc Son establishes three basic criteria for this behaviour: (i) the abuse of dominant and monopoly positions is listed in the Law; (ii) subjects of these types of behaviour are firms having dominant or monopoly positions; (iii) consequences of the abusive behaviour are the possibility of reducing, deviating, or obstructing competition on the market. See Nguyen Nhu Phat and Nguyen Ngoc Son, *Phan tich va Luan giai Cac Quy dinh Cua Luat Canh tranh ve Hanh vi Lam dung Vi tri Thong linh Thi truong, Vi tri Doc quyen de Han che Canh tranh* [Analysing and Interpreting Provisions of the Competition Law concerning Abuse of Dominant/Monopoly Positions to Restrict Competition] (Judicial Publishing House, 2006).

market shares and the gap in the market share among firms.[183]

7.3.2 Abusive behaviour of market dominance

The Law does not classify abusive behaviour, but rather supplies a list of prohibited behaviour. This includes both unilateral and collective groups of abusive behaviour, i.e. (i) taking advantage of a position to exploit customers to maximize profits; (ii) abuse of a dominant/monopoly position to reinforce and maintain the current position by means of activities aimed at obstructing and eliminating competitors. In fact, in both cases the final goal of the firm conducting the abuse is to take advantage of its market power to maximize profits. The prevention and elimination of competitors is mainly designed to reinforce market power which facilitates them to exploit customers.

The list of prohibited behaviour in Article 13 is similar to that of Article 102 *TFEU* (ex Article 82 *TEC*). This limits the activities of firms (group of firms) having a dominant/monopoly position in the market and confirms the viewpoint that any abuse of market dominant/monopoly is prohibited by the Law. There is also no article/sub-section mentioning whether this list is exhaustive or not. It is unclear if any special behaviour is later considered as 'abuse' according to the provision of the Law.[184] Hence, it is unclear, if any behaviour which does not appear on the list is regarded as an abuse of dominant/monopoly position, how the Law can apply. The determination of anti-competitive effects of this behaviour will be at the hands of the competition authority. However, as with the interpretation of the Constitution, laws and sub-laws and determination of validity as law is only provided by the Standing Committee of the National Assembly,[185] whether the conclusion of the competition authority is considered as enforceable as law is another concern.

[183] Ibid.

[184] This technique of law-making is seen in most Vietnamese Laws. The law often specifies a number of types of behaviour that fall under the coverage of the law. Besides this, there is a stipulation that the law can apply to other types of behaviour, according to provisions or principles of the law.

[185] *Constitution of the Socialist Republic of Vietnam 1992* art 91.

- **Exploitative abuses**

The exploitative abuse mentioned in the first group is regarded as the firm taking advantage of its dominant/monopoly position in the relationship with its customers to exploit them for profit.. Profits achieved by such firms are extracted from the exploitation of customers through unreasonable or unfair obligations through contracts.[186]

For this group there is a list of behaviour which appears identical to those set forth in Article 102 *TFEU* . The interpretation relies on the *Competition Law 2004*, its Decree giving guidance for implementation and academic work.

- *Imposing unreasonable buying or selling prices of goods or services or fixing minimum re-selling prices causing damage to customers*[187]

The imposition of unreasonable buying or selling prices is deemed unreasonable, thereby causing losses to customers, if the purchasing price set in the same relevant market is less than the prime cost of producing products stipulated by Article 27 of the *Decree No. 116/2005/ND-CP*.[188] This practice happens commonly in the purchase of agricultural products or raw materials, causing losses for farmers.[189] Fixing minimum re-sale prices makes it impossible for distributors or retail sellers to re-sell their goods at a lower price than a pre-determined price. By this behaviour, dominant/monopoly firms can maintain their 'unreasonable price' and continue exploiting customers.

- *Restricting production, distribution of goods, services, limiting markets, preventing technical and technological development, causing damage to customers.*[190] This is explained by the *Decree No. 116/2005/ND-CP* in three

[186] Phat and Son, *Phan tich va Luan giai*, above n 182, 21.

[187] *Competition Law 2004* art 13(2).

[188] *Decree No. 116/2005/ND-CP* art 27(1) giving guidance for the implementation of the competition law stipulates two criteria to consider an imposition of unreasonable buying or selling prices:

a) The quality of the goods or services for which a purchase order has been placed is not lower than the quality of the goods or services purchased previously;

b) There is no economic crisis, natural disaster or destruction by an enemy and there are no extraordinary fluctuations resulting in a reduction of the wholesale price of the products and services in the relevant market to a level of less than the prime cost of production during a minimum period of sixty (60) consecutive days as compared to previously.

[189] Oanh, above n 139, 68.

[190] *Competition Law 2004* art 13(3).

respective cases: (i) the restraint of production or distribution of goods or services;[191] (ii) the limitation of the market;[192] and (iii) the impediment of technical or technological development.[193]

- *Imposing dissimilar commercial conditions in similar transactions in order to create inequality in competition*[194]

According to *Decree No. 116/2005/ND-CP*, the application of different commercial conditions to the same transactions aims to create inequality in competition. In particular, this places one or more firms in a better competitive position than other firms. State monopolies can make use of this discrimination to exploit profits or favour state firms belonging to or having a close relationship with them. Market power enables them to impose different conditions for purchase and sale, price, time for payment and volumes of transactions of purchase and sale of goods and services of similar value or nature.

---

[191] According to Article 28(1) of the *Decree No. 116/2005/ND-CP*, restraining production or distribution of goods or services is regarded as the practices of:

- Ceasing the supply or reducing the quantity supplied of goods and services on the relevant market compared to the amount of goods or services previously supplied in conditions where there are no large fluctuations in the supply and demand relationship; where there is no economic crisis, natural disaster or destruction by an enemy; where there is no significant technical breakdown; or where there is no emergency situation;

- Fixing the quantity of goods or services supplied at a level sufficient to create a shortage in the market;

- Hoarding and not selling goods in order to create instability in the market.

[192] According to Article 28(2) of the *Decree No. 116/2005/ND-CP*, limiting the market means the practices of:

- Supplying goods or services in only one or a number of specified geographical areas;

- Supplying goods or services to only one or a number of specified customers;

- Purchasing goods or services from one or a number of specified sources only, except where other sources of supply fail to satisfy the conditions set by the purchaser and such conditions are both reasonable and consistent with normal commercial practice.

[193] The impediment of technical or technological development is interpreted as the practices of:

- Purchasing an invention, utility solution or industrial design in order to destroy it or keep it from being used;

- Threatening or coercing a person engaged in research into technical or technological development to suspend or abandon such research.

- Other illegal activities aimed at preventing a person or institution from engaging in research to introduce and apply a new design, invention, utilities solutions... This is explained by Le Hoang Oanh, even though it is not mentioned in *Decree No. 116/2005/ND-CP*. See Oanh, above n 139, 71.

[194] *Competition Law 2004* art 13(4).

- *Imposing conditions on other firms to conclude goods or services purchase or sale contracts or forcing other firms to accept obligations which have no direct connection with the subject of such contracts*[195]

The market power of state monopolies enables them to impose conditions on other firms to conclude contracts for the purchase or sale of goods or services. This is normally conducted prior to the signing of contracts. These conditions are a compulsory precedent for the contract but are not related directly to objects of the contract. Firms which want to conclude contracts with them will have to accept a number of disadvantageous conditions.[196]

There is a noticeable difference between the behaviour stipulated in Article 8(5) concerning agreements to impose conditions for signing contracts and the behaviour set forth in Article 13(5). In the former case, such imposition is implemented on the basis of an agreement among firms and the total market share of participating firms is over 30 per cent. In the latter case, this is imposed unilaterally by the dominant/monopoly firm (firms) or without evidence of an agreement or collusion among them. If this is conducted by a group of firms, whether it is an abusive behaviour is determined by the total market share of these firms, which is set according to the stipulation of Article 11(2).

- **Exclusive abuses**

The second group is regarded as attempts of the firm holding a dominant/monopoly position in the relevant market to maintain and reinforce their market power by eliminating or obstructing rivals from participating in the market.[197] Unlike the first

[195] Ibid art 13(5).

[196] Such conditions are explained by Article 30 of the *Decree No. 116/2005/ND-CP* as follows:

> - Restriction on production and distribution of other goods; purchase or supply of other services, not related in a direct way to the undertaking of the party accepting to act as an agent pursuant to the laws on agency;
>
> - Restriction on locations for re-sale of goods, except for goods on the list of goods the trading of which is conditional or restricted in accordance with law;
>
> - Restriction on customers which may purchase the goods for re-sale, except for the goods stipulated in above sub-clause;
>
> - Restriction on form and quantity of goods which may be supplied.

[197] Phat and Son, *Phan tich va Luan giai*, above n 182, 33.

group, this one directly targets the firm's competitors. Eliminating and preventing competitors will facilitate market dominance to reinforce a firm's position and eliminate competitive pressure from its rivals. Hence, it shares the nature with the abusive behaviour in the first group.

This group consists of two types of exclusive behaviour: (i) selling goods or providing services at prices lower than the aggregate costs in order to eliminate competitors;[198] and (ii) preventing new competitors from entering the market.[199]

- *Selling goods or providing services below total prime cost aimed at excluding competitors*

First, this behaviour involves selling goods or providing services at a price which is less than the total of either the costs comprising the prime cost of producing the products and services, or being the purchasing price of goods for re-sale[200] or costs of circulating goods or services.[201] Second, when conducting this behaviour, dominant/monopoly firms aim at excluding their competitors from the market, which will enable them to maintain their current positions. It is significant that a behaviour consisting of both the two above acts will be regarded immediately as anti-competitive without considering its consequences i.e. whether competitors have actually been excluded from the market or losses have occurred.[202] The law does not prohibit certain behaviour which does not aim to exclude competitors. Certain exemptions are provided in Article 23(2) of *Decree No.*

[198] *Competition Law 2004* art 13(1).

[199] Ibid art 13(6).

[200] *Decree No. 116/2005/ND-CP* art 23(1)(a).

[201] Ibid art 23(1)(b).

[202] Oanh, above n 139, 66.

116/2005/ND-CP.[203]

- *Preventing new competitors from entering the market*

To maintain market power, dominant/monopoly firms may set up barriers which will restrict the establishment of a firm providing goods or services in the related market or to penetrate the market which they currently dominate.[204] Unlike in an anti-competitive agreement, such barriers target future potential competitors. This is clearly explained in *Decree No. 116/2005/ND-CP*.[205]

- **Abuses of monopoly position**

The abuse of monopoly position is also prohibited under the Law in the same ways as the

[203] Exemptions under Article 23(2) of *Decree No. 116/2005/ND-CP* are:

- Reduction of selling prices of goods being fresh foods;

- Reduction of selling prices of goods in stock due to reduced quality or old-fashioned form or due to the goods now not suiting the tastes of consumers;

- Reduction of selling prices of goods out of season;

- Reduction of selling prices of goods pursuant to a promotional campaign in accordance with law;

- Reduction of selling prices of goods in cases of bankruptcy, dissolution, termination of production or business operations, change of location or change in production or business policy;

- Measures to carry out the State policy on price stabilization in accordance with applicable laws on pricing.

[204] Oanh, above n 139, 75.

[205] According to *Decree No. 116/2005/ND-CP* art 31, a firm (group of firms) having a dominant/monopoly position cannot conduct any of the following behaviour:

- Requiring one's customers not to trade with a new competitor.

- Threatening or compelling distributors or retail sales outlets not to agree to distribute the goods of a new competitor.

- Selling goods at prices at a level sufficient to ensure that a new competitor is not able to access the market, or the behaviour of selling goods or providing services below total prime cost.

abuse of dominant position.[206]At the same time the Law also prohibits two more types of behaviour: (i) imposing unfavourable conditions on customers, or forcing customers to accept unfavourable duties unconditionally during contract period; and (ii) unilaterally modifying or cancelling without plausible reasons any contracts already signed.[207]

7.3.3 The application of competition rules to state monopolies' abusive behaviour

This part examines issues relating to the application of the Law and only notes those issues most related to state monopolies. In particular, it is concerned with the consideration of market dominance and the determination of whether an abuse of dominant/monopoly position is constituted. It is noted that the *Competition Law 2004* applies without discrimination to the behaviour of firms doing business in Vietnam, thus including those of state monopolies.[208]

7.3.3.1 Criteria to determine dominant or monopoly positions

As approached by the Law, to determine whether there is an abuse, the first thing is to

---

[206] According to Article 14, firms holding a monopoly position in the market, including natural or state monopoly ones, are prohibited from applying behaviour listed in Article 13.

> Article 13: *Practices constituting abuse of dominant market position which are prohibited:*
>
> Any enterprise or group of enterprises in a dominant market position shall be prohibited from carrying out the following practices:
>
> 1. Selling goods or providing services below total prime cost of the goods aimed at excluding competitors;
>
> 2. Fixing an unreasonable selling or purchasing price or fixing a minimum re-selling price for goods or services, thereby causing loss to customers;
>
> 3. Restraining production or distribution of goods or services, limiting the market, or impeding technical or technological development, thereby causing loss to customers;
>
> 4. Applying different commercial conditions to the same transactions aimed at creating inequality in competition;
>
> 5. Imposing conditions on other enterprises signing contracts for the purchase and sale of goods and services or forcing other enterprises to agree to obligations which are not related in a direct way to the subject matter of the contract;
>
> 6. Preventing market participation by new competitors.

[207] This is the behaviour of monopoly firms in one of the following forms: (i) unilaterally changing or cancelling signed contracts without informing customers in advance and not suffering any punitive sanctions; (ii) unilaterally changing or cancelling a signed contract based on one or more reasons which are not directly related to necessary conditions for continuing to perform the contract fully and not suffering any punitive sanctions.

[208] *Competition Law 2004* art 2.

determine whether the firm in question possesses a level of dominance (dominant or monopoly positions) in a relevant market. Therefore, investigation agencies dealing with competition cases cannot conclude a breach of competition law is constituted if there is not enough evidence to show market dominance of the investigated firm (firms).

According to Article 11(1), firms are considered to have market dominance if they have a market share of 30 per cent or more in the relevant market, or are able to cause a significant anti-competitive effect. Here the determination of a dominant position is based on the market share firms have in the relevant market (30 per cent) and the capability of causing a significant anti-competitive effect.[209] Article 11(2) separates market dominance by groups of firms into different categories based on the criterion of market share,[210] while it also stipulates that groups of firms may act together to cause a significant anti-competitive effect. In this case, there is not any an agreement or collusion among them in conducting such kinds of behaviour or they conduct this abusive behaviour contingently.[211]

In both cases, the first criterion is 'market share'. The level of market dominance of firms (or a group of firms) will then be determined principally on the basis of that 'market share' criterion.

- **Market share criterion**

Market share criterion appears to be the first criterion used to determine whether a firm(s) possesses market dominance. Most countries consider market share a basic foundation for

[209] Ibid art 11(1).

[210] Article 11(2) of the *Competition Law 2004* defines groups of firms having market dominance as below:

1. Two firms that have a total market share of 50 per cent or more in the related market;
2. Three firms that have a total market share of 65 per cent or more in the related market;
3. Four firms that have a total market share of 75 per cent or more in the related market.

[211] Nguyen Nhu Phat, 'Bao cao Tong hop De tai Nghien cuu "Xay dung The che cho Canh tranh Thi truong o Vietnam"' [Overall Report of the Project "Building up a Market Competition Institution in Vietnam"] (2004) 57.

determining dominant position.[212] The main difference between countries is the determination of market share held by a firm (group of firms) in attributing market power (threshold). Depending on the situation of each country, market share threshold will be applied differently to one firm or a group of firms.

When there is no other firm competing in a relevant market, the conclusion of monopoly position of the firm in question is clearly sufficient.[213] On the other hand, when there are competitors, a presumption of market power is based on market share and an analysis of other economic factors.[214] It can be observed that the determination of market dominance based mainly or merely on market share can lead to inaccurate results. The reason is that, in many cases, other than market share indicators, factors also have remarkable effects on the formation of market dominance. These are factors such as whether there exist market participation barriers; current market structure and collaboration among firms.[215] Therefore, in many countries, market share is not always the only factor to determine a firm's position.[216] A conclusion based on the consideration of market share indicators and factors mentioned above will reflect more accurately a firm's power on the relevant market.[217] In the EU, the US, Australia and many OECD countries, the conclusion is based on not only law and sub-laws, but also views and judgments of the court and

---

[212] ICN, *Objectives of Unilateral Conduct Laws,* above n 124. In the US Antitrust Law, this is a 'traditional starting point' for assessing the existence of market power. See ABA Section of Antitrust Law, Antitrust Law Development 68 (ABA 5th ed 2002) cited by Stephen H Harris, 'The Making of an Antitrust Law: the Pending Anti-Monopoly Law of the People's Republic of China' (2006-2007) 7(1) *Chinese Journal of International Law* 196. The consideration of a dominant position based mostly on market share is similar to that of the EC Law. In the EC Law, several factors can be used to define the existence of a dominant position, among them: the existence of a very large market share is highly important. *Hoffmann-La Roche* (C-85/76) [1979] ECR 461, 520 cited by Stephen H Harris, 'The Making of an Antitrust Law: the Pending Anti-Monopoly Law of the People's Republic of China' (2006-2007) 7(1) *Chinese Journal of International Law* 196

[213] Most competition jurisdictions regard 'monopoly position' of a firm (firms) as a situation where there is no other firm (firms) competing with the firm (firms) in question. See the *German Competition Act*.

[214] Harris, above n 212, 196.

[215] Phat and Son, *Phan tich va Luan giai*, above n 182, 20.

[216] Harris, above n 212, 196. For example, The European Court in the AKZO held that 'market share, while important, is only one of the indicators from which the existence of a dominant position may be inferred. Its significance in a particular case may vary from market to market according to the structure and characteristics of the market in question'. See *Akzo Chemie BV v European Commission* (C-53/85) [1986] ECR 1965.

[217] Another example can be found in the United Brands case, where the Court held that the share of United Brands was around 40-45 percent in the relevant market, so that it was not sufficient to conclude that United Brands would automatically control the market. Hence, it was necessary to refer to other criteria, such as the strength and number of competitors, in order to determine the market power of the company in question. See *United Brands v Commission* (C-27/76) [1978] ECR 207.

tribunals in previous cases.[218] The most important issue is the approach to the 'market dominance' concept and its explanation.

In Vietnam, the determination of market dominance depending on a market share threshold entails some limitations. State firms are currently participating in most fields of the economy and there are certain fields which are considered state monopolized domains.[219] However, it is possible that in one such domain there is the participation of many state firms, but the market share of each is less than 30 per cent.[220] Therefore, these firms will not be covered by the competition law, although they are state monopolies.[221] This is the first limitation of determining dominant position by market share criterion.

- **The capability of causing 'significant anti-competitive effect' as an additional criterion**

Besides considering the relevant market and market share as the main criterion, the second criterion is the 'capability of causing a significant anti-competitive effect'. According to Article 11, 'the capability to cause significant anti-competitive effects' is used to determine market dominance when a firm does not accumulate the minimum

[218] For example, the concept of 'dominant position' is not specifically defined in Article 102 *TFEU* (ex Article 82 *TEC*). However, this notion was observed as 'a position of economic strength enjoyed by an undertaking which enables it to prevent effective competition being maintained on the relevant market by affording it the power to behave to an appreciable extent independently of its competitors, its customers and ultimately of the consumers'. See *N V Netherlands Banden Industrie Michelin v Commission* (C-322/81) [1983] ECR 3451; This issue can be found in other similar cases For example, *United Brands v Commission* (C-27/76) [1978] ECR 207; *Hoffmann-La Roche* (C-85/76) [1979] ECR 461.

In the United States, monopoly power is considered by assessing a number of criteria regarding the firm's market share in conjunction with market structure factors, i.e. the relative size and strength of competitors, fluctuations in market share, ease of entry and evidence of monopoly profit. See OECD, *Abuse of Dominance and Monopolisation* (1996), 227 <http://www.oecd.org/dataoecd/0/61/2379408.pdf>.

In the Australian *Trade Practice Act of 1974* (*Cth*) (currently the *Competition and Consumer Act 2010* (Cth)) the concept 'market power' can be defined as 'the ability of a firm to raise prices above the supply cost without rivals taking away customers in due time, supply cost being the minimum cost an efficient firm would incur in producing the product'. See *Queensland Wire Industries Pty Ltd v Broken Hill Proprietary Co Ltd* and another [1989] HCA 6; (1989) 167 CLR 177. Similarly, 'market power' is observed as the power which 'enables a corporation to behave independently of competition and of the competitive forces in a relevant market...'. See *Melway Publishing Pty Ltd v Robert Hicks Pty Ltd* [2001] HCA 13. In *Re: Eastern Express Pty Limited* (1992) 35 FCR 43. See also chaper 2, sub-section 2.1.6.

[219] According to *Decision No. 38/2007/QĐ-TTg* dated 20-3-2007, there are 19 industries and sectors in which the state will hold 100 per cent of registered capital and another 27 industries and sectors in which the state will possess more than 50 per cent of total shares of state equitized firms.

[220] According to Article 11(1), a threshold of market share at 30 percent is used to consider whether a firm has a dominant position.

[221] Nguyen Van Nam, 'Ban hanh Luat ve Doc quyen Nha nuoc la Cap bach' [It is Urgent to Adopt a Law Governing State Monopolies] (2008) <http://www.thesaigontimes.vn/Home/diendan/ykien/22517/>.

market share as required by the law to be considered as having a dominant position.[222] The important issue is that the competition authority has to determine if this kind of firm can limit competition significantly. The basis for determining capability to cause such effects is given by *Decree No. 116/2005/ND-CP* providing guidance for the implementation of the competition law, which consists of criteria similar to those in EU competition case law.[223]

The introduction of criteria regarding the capability of causing the restraint of competition substantively aims to eliminate attempts of a firm (firms) to abuse financial strength and technology to corner the market from firms, domestic and international investors. This is important to ensure the health and orderly development of the market.[224] This stipulation expands the scope for determining market dominance of firms in a situation where they in fact do not achieve market power due to an insufficient accumulation of required market share, but are able to manipulate the market by virtue of their external strength or internal potentiality. It enables the competition authority to fight effectively against unhealthy manifestations which aim to limit competition at early stages of a plan for achieving market power.

However, conducting a comprehensive analysis efficiently requires transparency in the market and trustworthy information and sufficient capability of the competition authority in charge, especially the professional skills of the staff. The central issue is how to analyse and draw an exact conclusion about the 'possibility of causing a significant anti-

[222] In other words, this exemption is applied to firms with a market share of below 30 per cent. In terms of determining the dominant position of groups of firms, this exemption is applied to groups of firms with a total market share of 50, 65 and 75 per cent respectively in the related market.

[223] According to Article 22 of *Decree No. 116/2005/ND-CP*, the capability to cause significant anti-competitive effects is determined by considering:

1. financial capability of firms;
2. financial capability of organization/private forming firms;
3. financial capability of the firm having the right to control or rule over the operation of firms according to the stipulation of law or the charter of firms;
4. financial capability of mother firms;
5. technical capability;
6. possession and use of industrial possession object.
7. scale of distribution network;
8. other bases that competition management agencies and competition councils consider to be appropriate.

[224] Phat and Son, *Phan tich va Luan giai*, above n 182, 19–20.

competitive effect' in which such questions arise as to what the effects on competition are and how they affect it, to what extent these effects are considered as significant, etc. In other countries, this issue is dealt with through an analysis of case law and the use of an economic point of view to clarify these concepts beyond legal analysis.[225] Another concern in this regard is that assessing the necessary financial and accounting documents of monopoly firms, particularly state monopolies, is not easy, because this depends on an autonomous accounting system and the willingness to disclose relevant information. Consequently, these requirements lead to difficulties in determining the next key issues, such as market share, dominance or abuse of dominance.[226] In the current situation of Vietnam's competition authority this remains a major concern, as this body is currently faced with limitations, such as of the necessary funds for operation and human resources.[227]

Additionally, the explanation of the concept 'dominant position' in other countries is made simpler by recognising legality and applying arguments of the Court in competition cases. In Vietnam this involves another significant difficulty, because few monopoly cases have been settled since the Law came into effect.[228] More importantly, whether the legality of arguments and analyses of relevant concepts can be used as evaluating criteria, a mere reliance on market share makes limits the interpretation of the concept.

7.3.3.2 The determination of abuse of dominant/monopoly positions

The next issue is the determination of whether the behaviour performed by a firm (firms) constitutes an abuse. As in Article 102 *TFEU* (ex Article 82 *TEC*), the Law does not give a detailed explanation about what 'abuse of dominant/monopoly position' is. The

[225] Other than the EU, experiences of such countries as Australia and the US show that a number of assessments (tests) are resorted to, as well as the reliance on arguments given by judges and experts to reach a final conclusion about effects to competition.

[226] VNEconomy, 'Luat Canh tranh Khoanh tay Nhin Doc quyen' [Competition Law Stands Idly Seeing Monopoly] <http://vneconomy.vn/20090306095723894P0C5/luat-canh-tranh-khoanh-tay-nhin-doc-quyen.htm>.

[227] Regarding limitation of Vietnam's Competition Agency, see Trinh Anh Tuan, *Ban chat Phap ly va Cac Yeu cau Co ban Doi voi Co quan Canh tranh – Bai hoc cho Vietnam* [Nature and Fundamental Requirement for a Competition Authority: Lessons for Vietnam] (2009) <http://qlct.gov.vn/Modules/CMS/Upload/36/2009_6_22/dien%20dan%20T5.doc >.

[228] In 2009 Vietnam's competition agencies (VCAD and VCC) settled the first case involving anti-competitive behaviour (*VINAPCO v Pacific Airlines*) after 5 years since the Law came into effect. It is currently undertaking investigations into agreements in fixing fees concluded by the Association of Insurance companies.

difference is that categories of abusive behaviour listed in Article 102 are the most typical and evident ones. When determining if certain behaviour falls into this list, the ECJ must also prove its anti-competitive effects. The concept of the anti-competition effects is then used as another important criterion to consider whether the behaviour of the firm(s) is prohibited according to Article 102, although they may not belong to the prohibited behaviour listed above.[229] In the same way, in Australia, the *Competition and Consumer Act 2010* (Cth) (formerly the *Trade Practice Act 1974* (*Cth*)) implies the abuse of dominance as an activity intended to 'take advantage of the "substantial degree of market power" that it has in the relevant market'.[230]

Therefore, in determining the abuse of dominant position of firms (group of firms), not only should the competition authority focus on whether certain behaviour is listed in the law, but should also rely significantly on previous arguments and conclusions in settled cases. As in the conclusion of 'anti-competitive effects', such a determination also includes a series of considerations with regard to economic theories and legal principles applicable to violating behaviour. Besides, during the handling process, members of

[229] For example, it was stated in *Hoffmann-La Roche* that:

> The concept of abuse is an objective concept relating to the behaviour of an undertaking in a dominant position which is such as to influence the structure of a market where , as a result of the very presence of the undertaking in question , the degree of competition is weakened and which , through recourse to methods different from those which condition normal competition in products or services on the basis of the transactions of commercial operators , has the effect of hindering the maintenance of the degree of competition still existing in the market or the growth of that competition. See *Hoffmann-La Roche* (C-85/76) [1979] ECR 461.

[230] This concept, 'taking advantage of a substantial degree of market power', was then explained in *Queensland Wire Industries Pty Ltd v Broken Hill Proprietary Co Ltd* as that '…an infringement may be found only where the market power is taken advantage of for a purpose proscribed in par (a), (b) or (c) (of Section 46 (i))'. These provisions define what uses of market power constitute misuses. See *Queensland Wire Industries Pty Ltd v Broken Hill Proprietary Co Ltd* [1989] 167 CLR 177.

It is stated in the *Competition and Consumer Act 2010* (Cth) s 46(1) that:

> A corporation that has a substantial degree of power in a market shall not take advantage of that power for the purpose of:
>
> (a) eliminating or substantially damaging a competitor of the corporation or of a body corporate that is related to the corporation in that or any other market;
>
> (b) preventing the entry of a person into that or any other market; or
>
> (c) deterring or preventing a person from engaging in competitive conduct in that or any other market.

settling panels can also express their own views and considerations about the case.[231] It is important to weigh up the positive and negative effects on competition and economic efficiency and to prove anti-competition effects of an abuse which possibly causes losses to competitors and consumers. Once again, the problem is the limited capability of Vietnam's competition authority.

It is noted above that the Law stipulates that a declaration of an abuse of market dominance can be made by examining the consequences of an investigated behaviour or analysing 'the capability of causing significant anti-competition'.[232] However, according to the Law, this effect criterion is only used when a firm (group of firms) does not reach the minimum market share threshold set forth by the law. The question is how to clarify what the 'capability of causing significant anti-competition' is and how it can affect the interests of customers and society as a whole.[233] As in many countries, for example Australia and the EU, when considering anti-competitive effect, the competition authority will have to analyse certain behaviour of the infringing firms and take into consideration how they can affect competition in a wider sense, particularly in a case when an anti-competitive behaviour can affect not only the infringed firms in question, but also other firms and customers as a whole.

In this regard, another issue is exposed to the competition authority when both competition law and a specific law(s) such as contract law can also apply. In such a case there is a possibility that firms could use matters relating to contract as a ground for

[231] Nguyen Ngoc Son, 'Mot so Binh luan tu Thuc tien Giai quyet Vu viec ve Han che Canh Tranh' [Some comments from the Practices of Handling of Competition Cases] (2009) *Legislative Studies* [Nghien cuu Lap phap] <http://www.nclp.org.vn/thuc_tien_phap_luat/mot-so-binh-luan-tu-thuc-tien-giai-quyet-vu-viec-ve-hanh-vi-han-che-canh-tranh/?searchterm=%22lu%E1%BA%ADt%20c%E1%BA%A1nh%20tranh%22>.

[232] This is mentioned in the *Competition Law 2004* art 11 and guided at the *Decree No. 116/2005/ND-CP*.

[233] For example, in the first case involving anti-competitive behaviour (VINAPCO case), the Panel held that the unilateral termination of supply of aviation oil by VINAPCO would destroy competition in the civil aviation market. As of April 2008, there existed a direct competition between Vietnam Airlines (VINAPCO parent company) and Pacific Airlines. This observation shows that the anti-competitive effect of the unilateral termination of supply would not be limited to the competition between the supplier (VINAPCO) and the buyer (Pacific Airlines). This behaviour would affect competition in the aviation market because the termination would place Pacific Airlines in a disadvantageous position in competition with Vietnam Airlines, to which VINAPCO is a subsidiary company. See *Decision No. 11/QĐ-HĐXL* on 14/04/2009 of the Panel settling the dispute concerning the unilateral termination of aviation oil supply of VINAPCO to Pacific Airlines (currently Jetstar Pacific Airlines).

taking abusive actions and to escape from the reach of the Competition Law.[234] For example, when a dominant firm unilaterally terminates or imposes new conditions on the contract that its partners must accept, or an adjustment of contract details, it may argue that is simply a contractual relationship. The firm in question can also allege a breach of a contract's terms and conditions (i.e. violation of terms on payment) of its partners to justify an abusive action (i.e. a refusal to sell/supply). Concern arises as to whether the law on contracts or competition law would be applied.[235] This is important because if such a case is viewed as a commercial/economic dispute, commercial/economic procedures will be applied, rather than a competition law procedure and *vice versa*. Hence, it may be impossible to sanction a monopoly firm when they obviously commit an abuse of the dominant /monopoly position.[236] It is even more complicated when infringed firms do not bring a case to the competition authority (or do not want to do this). In this case, the competition authority must be competent to declare that the case is settled under the *Competition Law*.[237]

---

[234] An example for this situation can be found in the dispute between VINAPCO (a monopoly supplier of aviation oil) and its client Pacific Airlines. VINAPCO argued that it was simply a dispute regarding a commercial contract between them and the unilateral termination of supply was a reaction against the delay of payment by Pacific Airlines. However, this argument was rejected by the Panel settling the case in *Decision No. 11/QĐ-HĐXL* on 14/4/2009 on the grounds that such action had been committed in an abuse of monopoly position and it was not considered as a dispute concerning a commercial contract between the parties.

[235] This question is actually stipulated in Article 5(1) '...[w]here there is any disparity between the provisions of this Law and those of other laws on competition restriction acts or unfair competition acts, the provisions of this Law shall apply'.

[236] For example, there was a dispute concerning exclusive dealing imposed on Cay Dua Restaurant in Hochiminh City by Vietnam Beer Joint – Venture aimed at preventing Laser Beer, the first Vietnamese brand of bottled draught beer (produced by Tan Hiep Phat Corp.), from entering the market. The case was settled by the Ho Chi Minh City People's Court. The decision of the Court held that the restaurant in question violated the exclusive contract between them and Vietnam Beer Joint – Venture and they must not advertise, sell or allow Laser marketing staff on their site. Even though such kind of contract was clearly a violation of competition law in terms of using the exclusive dealing method intended to prevent other competitors entering the market, relevant competition rules could not be applied because at that time the *Competition Law 2004* had not come into effect. There arose a concern if infringing firms try to argue on the ground of contract violation, therefore they claim the application of a commercial procedure in order to escape from the application of competition law.

[237] In the VINAPCO case, the Panel held that the dispute between VINAPCO and Pacific Airlines had thea nature of a dispute regarding a commercial contract. However, this dispute entailed an anti-competitive effect, as VINAPCO imposed on its client unfavorable conditions and committed an abuse of its monopoly position to unilaterally modify or cancel the contracts already signed, without plausible reasons. Not only does this show that relevant competition rules have been applied to deal with an abuse of monopoly position, it also expresses a strong intention of the competition agency to take action against anti-competitive behaviour.

In sum, there are a number of limitations that prevent these bodies from carrying out assessments of either the abuse of market monopoly/dominance or the capability of causing 'significant anti-competitive effect'. Such assessment is important to the application of competition law to abuse of market power. The first limitation is that of human resources which makes the authority unable to carry out its current wide-range of tasks.[238] The second limitation is the lack of funds which are necessary for staff to conduct investigation, gather information, to carry out reviewing tasks to documents and regulations provided by regulators or to run a regional resprensentative officce.[239] The third limitation is the lack of expertise of staff, especially in the areas of economic and law.[240] There is little collaboration between the competition authority and the court in relation to a competition case. According to Article 115, the competent provincial/municipal People's Courts will only become involved in the case if the parties disagree with the decision to settle complaints about competition case-handling decisions. This raises another difficulty for the competition authority when investigating task. Last, but not least, the Vietnam Competition Council itself has critical limitations. Its decision to set up a panel for settling a competition case must rely on the work of VCAD. VCC's activities are financed directly by the state budget through MoIT and its staff mostly work on irregular basis.[241]

- **Conclusion**

It is well known that the rules governing abuse of a dominant/monopoly position in Vietnam's competition law appear identical to those of Article 102 *TFEU and* in general to most competition legislation. The law and its Decrees give detailed guidance and have basically provided a comprehensive framework that can be applied equally to state monopolies. This shows the point of view of the Vietnamese government in setting up a fair competitive environment for all firms, regardless of ownership. Hence, the determination of the competition authority is important. How to apply the law effectively

[238] As for 2009, the total staff of Vietnam Competition Administration Department is 71. See Trinh Anh Tuan, *Ban chat Phap ly va Cac Yeu cau Co ban Doi voi Co quan Canh tranh – Bai hoc cho Vietnam* [Nature and Fundamental Requirement for a Competition Authority: Lessons for Vietnam] (2009) <http://qlct.gov.vn/Modules/CMS/Upload/36/2009_6_22/dien%20dan%20T5.doc >.
[239] Ibid.
[240] Ibid. Whereas Article 52 of the Competition Law 2004 stipulates that an investigator must work at least five years in law, economics or finance domains. However, over 80 per cent of VCAD staff have not meet this criterion. According to criteria set forth in Article 52, there were only eligible four investigators appointed by the MoIT's Minister.
[241] See further discussion at section 9.3 Chapter Nine.

and how to deal with state monopolies' anti-competitive behaviour successfully lies in the hands of the competition agencies.[242]

The competition authority must be capable of conducting the task of investigating and determining infringements. The independence of the competition authority, *inter alia*, serves as the central point. In addition, the awareness of the firms in using the *Competition Law* and its mechanism for settling cases involving abuse of market dominance is important. In dealing with abuses caused by state monopolies, the active role of firms will be significant. Firms must be aware of their rights and obligations, in taking actions against abuses of market dominance by state monopolies, because such abuses will not only involve the state monopolies and the infringed firms, but can affect the legitimate interests of the others.

[242] VN Economy, 'Luat Canh tranh Khoanh tay Nhin Doc quyen', above n 226.

Chapter 8

THE CONTROL OF ECONOMIC CONCENTRATION OF STATE MONOPOLIES UNDER COMPETITION LAW

This chapter deals with the control of economic concentration regarding state monopolies. Like the previous two chapters, it is based principally on relevant legislation under EU competition law and also that of some other countries.

The chapter is structured into 4 parts. The first part reviews basic issues related to economic concentration, such as definitions, classification and impacts on competition. The second is a study of EU merger control.[1] The third part discusses the control of economic concentration created by state monopolies. The fourth part focuses on that issue under Vietnam's *Competition Law 2004*. It deals with such issues as understanding, effects on competition and the legal framework for the control of economic concentration regarding state monopolies in Vietnam.

8.1 Basic issues regarding economic concentration under competition law

In general, economic concentration (hereinafter referred to as concentration) should not be placed within the same group as anti-competitive agreements and abuse of market dominance, because its nature is not one of market conduct. Mergers are concerned with market structure rather than firm behaviour[2] and in this respect they do not constitute anti-competitive behaviour.[3] Rather, concentration is directly related to market structure, because it brings about a change in market structure. Hence, economic concentration is related to activities of firms to coordinate or restructure themselves in order to achieve

[1] Most of the substantive contents of the first part of this chapter rely extensively on the book of Alison Jones and Brenda Suffrin, *EC Competition Law – Text, Cases and Materials* (Oxford University Press, 3rd ed, 2008). This part also refers to the academic work of other prominent scholars such as Ivo Van Bael and Jean-Francois Bellis, Mark R Joelson, Lennart Ritter and Braun W David, Barry J Rodger and Angus MacCulloch, etc.

[2] Femi Alese, *Federal Antitrust and EC Competition Law Analysis* (Ashgate Publishing, 2008) 410.

[3] Wolf Sauter, *Competition Law and Industrial Policy in the EU* (Oxford University Press, 1997) 132.

higher economic benefits.[4]

In fact, the term 'mergers and acquisitions' is commonly used instead of 'concentration'[5] and particularly, in research and academic work, this term is used by preference.[6] 'Merger' alone is even used instead of 'mergers and acquisitions',[7] and therefore, in this part, the term 'merger' will be the term used.[8]

However, the focus of this chapter is not on 'mergers and acquisitions' or 'mergers'. Its fundamental features and interpretation are only employed as the basis for the next study regarding state monopolies. Hence, this part is a brief review of issues surrounding mergers, such as their pro- and anti-effects on competition and the need for a merger control.

8.1.1 Pro-competitive effects of mergers

The question dealt with here is whether a merger can entail pro-competitive effects, in which case a merger could be acceptable. To do this, it is necessary to review the motivation for mergers.

---

[4] Further discussion regarding effects of economic concentration can be found in Chapter 5 part *5.1.1.1*.

[5] Concentration is interpreted in the *EC Merger Regulation of 2004* as two or more previously independent undertakings merging their businesses. A concentration also occurs where there is a change in the control of an undertaking in the form of a sole or joint-control of an undertaking which is being acquired by another undertaking or undertakings. See *EC Merger Regulation of 2004,* art 3 <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2004:024:0001:0022:EN:PDF>.

[6] See, for example, Jones and Suffrin, above n 1.

[7] For example, the existing legislation about control of economic concentration in the EU is the Council Regulation (EC) No.139/2004 dated 20 January 2004 (ECMR) known as the *EC Merger Regulation*, as it appears in that Regulation. See *EC Merger Regulation* <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2004:024:0001:0022:EN:PDF>.

[8] As mentioned above, concentration is often regarded as 'merger' which is understood as the amalgamation or joining of two or more firms into an existing form or to form a new firm. See OECD, *Glossary of Industrial Organisation Economics and Competition Law* (1993), 58 <www.oecd.org/dataoecd/8/61/2376087.pdf>. In the UNCTAD's Model Law on Competition of 2007, the term 'economic concentration' is not defined, even though this term is found in a number of competition legislations. According to commentaries on chapters of the UNCTAD's Model Law, 'concentration of economic power occurs inter alia through mergers, takeovers, joint ventures and other acquisitions of control, such as interlocking directorates'. However, this definition appears unclear, because in the previous Part of this document about definition and scope of application, 'mergers and acquisitions' is explained as 'situations where there is a legal operation between two or more enterprises, whereby firms legally unify ownership of assets formerly subject to separate control. Those situations include takeovers, concentrative joint ventures and other acquisitions of control such as interlocking directorates'. Hence, 'mergers and acquisitions' can be used interchangeably with 'economic concentration'. The rest of Part II of the UNCTAD's Model Law uses 'mergers and acquisitions', instead of 'economic concentration'. See UNCTAD, *Model Law on Competition* (TD/RBP/CONF.5/7/Rev.3, United Nations, 2007) 3, 50 <http://www.unctad.org/en/docs/tdrbpconf5d7rev3_en.pdf>.

First of all, it can be argued that a merger would enhance economic efficiency.[9] A post merger firm will be able to exploit economies of scale and economies of scope in production and technological progress.[10] A merger is said to bring about the enhancement of such economies of scope, marketing efficiencies, efficiencies arising from integration of complementary activities, or the ability to pool research and development of management skills.[11] As a result, a merger can lead to an increase in efficiencies of manufacture, research and development, faster and cheaper distribution for merged firms.[12]

In a market where there are many competitors, a merger among competitors may not bring about negative effects on competition. This is the case where a merger occurs when one of the merging firms is about to exit the market and thus the number of competitors after the merger is unchanged, or where a merger is between smaller firms that will create a new firm with increased ability and capability to compete with an existing powerful firm in that market and engage in greater competition, which generally benefits customers.[13]

A merger may be a good opportunity for firms to escape from the market when they want to transfer their business for such reasons as not making enough profit, realizing capital profit from it, or having no chance to be successful in conducting their business. A merger can also act as an alternative solution to withdrawing from the market to avoid liquidation.[14]

---

[9] Economic efficiency arises when inputs are utilized in a manner such that a given scale of output is produced at the lowest possible cost. See OECD, *Glossary*, above n 8, 41.

[10] Lars-Hendrik Röller, Johan Stennek and Frank Verboven, 'Efficiency Gains from Mergers' in Fabienne Ilzkovitz and Roderick Meiklejohn (eds),
European Merger Control: Do We Need an Efficiency Defence? (Edwards Edgar Publishing, 2006) 84; Jonathan Green and Gianandrea Staffiero, 'Economics of Merger Control' in *The 2007 Handbook of Competition Economics: Global Competition Review Special Report* (2007) 9.

[11] For example, new and superior management can be applied to the firm, leading to the enhancement of management efficiency, as most productive assets are managed by the most efficient managers. See Jones and Suffrin, above n 1, 943.

[12] Röller, Stennek and Verboven, above n 10, 84; Jones and Sufrin, above n 1, 943.

[13] Jonathan Green and Gianandrea Staffiero, 'Economics of Merger Control' in *The 2007 Handbook of Competition Economics: Global Competition Review Special Report* (2007) 8,9 cited in Julie Nicole Clarke, *The International Regulation of Transnational Mergers* (PhD Thesis, Queensland University of Technology, 2010) 30.

[14] Transferring business is a form of merger which helps investors, business owners and employees to avoid negative impacts from the business failure of a firm. See Jones and Sufrin, above n 1, 943 – 944.

In terms of market integration, a cross-border merger can serve as a way of promoting market integration and bringing greater benefits to the firms involved. A merger among domestic firms can create stronger firms which are able to compete in the international market and may act as national champions,[15] or serve political ends, such as preventing a domestic firm from being taken over by a foreign one.[16] It can also play an active role in bringing technical and economic progress and facilitating cross border trade among firms in the market.[17]

8.1.2 Adverse impacts of mergers and the need for merger control

However, in certain circumstances a merger has the potential to produce anti-competitive economic effects, because it may enhance market power.[18] There are many factors that may be affected by a merger and are considered by competition agencies when they determine whether or not a merger should be prohibited, i.e. competition policy and regional, industrial or social policy,[19] with competition being an important criterion. Legal control of mergers is an important component of any regime to deal with competition,[20] and a strict competition policy against mergers is the result of an exclusive focus on competition issues.[21]

One question here is whether or not a merger should be prohibited. The pro-competitive effects mean that a merger may be acceptable as long as it does not have adverse effects

[15] For example, the desire to increase the scale of national and European firms may be of a goal of industrial policy of either national or European Community. Under this goal, they can have chance to restructure and become national champions, to survive and compete more effectively in international trade. See Jones and Sufrin, above n 1, 944; OECD, 'Competition Policy, Industrial Policy and National Champions' (Competition Policy Roundtable, DAF/COMP/GF (2009)9, 2009) <http://www.oecd.org/dataoecd/12/50/44548025.pdf>.

[16] For example, the merger of a French state-owned company, Gaz de France (GDF), with a private firm, SUEZ, in 2009 was encouraged by the government to form a large and fully competitive capacity (national champion) in energy, therefore outbidding an attempt to acquire SUEZ of ENEL an Italian firm. Similarly, a merger between two Spanish firms, Gas Natural and Endesa, was also backed by the government to prevent Endesa from being taken over by EON, a German firm. See OECD, 'National Champions', above n 15. See also, Jens Suedekum, *National Champion versus Foreign Takeover* (2007), 2 <http://ftp.iza.org/dp2960.pdf>.

[17] Jones and Sufrin, above n 1, 944.

[18] Clarke, above n 13, 30.

[19] Barry J Rodger and Angus MacCulloch, *Competition Law and Policy in the EC and UK* (Routledge Cavendish Publishing, 4th ed, 2009) 276.

[20] Paul Craig and Crainne de Burca, *EU Law: Text, Cases and Materials* (Oxford University Press, 4th ed, 2008) 1042.

[21] Jones and Sufrin, above n 1, 945.

on competition and so competition authorities may be concerned not about how to prohibit mergers, but how to control and limit such effects on competition and to encourage the pro-competitive effects. Control by competition authorities will be necessary if the ultimate goal of a merger is merely to achieve or reinforce market power. This is because the market power of the post merger firm will enable them to engage in anti-competitive behaviour.

As mentioned earlier, in the relationship between elements of the SCP paradigm, market structure[22] is considered as the primary source of market power and the primary determinant of firm conduct in the market.[23] It is inferred from this approach that a merger noticeably affects market structure through two factors: the number of firms involved (as the number of firms in the market is reduced after the merger) and the size of the firms (as post-merger firms are larger and much stronger). This leads to a higher concentration in the market, which creates the possibility of anti-competitive conduct.[24]

As mergers can take a number of forms and how they affect competition differs, the effects on competition will be analysed in relation to specific forms. Laws on the control of mergers usually classify a merger according to three basic types: horizontal, vertical and conglomerate mergers.[25]

---

[22] Market structure includes 'the number and size distribution of buyers and sellers in the market and the conditions of entry of new firms and the extent of product differentiation, including geographical dispersion'. Among these, the number of firms and their size are principal characteristics. See S G Corones, *Competition Law in Australia* (Thomson Reuters, 3rd ed, 2004) 30; Martyn D Taylor, *International Competition Law: A New Dimension for WTO?*(Cambridge, 2006)79.

[23] Corones, above n 22, 30.

[24] It is also observed that mergers and acquisition have become a central issue of antitrust and competition law in many countries, particularly in the US, where one of the most fundamental legislations concerning antitrusts was the Clayton Act of 1915. As proclaimed in the US Department of Justice (DOJ) *Merger Guidelines* in 1968, the focus by the Department is chiefly on market structure, because 'the conduct of the individual firms in a market tends to be controlled by the structure of that market'. See the US Department of Justice' *Merger Guidelines 1968*; The EC Commission took a similar view as mentioned in the *EC Merger Regulation* as a merger would result in 'a lasting change in the control of the undertaking concerned and therefore the structure of the market'. See *ECMR* art 3.

[25] Horizontal mergers are defined as those between firms that make the same products and operate at the same level of the market. Vertical mergers are regarded as those between firms which operate at different distributive levels of the same product market. Conglomerate mergers are those between firms which have no connection with each other in any product market. See Craig and Burca, above n 20, 1043; Rodger and MacCulloch, above n 19, 276.

8.1.2.1 Horizontal mergers

Horizontal mergers are generally considered as the greatest concern for competition law.[26] As a horizontal merger involves two firms in the same market, it results in a reduction in the number of firms in that market. Besides, it causes an increase in the market share of the new firm, which is larger than either of the partners had before the merger.[27] Concerns here involve both the issue of market structure: the number of firms and their size,[28] which can lead to a reduction in inter-brand competition, particularly where there are already few market participants and fact that competition is limited.[29]

There are two possible outcomes of horizontal mergers. First, if the merger brings about the market dominance of a single firm, or strengthens the existing dominance of a firm, efficiencies will not be delivered as they are achieved in a competitive market. It also causes difficulties for competition authorities in controlling the behaviour of this dominant firm and detecting any abuse of market power.[30] Second, if the merger does not create a dominant position for the post merger firm, there is concern about the possibility of causing a substantial increase in the concentration of a particularly industry. Such a concentration will enable the merged firm to raise prices and restrict output by means of either explicit or tacit coordination of behaviour with other firm operating in the market through coordinated effects,[31] or through non-coordinated, unilateral effects.[32]

---

[26] Rodger and MacCulloch, above n 19, 276; Alese, above n 2, 409.

[27] Herbert Hovenkamp, *Federal and Antitrust Policy: The Law of Competition and its Practice* (Thomson West, 3rd ed, 2005) 12.1.b; Rodger and MacCulloch, above n 19, 276.

[28] Rodger and MacCulloch, above n 19, 276.

[29] Ibid.

[30] Jones and Sufrin, above n 1, 945.

[31] A concentration with coordinated effects will enable the remaining firms to coordinate their behaviour, such as bringing about the possibility of both explicit and implicit agreements being reached regarding prices and customers. The notion 'coordinated effects' is described as follows:

> A merger may diminish competition by enabling the firms selling in the relevant market more likely, more successfully, or more completely to engage in co-ordinated interaction that harms consumers. Co-ordinated interaction is comprised of actions by a group of firms that are profitable for each of them only as a result of the accommodating reactions of the others. This behaviour includes tacit or express collusion and may or may not be lawful in and of it.

See OECD, *A Framework for the Design and Implementation of Competition Law and Policy* (WB and OECD, 2004) 22

In both cases a horizontal merger enables the merged firm to conduct anti-competitive behaviour.[33] It removes direct competitive constraints and brings about the possibility of the new firms committing behaviour that is detrimental to consumers.[34]

8.1.2.2 Vertical mergers

A vertical merger is undertaken by firms at different levels of production and aims at either obtaining a secure supply of a raw material or securing an outlet for the sale of products.[35] While anti-competitive consequences of horizontal mergers seem to be obvious, those of vertical mergers are subject to debate.[36]

Concerns arising here primarily involve a 'foreclosure' of the market or of a source of supply to competitors.[37] This is particularly serious when the merging firms have market power at one or more vertical levels.[38] In these cases, mergers can affect the suppliers of raw materials and the distribution of products.[39] It is assumed that in a vertical merger structural changes in the market occur, involving a reduction in the number of firms vertically and involving an increase in the size of firms in terms of economies of scope and geographical criteria. While the concern regarding horizontal mergers is mostly related to the creation or intensification of market dominance, concern about vertical

---

[32] In particular, a concentration which has anti-competitive unilateral effects often creates a single firm with substantial market power, or it enhances significantly the market power which the firm has already enjoyed or, in the worst situation, brings about a monopoly. This enables the firm to conduct anti-competitive practices, such as increasing prices above the competitive level or creating barriers to entry. This effect also occurs in the markets with heterogeneous products, where products have distinctive characteristics, such as technical specifications or brand image. See OECD, *A Framework*, above n 31, 42. See also Jones and Sufrin, above n 1, 945.

[33] Craig and Burca, above n 20, 1043.

[34] S Bishop, A Lofaro and F Rosati, 'Turning the Tables: Why Vertical and Conglomerate are Different?' (2006) 27 (7) *European Competition Law Review* 406.

[35] Jones and Sufrin, above n 1, 946; Barry J. Rodger, Angus MacCulloch, *Competition Law and Policy in the EC and UK* (4th ed, 2009) 276.

[36] For example, to some extent pro-competitive effects can be claimed, such as that it may contribute to the improvement of a branded product and hence help to improve inter-brand competition. See Craig and Burca, above n 20, 1043.

[37] Ibid.

[38] John C Cook and Christophe S Kerse, *EC Merger Control* (Sweet & Maxwell, 3rd, 2006) 7-20.

[39] This 'foreclosure' concern is apparent when there are few or no other suppliers of an essential component. Similarly, other competitors will find it difficult to distribute their products if a merger is completed by a manufacturer or a distributor (forward integration). Besides, price transparency or collusion between firms operating on the market may be facilitated by a vertical merger. See Jones and Sufrin, above n 1, 946; Corones, above n 22, 380.

mergers also involves the market entry of firms and the exclusion of competitors from the market, which has the same effects of market dominance.

8.1.2.3 Conglomerate mergers

A conglomerate merger brings about different competition concerns.[40] It can be justified by harmless reasons, such as the need for risk reduction.[41] Therefore competition concerns do not always arise as noticeably as in the cases of horizontal and vertical mergers. However, there is a concern that a post-conglomerate merger firm can use its power to foreclose competition in a neighbouring or related market by engaging in tying, cross subsidising or predating in that market. This is likely to be true if the relevant markets are closely related and the post-merger firm is able to provide a wide portfolio of products.[42]

Moreover, a conglomerate merger can lead to the loss of potential competition if the firms participating in the merger are operating in different products or geographical markets, because this will remove the threat of their entering each other's markets. If these firms are producing the same products but in a different geographical market, or they are operating in neighbouring markets, the possibility of causing loss to potential competition is very significant.[43] Therefore, a conglomerate merger can entail anti-competitive effects by causing structural changes, because it can cause a decrease in the number of firms participating in the market, enabling the merged firms to engage in anti-competitive behaviour.[44]

Besides, there are other concerns. First, there is the fear that big businesses are created after conglomerate mergers to serve purposes other than competition, such as socio-

[40] Rodger and MacCulloch, above n 19, 276.

[41] A conglomerate merger can be created on the grounds that it will aim to expand into another market when the existing market of the firms is in a decline, or they are in a cyclical industry, where such a merger is a way to spread risks. See Jones and Sufrin, above n 1, 946.

[42] Corones, above n 22, 380; Jones and Sufrin, above n 1, 946.

[43] Jones and Sufrin, above n 1, 947.

[44] Competition concerns of conglomerate mergers are summarized as: creating the possibility for a firm to ruin its less affluent competitors; lowering costs for a predatory price to drive out competitors; raising barriers of entry; threatening smaller firms with vigorous competition; bringing about opportunities for the firm to engage in reciprocal dealings and eliminating competition. See R H Bork, *The Antitrust Paradox* (1978) 249 (reprinted in 1993 with a new Introduction and Epilogue) cited in Jones and Sufrin, above n 1, 947.

political ones. As noted by Alison and Brenda, they may have implications for the freedom of society and a too great concentration is even said to be anti-democratic and to limit the freedom of individuals and enterprises or to be harmful to the distribution of wealth.[45] Second, the social consequences of mergers, such as unemployment, are another cause for concern.[46] Finally, when a merger is undertaken in special sectors, or those that are sensitive to the government, it may affect the public interest or important areas of national security or defence. The fear is that some such sectors may be controlled by foreign investors.[47]

8.2 Fundamental issues of merger control under EU competition law

8.2.1 A brief overview of the development of merger control regulation in the EU

Merger control was not officially introduced in the EC until 1966, after the EC Commission led a drive to introduce legislation governing mergers.[48] In the *Memorandum on the Concentration of Enterprises in the Common Market*, some form of EC merger control was mentioned as necessary.[49] Despite controversies over the suggestion, this was supported by the ECJ in the *Continental Can* case.[50] Later, the EC Commission adopted

[45]Jones and Sufrin, above n 1, 948.

[46]This is true because mergers tend to entail asset-stripping, profits to shareholders, rationalization and loss of jobs. Such concerns must be taken into account in depressed regions or in areas of high unemployment. See Jones and Sufrin, above n 1, 948. Hence, a merger policy may be well supported by the government as it can serve as 'one means of maintaining a balanced distribution of wealth and job opportunities around the countries See Craig and Burca, above n 20, 1043.

[47] This concern is likely to be vital for developing and transitional countries as they would not allow foreign investors to control certain industries which can be detrimental to the wish for an autonomous economy.

[48] The *EC Treaty 1957* did not contain any specific provision for merger control. See Rodger and MacCulloch, above n 19; Jones and Sufrin, above n 1, 949. However, merger provisions were mentioned in the *European Coal and Steel Community Treaty.* See Chris Newton 'Do Predators Need to be Dominant?' (1999) 3 *European Competition Law Review* 127.

[49] Rodger and MacCulloch, above n 19, 277; Jones and Sufrin, above n 1, 949. In fact, Articles 85 and 86 of the EC Treaty could be applied where possible to prohibit some mergers. The Commission also suggested that Art 86 (currently Article 102 *TFEU*) should cover mergers where the merger amounted to an abuse of a dominant position.

[50] This case involved a US firm having a dominant position in the market for metal containers, which attempted to gain control of a Dutch firm operating in the same market. The Commission for the first time took the view that the acquisition of the target firm would constitute an abuse of Continental Can's dominant position as it would eliminate future competition between the two firms. See *Continental Can v Commission* (C-6/72) [1973] ECR 215.

its first legislation proposal for merger control in 1973.[51] It took 15 years for the EU Commission to launch the first Merger Regulation.[52] The new *EC Merger Control of 2004* was eventually approved and came into force on 1 May 2004 (the current *ECMR*).[53] While replacing a number of previous Notices concerning relevant issues,[54] this *Consolidated Notices* has incorporated the contents of these Notices into a complete set of provisions and guidelines.

8.2.2 The concept of concentration

The *ECMR* applies, subject to specific exceptions, to 'concentration'[55] with a 'Community dimension'.[56] In general, a concentration occurs when two or more undertakings merge their businesses; when there is an acquisition in the form of sole or joint control of the whole or part of an existing undertaking; or when an autonomous full-

[51] This proposal was released after the EC Commission believed its inability to control mergers inhibited its capability to operate effective competition control. See Jones and Sufrin, above n 1, 949. Unfortunately, this proposal and some of following draft regulations were rejected by the EC Council, mostly because of disagreement over the necessity of merger control amongst Member States, as well as the transfer of power to the Commission to deal with merger issues. See further the discussion over merger control in Jones and Suffrin, above n 1, 949-950 and Rodger and MacCulloch, above n 19, 277-9.

[52] The original legislation was finally adopted by Council in December 1989 and came into force in September 1990 (*Regulation 4064/89/EEC on the Control of Concentrations between Undertakings* [1990] OJ L257/13). The Regulation set out jurisdictional, procedural and substantive rules and a number of regulations and notices adopted later provided detailed guidance as well as related matters dealing with procedure, such as notification, time limits and hearings. See *Commission Regulation No. 447/98 on the Notifications, Time Limits and Hearings* [1998] OJ L61/1.However, debates continued over the thresholds that brought a merger within the Community system. See Rodger and MacCulloch, above n 19, 279. In 1996 a number of issues in the Merger Regulation were outlined to be addressed in the Commission's Green Paper, including the treatment of joint ventures. In 2001 another Green Paper was adopted, introducing a number of changes with regard to jurisdictional, substantive and procedural matters set out in the first *ECMR*. Following consultation, a draft proposal was published in late 2002 to introduce a package of measures to reform the provisions and workings of this *ECMR*. See Jones and Sufrin, above n 1, 953-954.

[53] This Regulation is given detailed explanation by the *Commission Consolidated Jurisdictional Notice under Council Regulation (EC) No 139/2004 on the Control of Concentrations between Undertakings*. [2004] OJ L24/1 (Hereinafter referred as the *EC Merger Regulation or ECMR).*

[54] In particular, these Notices are: *Notice on the Concept of Concentration* [1998] OJ C 66; the *Notice on the Concept of Full function Joint Ventures* [1998] OJ C 66; *Notice on the Concept of Undertakings Concerned* [1998] OJ C 66 and the *Notice on Calculation of Turnover* [1998] OJ C 66.

[55] The term 'concentration' mentioned in the ECMR covers a wide range of activities, including merger, acquisition of shares or assets and also some forms of joint ventures. See *ECMR*.

[56] Jones and Sufrin, above n 1, 958.

functioning joint-venture is created.[57]

8.2.2.1 Mergers

The new Notice (*ECMR of 2004*) separates two cases relating to a merger of two or more previously independent undertakings. The first case is that of mergers in a legal sense,[58] when two or more independent undertakings amalgamate into a new undertaking and they cease to exist as separate legal entities. A merger may also occur when an undertaking is absorbed by another, the latter retaining its legal identity whilst the former ceases to exist as a legal entity.[59] This is illustrated by a number of recent cases, such as *Exxon/Mobil,*[60] *Veba/VIAG,*[61] *AstraZeneca/Novartis,*[62] and *Chevron/Texaco.*[63] In both cases, there must be a termination of legal entities of undertakings involved, or at least one undertaking must cease to exist if it has been absorbed by the other.

The second case is regarded as *de facto* mergers, which occur where, in the absence of a legal merger, the combination of the activities of previously independent undertakings results in the creation of a single economic unit.[64] This economic unit is established while previously independent undertakings may retain individual legal personalities. In particular, this may occur when two or more undertakings establish contractually a

---

[57] It is clearly stated in the *ECMR* art 3(1) that a concentration is regarded as:

(a) the merger of two or more previously independent undertakings or parts of undertakings; or

(b) the acquisition, by one or more persons already controlling at least one undertaking or by one or more undertakings, whether by purchase of securities or assets, by contract or by any other means, of direct or indirect control of the whole or parts of one or more other undertakings.

With regard to joint-ventures, the *ECMR* art 3(1) provides:

> The creation of a joint-venture performing on a lasting basis all the functions of an autonomous economic entity shall constitute a concentration within the meaning of paragraph 3(1)(b).

This is further explained in two other Commission Notices: (i) the *Notice on the concept of concentration* and the *Notice on the concept of full-function joint-ventures*. See OJ C 66/5 (1998) and OJ C 66/1 (1998). These notices have been now replaced by the *Commission Consolidated Jurisdictional Notice under Council Regulation (EC) No. 139/2004 on the control of concentrations between undertakings* [2008] OJ C 95/01 A.(2) (hereinafter referred as *Commission Consolidated Jurisdictional Notice*).

[58] Piet Jan Slot and Angus Johnson, *An Introduction to Competition Law* (Hart Publishing, 2006) 158.

[59] *Commission Consolidated Jurisdictional Notice* B I(9).

[60] *Exxon/Mobil* (IV/M.1383) [2004] OJ L 103/1.

[61] *Veba/VIAG* (COMP/M. 1673) [2001] OJ L 188/1.

[62] *AstraZeneca/Novartis* (COMP/M.1806) [2004] OJ L 110/1.

[63] *Chevron/Texaco* (COMP/M.2208).

[64] Slot and Johnson, above n 58, 158.

common economic management,[65] or the structure of a dual listed company.[66] If this leads to a *de facto* amalgamation of the undertakings concerned into a single economic unit, the operation is considered to be a merger. As was observed in *Price Waterhouse/Coopers & Lybrand*,[67] the *de facto* amalgamation may be solely based on contractual arrangements, but it can also be reinforced by cross-shareholdings between the undertakings forming that economic unit.[68]

8.2.2.2 Acquisition

An acquisition occurs whenever there is a change in the control of an undertaking[69] and is regarded as involving the possibility of exercising decisive influence over one or more other undertakings.[70] The acquisition of control is considered as the key issue in the application of the *ECMR*.[71]

Such control can be exercised on either a legal or *de facto* basis, directly or indirectly.[72] It is not important whether such direct or indirect acquisition is acquired in one, two or more stages, or by means of one or more transactions, as long as the result of this will constitute a single concentration.[73] It does not matter what form the control of the acquisition takes, the key is whether the acquiring party or parties will have the ability to

---

[65] This case is explained as applicable in the case of a 'Gleichordnungskonzern' in German law, certain 'Groupements d'Intérêt Economique' in French law and the amalgamation of partnerships, as in *Price Waterhouse/Coopers & Lybrand* (IV/M.1016) [1999] OJ L 50/27. See *Commission Consolidated Jurisdictional Notice* B I(10).

[66] This was illustrated by *RTZ/CRA* (IV/M.660) [1996] OJ C 22/10; *Carnival Corporation/P&O Princess II* (COMP/M.3071) [2003] OJ C 42/7.

[67] *Price Waterhouse/Coopers & Lybrand* (M.1016) [1999] OJ L 50.

[68] *Commission Consolidated Jurisdictional Notice* B I(10).

[69] Jones and Sufrin, above n 1, 959.

[70] Jonathan Faull and Ali Nikpay, *The EC Law of Competition* (Oxford University Press, 2nd ed, 2007) 432; Jones and Sufrin, above n 1, 959.

[71] Slot and Johnson, above n 58, 159. Control of acquisition is further defined by the *ECMR* art 3(2) as below:

> Control shall be constituted by rights, contracts or any other means which, either separately or in combination and having regard to the considerations of fact or law involved, confer the possibility of exercising decisive influence on an undertaking, in particular by:
>
> (a) Ownership or the right to use all or part of the assets of an undertaking;
>
> (b) Rights or contracts which confer decisive influence on the composition, voting or decisions of the organs of an undertaking.

[72] Faull and Nikpay, above n 70, 432.

[73] Jones and Sufrin, above n 1, 959.

determine such strategic decisions as budgets, business plans and the appointment of senior managers of the target firm. It also does not matter if the acquisition of control was the intended result of the transaction. There is also no need for such ability to be exercised in practice.[74] A number of recent cases show that control can be commonly acquired by means of share purchases and/or shareholders' agreements, or through other agreements relating to intellectual property rights, long term supply arrangements, or credits or other means.[75]

There are two types of control. The first type is regarded as 'sole control', when such acquisition is made by one firm.[76] There will be three factors to conclude the sole control of the acquirer: the amount of shares in the target firm;[77] the ownership rights coupled with contractual arrangements between two or more shareholders[78] or more exceptionally, the basis of other contractual arrangements;[79] and the basis of options and other financial

[74] Faull and Nikpay, above n 70, 432.

[75] *Blokker/Toys 'R' Us* (IV/M.890) [1998] OJ L 316/1; *KLM/Air UK* (IV/M.967) [1997] OJ C 372/20.

[76] 'Sole control' refers to the positive ability of the acquiring undertaking to impose strategic decisions on the controlled entity. See Faull and Nikpay, above n 70, 432. There will be a change from no control to sole control of the acquirer, as it is in a position of having no decisive influence over the target firm before the acquisition. Another version of this case is when the acquirer may already have joint control over the target firm and the acquisition will bring it sole control, in which case it is referred as changing from joint to sole control. See *ICI/TIOXIDE* (IV/M.0023) [1990] OJ C 304. See also Faull and Nikpay, above n 70, 433.

[77] This is normally established by considering the proportion of voting rights that the acquirer will have after the acquisition is undertaken. The holding of more than 50 per cent of the votes will be regarded as the acquisition of sole control for the acquirer if the Memorandum or Articles of the target firm do not specify any requirements regarding qualified majorities that must be held for strategic decisions. However, in publicly quoted firms in particular, sole control can also be conferred on the acquirer on a de facto basis, even if it only holds a qualified minority holding of less than 50 per cent of the voting rights. The reason is that it is unlikely that all smaller shareholders will be present or represented at a meeting of shareholders. The evidence of the presence of shareholders at meetings in previous years will be the grounds for an assessment to consider whether the holder of a particular share will be likely to achieve a majority at future meetings. See Faull and Nikpay, above n 70, 434.

[78] *Ford/Hertz* (IV/M.397) [1994] OJ C 121.

[79] For example, contractual arrangements can be those concerning the management of another undertaking. See *Lehman Brothers/SCG/Starwood/Le Meridien* (COMP/M.3858). In these cases, a shareholders' agreement may be concluded in such a way that it can give a single shareholder the ability to manage or determine the strategic behaviour of the target firm, or such agreement can enable a single shareholder to appoint the majority of the managing body of the target firm concerned. This sole control is equally conferred on a single shareholder if such an agreement provides it with the veto rights over the appointment of senior management and/or the approval of budgets or business plans. See *Nabisco/United Biscuits* (COMP/M.1920) [2002] OJ C 43/ 23.

arrangements.[80] Hence, not only the size of the undertakings' share holdings, but also such factors as the voting rights attached to the shareholdings and shareholders and management agreements, veto rights and the ability of two or more undertakings to jointly exercise the majority of voting rights, etc should be taken into consideration.[81]

The second type is referred to as 'joint control', when control is in the hands of two or more firms.[82] This refers to the negative ability of the holders of such control to make less strategic decisions than those of sole controllers, such as the veto of important decisions proposed by the other jointly controlling partners. Apart from these two cases leading to the acquisition of sole control or joint control, the *ECMR* applies to operations leading to changes in the quality of control.[83]

---

[80] This sometimes occurs in very important supply contracts, as mentioned in a number of related cases. See *Coca-Cola/Amalgamated Beverages GB* (IV/M.794) [1997] OJ L 218/15; Scottish & *Newcastle/Groupe Danone* (COMP/M.1925); *Shell/DEA* (COMP/M.2389) [2003] OJ L 15/35. It happens when two or more parties agree on the terms of a future transaction, despite the fact that such agreements may involve the control of the target firm at the time of their exercise and do not lead to a change in the control structure before it is exercised. See Faull and Nikpay, above n 70, 435.

[81] These matters are given detailed guidance in the *Commission Consolidated Jurisdictional Notice*, para 65-82.

[82] See Faull and Nikpay, above n 70, 432. Joint control may be acquired in two cases:

(i) When two parent companies hold the voting rights equally. This case may not need a formal agreement between them. Equality may also be achieved where both parent companies have the right to appoint an equal number of members to the decision-making bodies of the joint venture.

(ii) Where there is no equality between the two parent companies in votes or in representation in decision-making bodies, or where there are more than two parent companies. It is caused by, for example, minority of shareholders having additional rights which allow them to veto decisions which are essential for the strategic commercial behaviour of the joint-venture i.e. changes in the statutes, an increase or decrease in the capital or liquidation.

See *Commission Consolidated Jurisdictional Notice* BII(64). This is illustrated by *Conagra/Idea* (IV/M.0010) [1991] OJ C 175 and *Air France v Commission* (T-2/93) [1994] ECR II-323. See *Commission Consolidated Jurisdictional Notice* B II(65).

[83] This is explained in the Commission Consolidated Jurisdictional Notice by the following situations: first, such a change in the quality of control, resulting in a concentration, occurs if there is a change between sole and joint control, changing it from sole to joint control. Second, a change in the quality of control occurs between joint control scenarios before and after the transaction if there is an increase in the number or a change in the identity of controlling shareholders. This situation may involve a change in joint control by the entrance of a new shareholder, by replacement of an existing shareholder or possibly by a reduction in the number of jointly controlling shareholders. This situation may also involve a change from joint control to sole control. See *Commission Consolidated Jurisdictional Notice* B II(83-90).

8.2.2.3 Joint-ventures

As is stated in Article 3(4) of the *ECMR*, concentration may occur when there is a creation of a 'full-function' joint-venture.[84] As joint-ventures are undertakings jointly controlled by two or more undertakings, the meaning of joint control is explained as being the same as the joint control described above.

As joint-ventures may be covered by Article 101 *TFEU* (ex Article 81 *TEC*) regarding behavioral rules involving agreements concluded between undertakings operating in a particular market, they may only be regulated under *ECMR* if they amount to a 'concentration' within the meaning of Article 3, where the consequence is a change in the market structure. In this case, joint-ventures are perceived as receiving significantly more favourable treatment.[85]

8.2.3 The Community Dimension: The thresholds for the control of concentration

The introduction of the Community dimension is significant in the context of the centralization of notifications for clearance with the European Commission.[86] The concept of 'Community dimension' is important for serving the above goals and delimiting those concentrations requiring notification to the Commission.[87] According to

[84] A 'full-function' joint-venture is a kind of joint-venture which will perform on a lasting basis all the functions of an autonomous economic entity. The full-functionality criterion is stated by the Commission Consolidated Jurisdictional Notice as being sufficient for the application of the Merger Regulation to the creation of joint ventures by the parties. The joint venture must only fulfill the full-functionality criterion, irrespective of whether such a joint venture is created as a 'Greenfield operation', or whether the parties contribute assets to the joint venture which they previously owned individually. See *Commission Consolidated Jurisdictional Notice* B II(92).

[85] In particular, the test applied in the *ECMR* will catch fewer transactions than the test for 'restriction of competition' under Article 101 *TFEU* (ex Article 81 *TEC*). Besides, joint ventures will benefit from a 'one stop shop', by which national competition rules do not apply if they have a Community dimension and they will not be covered by EC competition law if they do not have a Community dimension. There are strict legal deadlines provided for the decision taken under the *ECMR*, while clearance decisions are absolute and not limited in time. See Jones and Sufrin, above n 1, 962.

[86] This centralization is regarded as one of the key attractions of the EC merger control regime, which helps to save time and resources if compared with the multiple procedures in different Member states. See Slot and Johnson, above n 58, 162. This centralization is also important to divide the examination of concentrations into two groups: EC and national. In particular, those concentrations which are of significance for the interests of the Community will be considered by the EC levels (having a community dimension), while those with a national dimension will be determined by the relevant national NCA(s) in accordance with the general EC law principle of subsidiaries, mentioned in Article 5 of the *EC Treaty*. See Slot and Johnson, above n 58, 162.

[87] Ibid.

Article 1(2) and (3) of the *ECMR*,[88] a concentration will have a Community dimension in two cases, depending on the first criterion: the combined aggregate community-wide turnover.[89] The first case is where the combined aggregate worldwide turnover of all the undertakings concerned is more than EUR5,000 million and the aggregate Community-wide turnover of each of at least two of the undertakings concerned is more than EUR 250 million, unless each of the undertakings concerned achieves more than two-thirds of its aggregate Community-wide turnover within one and the same Member State.[90] The second case is regarded as an extended reach of Community merger control,[91] which will apply for concentrations which do not initially meet the community dimension set forth in Article 1(2).[92]

Extending the reach of Community merger control to cover those concentrations is to ensure that their competitive impact will be considered for the Community as a whole.[93] In both cases, it is obvious that the determination of whether or not there is a Community dimension to any given concentration depends on two important factors: the accurate assessment of 'undertakings concerned' and the examination of their turnover.[94]

---

[88] *The Council Regulation (EC) No 139/2004 of 20 January 2004 on the Control of Concentrations between Undertakings* (the *ECMR*).

[89] Such concentrations could be examined by the merger laws of particular member states; hence this could be costly as well as giving rise to conflicting assessments in the different legal systems. See Draft Commission Consolidated Jurisdictional Notice (DJN) para 120 cited by Craig and Burca, above n 20, 1049.

[90] *ECMR* art 1(2). Besides, EC jurisdiction under Article 1(2) will also apply to mergers between two firms which have headquarters outside the EC, if and when the Community wide turnover exceeds EUR 250 million

[91] Craig and Burca, above n 20, 1049.

[92] *ECMR* art 1(3). This Article applies where a concentration does not meet the above thresholds, but it will have a Community dimension if the combined aggregate worldwide turnover of all the undertakings concerned is more than EUR 2,500 million; and (i) in each of at least three Member States the combined aggregate turnover of all the undertakings concerned is more than EUR 100 million; (ii) in each of at least three Member States used to satisfy the previous condition the aggregate turnover of each of at least two of the undertakings concerned is more than EUR 25 million; and (iii) the aggregate Community-wide turnover of each of at least two of the undertakings concerned is more than EUR 100 million, unless each of the undertakings concerned achieves more than two-thirds of its aggregate Community-wide turnover within one and the same Member State.

[93] Craig and Burca, above n 20, 1049.

[94] Slot and Johnson, above n 58, 163.

8.2.3.1 Undertakings concerned

The determination of undertakings concerned is important in order to apply the Community dimension under Article 1(2) and (3).[95] Both the acquiring and the acquired undertakings in an acquisition case are regarded as 'undertakings concerned'.[96] Once the undertakings concerned have been indentified, their turnover can be calculated.[97]

In a merger, the undertakings concerned are each of the merging entities.[98] In the remaining cases, it is the concept of 'acquiring control' that will determine which are the undertakings concerned. On the acquiring side, there can be one or more undertakings acquiring sole or joint control. On the acquired side, there can be one or more undertakings as a whole, or parts thereof.[99]

8.2.3.2 Turnover

Because of its complex nature, the Community previously had a specific Notice dealing with the calculation of aggregate turnover[100] where 'aggregate turnover is defined in

[95] The concept of undertakings concerned is explained in the Commission Consolidated Jurisdictional Notice as those participating in a concentration, i.e. a merger or an acquisition of control as mentioned in Article 3(1) of the *ECMR*. Detailed analysis of who the undertakings concerned are in acquisition of control cases is provided in paragraphs 132–153 of this Notice.

[96] Slot and Johnson, above n 58, 163.

[97] Jones and Sufrin, above n 1, 972.

[98] *Commission Consolidated Jurisdictional Notice* C IV(132).

[99] For example, when only one part of another undertaking is being acquired, the undertakings concerned will be only the acquiring undertaking and the relevant acquired part. See *Commission Consolidated Jurisdictional Notice* C IV(133).

[100] *Commission Notice on Calculation of Turnover under Council Regulations (EEC) No. 4064/89 on the Control of Concentration between Undertakings* [1998] OJ C 66 2.3. This Notice has now been replaced, with its contents having been incorporated into the *Commission Consolidated Jurisdictional Notice*.

Article 5(1) of the *ECMR*.[101]

From that definition, it can be seen that the sales turnover of the undertakings concerned is the essential criterion.[102] Where only one part of the undertaking is being acquired, the calculation of turnover will only take into account the turnover attributed to the part of the undertaking which is the subject of the transaction.[103] The relevant turnover includes not only that of the undertaking concerned, but also the turnover of (in summary) the whole corporate group of which that undertaking is a part.[104] This results in the consideration of an extensive 'organogramme', presenting the structure of the whole group of firms.[105]

8.2.4 The merger control procedure under the *ECMR*

The *ECMR* lays down a system for merger control with two different investigative procedures: the pre-investigation or 'first phase' and a second phase applied where a concentration creates difficulties that require a broader investigation.[106]

- **Prior assessment – A 'one-stop shop' system**

It is stipulated under the *ECMR* that assessment and decisions are required prior to the implementation of the concentration concerned, as a means of supervision exercised by the European Commission. Such requirements only apply to those concentrations having a Community dimension and where decisions made on the basis of the *ECMR* are of the

[101] 'Aggregate turnover within the meaning of this Regulation shall comprise the amounts derived by the undertakings concerned in the preceding financial year from the sale of products and the provision of services falling within the undertakings' ordinary activities after deduction of sales rebates and of value added tax and other taxes directly related to turnover'. The concept of turnover is further given detailed explanation in the *Commission Consolidated Jurisdictional Notice* in relation to two cases. First, in the case of products, turnover can be determined without difficulty, namely by identifying each commercial act involving a transfer of ownership. Second, in the case of services, the Commission takes into consideration the total amount of sales. However, the calculation of the amounts derived from the provision of services may be more complex, as this depends on the exact service provided and the underlying legal and economic arrangements in the sector in question. Where one undertaking provides the entire service directly to the customer, the turnover of the undertaking concerned consists of the total amount of sales for the provision of services in the last financial year. The *Consolidated Jurisdictional Notice* also provides in detail relevant issues relating to the assessment of turnover and Article 5 (3) provides rules for calculating the turnover of credit and other financial institutions and insurance undertakings. See *Commission Consolidated Jurisdictional Notice* C IV (157-9).

[102] Slot and Johnson, above n 58, 163.

[103] *ECMR* art 5(2).

[104] *Commission Consolidated Jurisdictional Notice* C IV(175) art 5(4) *ECMR*.

[105] Slot and Johnson, above n 58, 163.

[106] Ibid 144.

exclusive competency of the Commission.[107]

It is required that a concentration which consists of a merger or the acquisition of joint control shall be notified jointly by the parties to the merger or by those acquiring joint control. In all other cases, the notification shall be effected by the person or undertaking acquiring control of the whole or parts of one or more undertakings.[108]

From the stipulation of Article 5 of the *ECMR*, there are two kinds of concentration that need a prior notification: (i) those concentrations having a Community dimension under Article 3 of the *ECMR* and (ii) those concentrations which do not have a Community dimension within the meaning of Article 1 and which are capable of being reviewed under the national competition laws of at least three Member States.[109] In both kinds, it is provided that a notification is necessary and they cannot be implemented so long as they have neither been notified nor declared compatible with the common market (due to the Commission's failure to make decisions within the relevant time limits).[110] The Commission is also empowered to grant derogation from the obligation imposed in these cases.[111]

---

[107] Slot and Johnson, above n 58, 144. The so-called 'one-stop shop' system requires the undertakings concerned to notify one authority of their transactions which have a Community dimension prior to their implementation and following the conclusion of the agreement. Decisions relating to these transactions will be later made after a timeline limit becomes applicable in all 25 EU Member states. It is stated in the *ECMR* art 4(1) that:

> 1. Concentrations with a Community dimension defined in this Regulation shall be notified to the Commission prior to their implementation and following the conclusion of the agreement, the announcement of the public bid, or the acquisition of a controlling interest.
>
> Notification may also be made where the undertakings concerned demonstrate to the Commission a good faith intention to conclude an agreement or, in the case of a public bid, where they have publicly announced an intention to make such a bid, provided that the intended agreement or bid would result in a concentration with a Community dimension.

[108] *ECMR* art 4(1).

[109] This kind of concentration is regarded as one which is to be examined by the Commission according to Article 4(5) of the *ECMR*.

[110] However, certain exceptions are allowed for the implementation of a public bid and transactions in securities that result in a transfer of control, provided that the concentration is notified to the Commission without delay and the acquirer does not exercise the voting rights attached to the securities in question, or does so only to maintain the full value of its investments based on a derogation granted by the Commission. See *ECMR* art 7(2).

[111] Ibid art 7(3).

8.3 Control of concentration regarding state monopolies in Vietnam

This part is concerned with such issues as the motivations of state monopolies in achieving concentration, common forms of concentration and problems and impacts on competition. These issues are illustrated by the regulations of the *Competition Law 2004*, which are mainly based on those of the European Community and with further reference to developing and transitional countries. Some concentration cases involving Vietnam's state monopolies are taken as examples to illustrate the discussion.

Concentrations can be directly undertaken by state monopolies. They can also be implemented by other firms in which state monopolies are involved. It is argued that when state monopolies are involved in concentration activities as other firms are, the consequences may bring about even worse effects on competition.

8.3.1 Concentration involving state firms

Concentration may be actively carried out merely among state firms, which may consequently form a state monopoly.[112] This type of concentration has normally received much support and encouragement from the state. First, it is generally considered as an effective solution to restructuring and rationalising state firms, together with SOE equitisation.[113] When state firms are low in efficiency and losing money, this may be seen as a good way to preserve the state's capital and assets, because of a viewpoint that they should not be transferred to the private sector and especially not to foreign firms.[114]

Second, this kind of concentration can help to enhance the market power and business efficiency of the newly formed state firms. It is desirable to have large and capable firms

[112] For example, a state firm may be merged into a state monopoly or the state monopoly in question may acquire another state firm. State monopolies may simply take over the control of a state firm by means of buying shares or capital contribution. This situation may involve a consolidation of state firms, including a state monopoly. Finally, the state monopoly may be involved in a joint venture established by it and other state firms. The recent formation of Vietnam's state monopolies (economic groups) is a good example. Another example is the merger in 2007 of two state firms in Europe: ČEZ (Czech Energy Plant) and REAS ((North-Moravian Energetics and Regional Distributors). See contribution of the Czech Republic in OECD, 'State-Owned Enterprises and the Principle of Competitive Neutrality' (Policy Roundtable, DAF/COMP (2009)37, 2009), 116 <http://www.oecd.org/dataoecd/43/52/46734249.pdf>.

[113] Pham Tri Hung, 'Khung Phap ly Dieu tiet Sap nhap, Mua lai Doanh nghiep o Vietnam' <http://my.opera.com/qtdn/blog/khung-phap-ly-dieu-tiet-sat-nhap-mua-ban-doanh-nghiep>.

[114] Nguyen Trung, *Vai Suy nghi ve Tap doan Kinh te Quoc doanh o Nuoc ta* (2008) [Some Thoughts about State Economic Groups in Our Country] <http://www.viet-studies.info/NguyenTrung/NguyenTrung_VeTapDoanKinhTe.htm>.

that can engage effectively in the market as 'national champions' and play a leading role in the economy, thus satisfying political aspirations.[115] A concentration, which actually reflects the process of accumulation of capital, is expected to generate internal growth and bring about 'real' powerful capacity for the state monopolies. However, there are two competition law concerns regarding concentration in this situation.

Firstly, it must be questioned whether the concentration will reinforce the current dominance of the state monopoly. This will not be a serious issue if thresholds for concentration are properly set up and the concentration process is supervised by a competition authority and enforceable by competition remedies. In that case, the possibility of bringing about market dominance or abuse of it would be controlled. On the other hand, it becomes complicated if the competition authority is not capable of dealing with concentration involving state monopolies, or there is any hesitancy in applying competition rules to them. Besides, the competition authority may also be exposed to obstacles due to the continuing interference of sectoral regulators, i.e. industrial ministries which are closely linked with these state monopolies. Finally, there is the possibility of shifting from 'state monopoly' to 'enterprise monopoly' in a concentration among state firms,[116] or for concentration to take place between state firms which are in the same

[115] For example, all state economic groups in Vietnam are large-scale state monopolies controlling commanding heights in the economy; this fact reflects the State's wish for a decisive role in the state economic sector.

[116] In 2007 a proposal for the establishment of a 'Power Trading Company' (PTC) prepared by Vietnam Electricity (EVN) was to deal with the distribution of power. It was argued by EVN as a step forward to abolish the monopoly rights of EVN and to develop a national electricity market. According to this proposal, PTC would be in the form of a single-buyer working as the distributor of power supply with a profit-seeking purpose. That company would be established in the form of a joint-stock company and invested in by some large state economic groups, including Petro Vietnam, VINACOMIN, VNPT, etc. The purchase price would only be offered on a tendering basis by power plants. The investors would also be the buyers of PTC. Among the shareholders, EVN would hold a dominant share, with 51 per cent of registered capital. The concern was whether it would be a form of economic concentration which could enable a shift from 'state monopoly' to 'enterprise monopoly'. Particularly, the monopoly in power generation and distribution could be transferred from EVN to PTC. The monopoly situation would not be eliminated; rather it would form another kind of monopoly. Participants in the EVN project were large state economic groups and the EVN-controlled power source companies, holding 80 per cent of total power capacity and holding the most important links of the chain for defining power prices. Therefore, it would allow the company to raise retail prices, making clients suffer. As argued by WB representatives in Vietnam, when shareholders are also power producers, this can lead to a conflict of interest among them and it would be hard to reduce the price, as the producers would also be the buyers. This proposal was finally rejected by the Prime Minister in 2008. See Fulbright Economics Teaching Program, *Electricity Power Trading Company (Single Byuer) Case Study* (2008) 3-4 <http://www.fetp.edu.vn/exed/2008/HaNoi/Docs/Readings/Day%202-2-Single%20Buyer-Case-E.pdf>; Vietnam Net Bridge, 'EVN's Project on PTC not Backed by MOI' <http://english.vietnamnet.vn/biz/2007/06/706767/>. Lao Dong Online, 'WB Lo ngai Ve Cong ty Co phan Mua ban Dien' (2007) <http://www.laodong.com.vn/Home/WB-lo-ngai-ve-Cty-co-phan-mua-ban-dien-cua-EVN/20076/39909.laodong>.

economic group. Both cases give rise to concerns about the augmentation of market dominance of state firms after such concentration.

Secondly, the question is whether such concentration will enable state monopolies to dominate in new areas (other than their existing domains).[117] This can happen because a state monopoly may want to shift to another domain where it will make greater profits, or simply to strengthen its current monopoly position.[118] Grounds for that may be that the existing domains do not bring them adequate benefits,[119] especially in the case of those relating to public utilities, where the provision of services for the community must be given priority. There are two possible interpretations of this situation, based on whether an expansion is clearly regulated by the *Competition Law* or not.

First, if such expansion is not explicitly covered by the Law,[120] a domination of that state monopoly in other areas is possible, because the state monopoly already has advantages such as large economies of scale, capital accumulation, assets and benefits from regulatory structures. This may create market power for them in a vertical or mixed manner and allow them to take advantage of their monopoly position in a monopolised domain.[121]

Even when this dominance is not created, the strengthening of current dominance is still a

[117] For example, a state monopoly in the field of electricity may wish to expand its business into fuel import-export or shipbuilding. Investing in areas other than monopolized domains by state economic groups has now become a popular trend in Vietnam. See Harvard Vietnam Program, John F Kennedy School of Government, *Choosing Success: The Lessons of East and Southeast Asia and Vietnam's Future* (2008) <http://www.fetp.edu.vn/Research_casestudy/PolicyPapers/PP001_Choosing_Success_E.pdf>.

[118] This explains the concentration activities of the state monopolies in other areas such as finance and credits or import of raw materials, because these areas enable them to earn more profits. Besides, this expansion may be justified on the grounds that the scope of doing business need not be confined to the assigned domains, as long as they can perform the task of preserving the state invested capital and assets and maximise profits.

[119] Harvard Program, *Choosing Success*, above n 117.

[120] For example, current regulations regarding the operation of state monopolies in Vietnam do not explicitly prohibit state monopolies from expanding their business scope into other areas. See Jonathan Pincus and Vu Thanh Tu Anh, 'Vietnam feels the Heat' (2008) 171 *Far Eastern Economic Review* <http://www.viet-studies.info/kinhte/VN_feels_heat_FEER.htm>; Viet Nam Net, 'Tap Doan Kinh te Phan doi Siet Dac quyen [Economic Groups Object to Tightening Their Exclusive Rights]<http://vietnamnet.vn/chinhtri/2008/08/798487/>.

[121] For example, a state monopoly in electricity (for example, Vietnam Electricity Group) may invest in telecommunication by acquiring another telecom firm or entering a joint venture arrangement with another, then merging or taking over the distribution chain (vertical). The state monopoly in question can also undertake acquisition or merging with other firms or implement a joint venture in the field of banking and finance (conglomerate), where it can make the most of its monopoly position in electricity and benefit from accessing financial resources.

clear consequence of such concentration and the concentration could still cause harsh competition between state monopolies themselves.[122] By undertaking concentration in a vertical or conglomerate manner, a state monopoly is able to attain greater market power, which will support its current dominance in the monopolised area.[123] While the effects on competition may be controversial, advantages resulting from the concentration of the state monopoly concerned are observable.

If competition law does not regulate such kinds of concentration (horizontal and conglomerate ones), it causes difficulties for the competition authority to apply the competition law to state monopolies. It can be much harder if there is an absence of a mechanism enabling the competition authority to analyse and determine the competitive effects of the concentration. Besides, a competition authority will find it difficult to apply competition rules to a concentration among state firms in different or mixed markets by using only the market share criterion.[124]

Second, if such expansion is explicitly restricted by the law, concerns about the strengthening of the current position of state monopolies still remain. A state monopoly can undertake concentration activities vertically, thus helping to consolidate its current position. Moreover, it may also create barriers of entry, which will exclude or limit the participation of other firms in the market. In the same way, these analyses can apply to concentration cases where a state monopoly merges with non-state firms.[125] There are the

---

[122] In Vietnam, conflict between two 'giants' in Vietnam, EVN and VNPT, regarding mobile provision illustrates the competition between a state electricity monopoly engaged in the provision of telecommunication services and another state monopoly VNPT. After EVN started operating in the provision of mobile and telecommunication services, there were a number of disputes between the two giants; for example, a connection dispute and the recent debates regarding the use of electricity posts. A similar case is that between Viettel, a military based general economic group and VNPT.

[123] For example, the electricity state monopoly will reinforce its monopoly position in providing electricity if, after concentration, it controls the input sources of materials, i.e. fuel and coal importation and distribution chains. Similarly, the control of banks and financial institutions will enable that state monopoly to access financial resources. In Vietnam, the Vietnam Electricity Group has its own commercial banks and Vietnam Petro, a state monopoly in the field of importation and provision of petrol and gas, has invested in financial areas by purchasing shares in a number of commercial banks. See Cuc Quan ly Canh tranh (VCAD), *Bao cao Tap trung Kinh te tai Vietnam: Hien trang va Du bao* [Report on Economic Concentration in Vietnam: Status and Forecast] (2009) <http://www.vca.gov.vn/Modules/CMS/Upload/31/2009_3_20/bao%20cao%20tap%20trung%20kinh%20te.pdf>.

[124] This issue will be discussed in the next part of this chapter. See also VCAD, *Bao cao Tap trung Kinh te*, above n 123.

[125] For example, a state monopoly implements concentration activities such as merger, acquisition, consolidation or joint-venture with private or foreign firms.

same concerns here, because the concentration may bring about a new monopoly position, or strengthen the current position of that state monopoly, which will finally affect competition.

8.3.2 Concentration to which state monopolies are parties

When a state monopoly is merged into another firm by being acquired, or when it participates in a joint venture, there are two possible situations.

First, state monopolies generally operate in vital industries and often serve both economic and political ends.[126] Countries often lay down protective provisions aimed at restricting or prohibiting the participation of non-state firms in such areas. When concentrations occurring in state monopolised areas are restricted in this way, other firms' access to such monopolised areas is not likely to be available. As a result, the state monopolies' monopoly positions are hard to change or indeed unbreakable. This leads to consequences that are not beneficial for competition.[127] Beside, such restriction hinders the pace of international economic integration, where market access is always the demand.

Second, the preset monopolised industries in vital areas of the economy protect state interests from concentration with foreign elements. Besides, protective provisions may be laid down to prevent state firms from being controlled.[128] A concentration involving state monopolies undertaken by foreign firms will often be subject to competition analysis. Sometimes, such a concentration may be rejected on the grounds of national defence,

[126] For example the maintenance of the stability of the economy, preservation of state control in areas that are important and sensitive to national defences, security and community interests, the wish for fully capable 'national champions', for competing effectively with foreign firms, etc.

[127] This will not promote economic efficiency through 'healthy' competition and will limit opportunities for state monopolies in attracting financial and technological investment and human resources to be able to participate more actively in international economic integration. See VCAD, *Bao cao Tap trung Kinh te*, above n 123.

[128] A number of restrictions can be seen, such as the restriction of foreign ownership in a firm, the restraints in the contribution of capital or the limited amount of shares that can be purchased by foreign investors or the restriction against participating in the managing board by a foreign invested firm and the requirements for technology licensing. See Theodore H Moran, *Foreign Direct Investment and Development: The New Policy Agenda for Developing Countries and Economies in Transition* (Peterson Institute for International Economics, 1998) 117-134.

security or simply for political reasons.[129] While this may secure state investment from not being acquired, the maintenance of the monopoly position of state monopolies can be the cause of anti-competitive practices, such as abuse of the monopoly position or anti-competitive agreements.

However, the restriction or prevention of foreign firms from participating in monopoly fields may become ineffective, if a concentration is considered a direct investment form.[130] Foreign firms can easily undertake this by merging, buying shares or making sufficient capital contribution to take over the control of the firm currently operating on the market. After that, they can officially engage in competition with state monopolies.[131] Besides, a concentration can also be undertaken in the form of indirect investment by private and foreign financial investment funds into state monopoly firms. As a result, they can manage, be involved in the operation or influence the decision making of a state monopoly. Therefore, if this kind of indirect investment does not fall within the category of concentration, it would raise the concern that important domains run by state monopolies can be taken control of by foreign investors, by investing in these state monopolies, thus taking the control.

In conclusion, it is clear that state monopolies can be involved in any form of concentration. That gives rise to competition concerns about the achievement of market

---

[129] The acquisition of a Chinese beverage firm by Coca – Cola is a good example Nicholas H.Cramer, 'Not So Fast: The Competition System Created by the *PRC Anti-Monopoly Law* and Recent Developments in its Implementation' (2009) <http://ssrn.com/abstract=1552266>; Cleary Gottlieb website, *Coca-Cola/Huiyuan: First Chinese Prohibition Decision under New Merger Control* <http://www.cgsh.com/files/News/ddcb6c55-e703-4266-9cce-1de9b2fd42d3/Presentation/NewsAttachment/fc2d112f-6ef2-4b5d-9918-9564c7b4f14f/CGSH%20Alert%20-%20Coca-ColaHuiyuan%20-%20First%20Chinese%20Prohibition%20%E2%80%A6.pdf>. Another one is the recent controversy over the purchase of shares of the Australian mineral giant Rio Tinto. See Peter Drysdale and Christopher Findlay, 'Chinese Foreign Direct Investment in Australia: Policy Issues for the Resource Sector' (2009) 2 (2) *China Economic Journal* 133-158.

[130] Fabienne Fortanier, 'Foreign Direct Investment and Host Country Economic Growth: Does the Investor's Country of Origin Play a Role?'(2007) 16 (2) *Transnational Corporations* <http://www.unctad.org/en/docs/iteiit20072a2_en.pdf>.

[131] For example, Jetstar Airline of Australia bought 30 per cent of the contribution capital of Vietnam's Pacific Airlines, which was sufficient for it to run a newly formed Jetstar Pacific airliner and then officially participated in the provision of local flights, which used to be the monopoly field of Vietnam Airlines. See VTV Website, 'Ra Mat Hang Hang khong Gia Re Jetstar Pacific' (2008) <http://www.vtv.vn/VN/TrangChu/TinTuc/CKX/2008/5/24/159028/>; Du Lich Online, 'Jetstar Pacific: Hang Hang khong Gia Re Dau tien Cua Viet Nam' (2008) <http://www.baodulich.net.vn/Story/vn/tieudiem/theodongsukien/tieudiem/2008/4/1848.html>; VCAD, *Bao cao Tap trung Kinh te*, above n 123, 14.

power or the possibility of abuses of it, since both are harmful to competition. Unlike in the case of anti-competitive behaviour of firms in the market, concentration is closely related to state attitudes towards state monopolies and may be influenced by factors other than law matters, such as the need for powerful and capable firms, or the interference of sectoral regulators. The application of competition law, therefore, appears to be more complicated. This may require a comprehensive mechanism for the evaluation of pro- and anti-competitive effects based on a number of assessments. An independent and capable competition authority is important in this regard.

8.4 Control of concentration under Vietnam's *Competition Law*

8.4.1 The concept of 'control of concentration' in Vietnam

8.4.1.1 Concept of 'concentration'

As Vietnam's *Competition Law 2004* does not provide an explicit definition, the concept of 'concentration' (economic concentration - *Tap trung Kinh te* in Vietnamese) is discussed by scholars[132] according to three basic approaches:[133]

First, as associated with the formation and change of market structure, 'concentration' is regarded as a process by which the number of competing independent firms in the market is reduced, through mergers (in a broad sense), or through internal growth of the firms due to the expansion of their production capacity.[134] According to this approach, as the number of firms participating in the market through mergers or consolidations is reduced, it breaks down the current balance of the market structure. This is a broader form of 'merger', including merger itself, consolidation, acquisition, or joint ventures between firms in the market.

Besides clarifying the causes and consequences of concentration on market structure, this approach appears to have some limitations. First, it does not further explain how competition is affected. The enlargement of a firm in the market in terms of its capital and capacity, to some extent, should be considered as beneficial to the economy, rather than

[132] See, eg, Nguyen Nhu Phat, Nguyen Ngoc Son, Dang Vu Huan, Le Viet Thai.

[133] VCAD, *Bao cao Tap trung Kinh te*, above n 123, 14.

[134] Le Viet Thai, 'Chuyen de ve Hanh vi Tap trung Kinh te': De tai Nghien cuu ve The che Canh tranh trong Dieu kien Phat trien Kinh te Thi truong tai Vietnam' [Study on Economic Concentration Activities – Research on Competition Institution in the Context of Developing a Market Economy in Vietnam] (2005).

merely detrimental. Second, it does not properly clarify concentration in the case of joint ventures because in this case the number of firms participating in the market will not be reduced. On the contrary, there is an increase of firms in the market due to the emergence of a new firm. Third, it seems to consider that the increase of 'capital accumulation' is a part of the 'concentration' concept.[135] Thus, a concentration is the result of either internal growth[136] or external growth of the firm concerned.[137]

Second, as a form of behaviour in the market, 'concentration' (also known as the capital concentration) is interpreted as the amplification of capitalists, resulting from the merger of many capitalists, or when one capitalist is taken over by another.[138] This approach reveals the nature (the increase of capitalists) and the method (through the consolidation of capitalists or absorption of a capitalist by another) of the 'concentration' concept.[139] However, specific forms of concentration, or the particular methods leading to concentration, are not identified. Besides, it does not clarify the effects on competition or the causative relationship between the growth of capitalists and the competitive environment in the market.

Third, from legal perspective, 'concentration' is defined as the behaviour of firms, which is stipulated in the *Competition Law 2004*. This involves two interpretations. Concentration is legally viewed as market behaviour of firms, categorised within the same group as two other anti-competitive behaviours. It affects the market and causes structural changes and entails the possibility of bringing adverse effects to competition and thus it needs proper control by competition law. Besides, it is inferred that only categories of behaviour prescribed in the Law are regarded as concentration. As a specific definition of 'concentration' is not provided, the effects on competition are not fully explained.

Despite these different approaches and interpretations, the concept of 'concentration' in

[135] Capital accumulation refers to a process whereby capital is increased through the accumulation of surplus value, which may need a reasonable period of time. In other words, it is the internal growth of a firm, using its own business accomplishment, with the aim of achieving a higher position on the market.

[136] Internal growth is gained by means of using surplus value created by the firm to expand its production capacity.

[137] External growth of the firm is gained by conducting behaviour in the market so as to enlarge the economies of scale and scope of the firm concerned.

[138] Vien Ngon ngu hoc, *Tu dien Tieng Viet* [A Dictionary of Vietnamese] (Social Sciences, 1994) 870; Le Danh Vinh, Hoang Xuan Bac, Nguyen Ngoc Son, *Giao trinh Luat Canh Tranh* [Textbook on Competition Law] (Hochiminh City National University Publishing House, 2010) 148.

[139] VCAD, *Bao cao Tap trung Kinh te*, above n 123, 14

Vietnam generally entails three key elements:[140]

- Subjects of concentration are entities (firms) participating in the market. These firms can operate in the same or different relevant markets.

- Concentration encompasses a wide range of activities of these firms in the market, including merger, consolidation, acquisition and joint ventures.[141]

- Concentration affects market structure and entails more negative effects on competition than positive ones.[142] Concentration lessens the number of firms participating in the market and affects the competition relationship between the firms participating in the concentration and others which do not engage in this process.

8.4.1.2 'Control of concentration' concept

Despite the lack of a complete definition of 'concentration', effects on competition are uniformly understood in Vietnam. A concentration generally brings about a significant change in competition and structure in the market. It creates a firm (group of firms) with a majority of market share in the relevant market, facing other firms with marginal presence and enables the firm to abuse its market dominance. Thus, concentration is a practice with the potential to hinder and distort competition considerably.[143] Hence, state intervention

[140] Ibid; Nguyen Ngoc Son, 'Kiem soat Tap trung Kinh te theo Phap luat Canh tranh va Van de cua Vietnam' (2008) *Legislative Studies* [Nghien cuu Lap phap] <http://www.nclp.org.vn/chinh_sach/kiem-soat-tap-trung-kinh-te-theo-phap-luat-canh-tranh-va-van-111e-cua-viet-nam/?searchterm=%22lu%E1%BA%ADt%20c%E1%BA%A1nh%20tranh%22>; Vinh, Bac and Son, *Giao trinh Luat Canh Tranh,* above n 138, 148-150.

[141] These activities have the nature of a process by which firms accumulate actively their own economic forces such as capital, labour, technology, management skills etc., by means of coordinating with others in order to form a unified entity or a closely linked group of firms (corporations or economic groups). This viewpoint helps to explain the fundamental difference between concentration and capitalist accumulation according to orthodox economic theory. See Vinh, Bac and Son, *Giao trinh Luat Canh Tranh,* above n 138, 148-150.

[142] Son, 'Kiem soat Tap trung Kinh te', above n 140.

[143] Ibid.

in the concentration process is viewed as necessary.[144] In this regard, there are some particular concerns.

First, the question of how to control 'concentration' is closely related to the question of determining to what extent the intervention of the state is suitable. There can be two opposing interpretations. On the one hand, a tough intervention by the state in the development of firms in the market will have negative rather than positive effects. In particular, the strict interference of competition authorities in that process could eliminate the ability to accumulate capital in order to attain higher economic efficiency. Additionally, it will face competition authorities with the burden of an added workload in dealing with documents regarding concentration. On the other hand, a loose control by the competition authorities over the concentration process could result in a situation where competition is distorted and there are more possibilities for large firms with market power, including foreign firms, to take advantage of the concentration to corner and dominate the market.

Thus, the issue of how to control concentration relies on the state's attitude towards concentration – how the state will 'treat' this situation. Such a decision is often taken through a mechanism to evaluate both positive and negative aspects of a concentration. Therefore, if the negative effects of concentration are taken seriously into account (the state's attitude appears strict), there should be more requirements and possibilities of prohibition during the concentration process. By contrast, if positive effects of concentration are given preference, the 'treatment' of the state will be limited to the extent that there will be control only when necessary and this aims to minimise adverse impacts on competition. The difference between the two competition regimes of the US and EU, to some extent, reflects this view.[145]

---

[144] Nguyen Nhu Phat, 'Cac Khia canh Phap ly ve Tap trung Kinh te va Vai tro cua Co quan Quan ly Canh Tranh' [Legal Aspects regarding Economic Concentration and the Role of Competition Authority] (2007) 4 *Khoa hoc Phap ly* [Legal Sciences] <http://www.hcmulaw.edu.vn/hcmulaw/index.php?option=com_content&view=article&id=322:ckcplvttkt&catid=110:ctc20074&Itemid=110>; Nguyen Nhu Phat, 'Bao cao Tong hop de tai "Xay dung The che Canh tranh Thi truong o Viet Nam"' [Overall Report of the Working Paper on the Project "Building up a Market Competition Institution in Vietnam"] (2005).

[145] In the US, stringent antitrust policy is featured in the *Sherman Act 1890* and the *Clayton Act 1914* which imposes strict prohibitions on certain acts aimed at attaining a dominant position in the market, or attempts to do this through concentration. Meanwhile, the mechanism for controlling concentration under the *EC Merger Regulation* is designed for supervising and dealing with concentration which is deemed to be harmful to competition.

Hence, to what extent the state should control concentration depends on whether the state regards concentration as positive or negative. There is a common viewpoint in Vietnam that concentration should not be considered as an entirely negative phenomenon and that therefore it does not need strong intervention by the government in the concentration process.[146]

For example, Nguyen Nhu Phat argues that concentration is an inevitable development trend in a market economy and concentration is one of the freedoms of firms. Monopoly itself (as the result of the ultimately internal growth of firms) is not harmful.[147] The state should respect and facilitate the implementation of concentration. Hence, control by the state of concentration should be undertaken in a way that will not constitute extensive intervention in market activities, because this may infringe on the right to do business.[148] The competition authority should only intervene in the concentration process to prevent the potential harmfulness to competition caused by firms holding a dominant/monopoly position in the market.[149]

This viewpoint is shared by other scholars,[150] and is supported by their arguments regarding the positive effects of concentration on both the firms concerned and the market in general. In summary, concentration is a shortcut way to attain market power, even though it can be traditionally undertaken by means of using internal forces (accumulation of capital), but this always takes time. Concentration enhances collaboration among firms in the market and helps to create a larger form of cooperation, having greater capacity in terms of capital, technology, trade-marks and market strategy. It also facilitates the coordination among firms with regard to management, distribution and consumption of their products, expansion of market and the sharing of opportunities and risks in the market.[151]

---

[146] See, eg, Nguyen Nhu Phat, Dang Vu Huan, Nguyen Ngoc Son.

[147] Nguyen Nhu Phat argues that enlargement through concentration is the result of the internal growth of the firm. Therefore, under no circumstances should the government prohibit or prevent such growth. See Phat, 'Cac Khia canh Phap ly ve Tap trung Kinh te', above n 144.

[148] Son, 'Kiem soat Tap trung Kinh te', above n 140.

[149] Phat, 'Cac Khia canh Phap ly ve Tap trung Kinh te', above n 144.

[150] See, eg, Nguyen Ngoc Son, Le Viet Thai, Nguyen Nhu Phat, Dang Vu Huan.

[151] See, for example, Son, 'Kiem soat Tap trung Kinh te', above n 140; Vinh, Bac and Son, *Giao trinh Luat Canh Tranh*, above n 138, 152-154.

There are a number of fundamental issues on which the concept of control of concentration in Vietnam is based. Firstly, concentration should be considered by its nature, characteristics and historical factors. As described in the previous chapters, concentration in Vietnam after Doi Moi mainly occurred in the state sector.[152] In addition, it has been carried out in the course of international economic integration and competitive pressures as a result of market opening.[153] Hence, the key influential idea throughout the process of building competition law has been to support the process of capital accumulation and concentration, which are principally undertaken within the state sector.[154]

Secondly, competition law was designed not to prohibit or control the ways to form a monopoly, but principally to eliminate adverse effects on competition and also to protect the legitimate interests of third parties, i.e. creditors and employees.[155] This approach corresponds to the practice of Vietnam's firms, which are principally small and medium, limited in capital, technology and management skills and lacking in human resources.[156] An appropriate threshold for concentration control that meets that situation should be adopted.[157]

Thirdly, forms of concentration (mergers, consolidation and joint ventures) are effective measures for restructuring inefficient and money losing firms, rather than seeking other means such as liquidation and bankruptcy. Besides, it contributes to the reorganisation of economies of scale of the entire economy and the creation of powerful domestic firms

[152] As previous chapters have explained, this derives mainly from the fact that the main goal of the state is to strengthen the leading role of the state sector as well as the dominance of state enterprises in a number of key sectors.

[153] As also mentioned in previous chapters, concentration in Vietnam was influenced by the viewpoint that supporting the formation of large state economic groups would deal effectively with competition from outsiders. See also VCAD, *Bao cao Tap trung Kinh te*, above n 123, 36.

[154] 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) 83-84; Phat, 'Cac Khia canh Phap ly ve Tap trung Kinh te', above n 144, 59; VCAD, *Bao cao Tap trung Kinh te*, above n 123, 36.

[155] This viewpoint was included in the *Enterprises Law 1999*, Article 107 and 108, which required consolidation and merger contracts to be sent to all creditors and notified to employees within fifteen (15) days from the date of its approval. These requirements are reaffirmed in the *Enterprises Law 2005* Arts 152-153. See VCAD, *Bao cao Tap trung Kinh te*, above n 123, 36.

[156] VCAD, *Bao cao Tap trung Kinh te*, above n 123, 36.

[157] This was the major debate by the National Assembly during the drafting process of the *Competition Law 2004* and the threshold for controlling concentration as 50 per cent as provided in Article 18 of the law illustrates this argument.

capable of international competition. It is also necessary for promoting the enhancement of technology and the skills of the firms.[158]

Finally, control of concentration is different from the application of competition law to other anti-competitive behaviour. In principle, competition law provides for situations that firms are prohibited from creating. Competition rules apply to violating firms to ensure a healthy competitive environment. The competition authority is authorised to handle such violations and is equipped with necessary enforcement measures. In practice, control of concentration only targets transactions of firms that can affect market structure. The purpose of concentration control is to ensure that such transactions will not bring about structural market changes and that no detrimental effects on competition may arise. The competition authority serves as the supervisor for the concentration process.[159]

In sum, the 'control of concentration' concept in Vietnam is approached from the context of competition law and is one of the functions of the competition authority. First, it does not mean the control of all concentration activities (such as acquisitions and mergers) on the market. Second, control should only deal with behaviour stipulated by the *Competition Law 2004*. Third, the competition authority should take serious note of transactions that can lead to a dominant position and the possibility of abuse of a monopoly position that will cause damage to the competitive environment.[160]

8.4.2 Key elements in Vietnam's competition law with regard to concentration control

The *Competition Law 2004* is the first legislation that officially includes mergers, consolidation, transfers of capital, assets and joint ventures under competition law. The relevant provisions in the competition law have influenced the adjustment of the corresponding provisions in the law on enterprises, investment securities, thus creating

[158] Son, 'Kiem soat Tap trung Kinh te', above n 140; Phat, 'Cac Khia canh Phap ly ve Tap trung Kinh te', above n 144; Thai, above n 134; VCAD, *Bao cao Tap trung Kinh te*, above n 123, 14.

[159] VCAD, *Bao cao Tap trung Kinh te*, above n 123, 89; Phat, 'Cac Khia canh Phap ly ve Tap trung Kinh te', above n 144.

[160] This explains why the mechanism for controlling concentration in Vietnam's *Competition Law* is much the same as that of the European Community merger control system, characterised by the active engagement of the Commission and a notification mechanism. See also Huan, above n 154, 83.

uniformity and consistency in the laws related to the control of concentration activities.[161]

8.4.2.1 Forms of concentration

'Concentration' is defined as acts of enterprises including: (i) merger of enterprises; (ii) consolidation of enterprises; (iii) acquisition of enterprises; (iv) jointventures between enterprises; and (v) other acts of concentration prescribed by law.[162] These forms of concentration are interpreted in detail in Article 17.[163]

First, unlike in other countries, concentration is not classified into horizontal, vertical and mixed forms. Rather, the Law is based on the legal expression of concentration activities.[164] Meanwhile, the use of combined market share[165] as a basis for determining the control of concentration shows that the Law will only deal with horizontal concentrations. Therefore other forms of concentration such as mergers, consolidation, acquisition and joint ventures between firms which do not operate or compete with each other in the same market are not subject to the Law, whether or not such operations are of great economic value.[166]

Second, as with the approach in dealing with the other two types of anti-competitive behaviour, 'market share' appears to be the primary criterion used to examine a

[161] VCAD, *Bao cao Tap trung Kinh te*, above n 123, 17.

[162] *Competition Law 2004* art 16.

[163] According to *Competition Law 2004* art 17, forms of concentration are interpreted as below:

> 1. *Merger of enterprises* means an act whereby one or several enterprises transfer all of its/their property, rights, obligations and legitimate interests to another enterprise and at the same time terminate the existence of the merged enterprise (s).
>
> 2. *Consolidation of enterprises* means an act whereby two or more enterprises transfer all of their property, rights, obligations and legitimate interests to form a new enterprise and, at the same time, terminate the existence of the consolidated enterprises.
>
> 3. *Acquisition of enterprises* mean an act whereby an enterprise acquires the whole or part of property of another enterprise sufficient to control or dominate all or one of the trades of the acquired enterprise.
>
> 4. *Joint venture* between enterprises means an act whereby two or more enterprises jointly contribute part of their property, rights, obligations and legitimate interests to the establishment of a new enterprise.

[164] In particular, Article 16 defines 'concentration' as the acts of enterprises and a list of legal forms of concentration is provided in Article 17. As discussed earlier in this chapter, concentration is not only carried out through the horizontal merger of firms (between firms in a market) but also by means of vertical or diagonal mergers, or through other forms such as joint ventures, acquisition of other firms (concentration among firms which do not operate in the same market).

[165] Article 3(6) states that 'combined market share means aggregate market share on the relevant market of enterprises participating in the competition restriction agreement or concentration'.

[166] Son, 'Kiem soat Tap trung Kinh te', above n 140.

concentration.[167] The market share that a firm holds after a concentration will be determined by evaluating the turnover of purchases and the sales of that firm, [168] both of which are actually quantitative measures. In fact, the market power of a firm also depends on a number of qualitative factors, such as the ability to mobilize capital and the reputation of the firm in terms of business, products, technology, management, etc. Thus, the quantitative factors may include qualitative factors.[169]

It appears that the consideration of the possible dominance of firms in a concentration is not simple. Quantitative factors (turnover) will be difficult to ascertain in the determination of market power of the firms in question. As a result, the competition authority is often expected to evaluate other qualitative factors in considering whether or not there is a possibility of structural changes occurring in the market.[170] By simply using statistical methods it is difficult to determine exactly the market power of the new firm, particularly when the firm (s) involved in a concentration operates in a number of different markets.

A heavy reliance on the 'market share' criterion in concentration cases under Vietnam's competition law is explained as follows. It is important in the sense that it sets up fixed thresholds by which the competition authority can easily determine whether or not a certain concentration is prohibited. Hence, it lessens the workload for the competition authority in dealing with a huge and complicated number of technical issues involving the assessment. It helps the firms participating in the market to self-evaluate their conditions before undertaking a transaction involving concentration and to implement the notification as required by law. For these reasons, this choice seems to be suitable for Vietnamese conditions, as the competition authority is faced with many limitations in terms of staff, capacity and experience.

---

[167] VCAD, *Bao cao Tap trung Kinh te*, above n 123, 22. According to Nguyen Nhu Phat, 'relevant market' is an important concept in competition law which will be used by the competition authority to identify current competitors and specifically, the real market power of a firm in competition. See Phat, 'Cac Khia canh Phap ly ve Tap trung Kinh te', above n 144.

[168] The determination of turnover is stipulated in the *Competition Law 2004* and is interpreted by the *Decree No. 116 116/2005/NĐ-CP* art 9-13.

[169] Phat, 'Cac Khia canh Phap ly ve Tap trung Kinh te', above n 144.

[170] For example, when a firm operating in one industry (coal) purchases (conducts an acquisition of) another firm operating in the steel industry, the total turnover of the firm after acquisition will include the turnover in both the coal and steel industries.

Third, the definition of a merger is consistent with the *Enterprise Law 2005* and also similar to the concept of merger in most countries.[171] After a merger, the former firms will no longer exist and their business name will be removed from the business registration files. The new firm will receive all properties, rights, obligations and interests of the former. The same applies in the case of consolidation. After business registration is completed, firms participating in the consolidation will no longer exist and the new firm resulting from the consolidation will have transferred to it all the rights and legitimate interests of the consolidated firms.

Fourth, from a legal perspective acquisition is a form of concentration by means of setting up an ownership relationship between the firm making the acquisition and the firm being acquired. Hence, acquisition is not regarded as a process of unification of the organizations of these firms. After acquisition, the firm holding ownership may decide whether it will merge the two firms together or not. Unlike in a merger, where the unification of the organization of a firm is the consequence of a merger in an acquisition, the acquiring of a firm is a perquisite for the merger. Acquisition will terminate competition in the same market between the firms participating in the acquisition.

It can be argued that if a firm acquires another firm as a whole, the acquisition will have the nature of a merger.[172] In the case where the firm acquires only a part of the acquired firm by means of purchasing sufficient assets or shares to control and influence the operation of the acquired firm,[173] if the participating firms contribute capital and assets in order to form a new firm, it is considered as a form of concentration. Other forms of acquisition are not considered concentration, including the acquisition of an insurance or

[171] From the viewpoint of enterprise law, a merger is regarded as a means of reorganisation of enterprises, under which one or more firms are merged and transfer all their assets, rights, obligations and legitimate interests to the new firm (merged firm) while they simultaneously terminate their existence.

[172] Because in the acquisition the acquirer (purchasing firm) becomes the owner of the acquired firm and enjoys the rights, obligations and the legitimate interests of that firm. However, the difference between the two forms lies in whether or not the acquired firm terminates its legal existence. According to Nguyen Nhu Phat, this will depend on the wish of the acquirer. If the acquired firm no longer exists, this case is regarded as a merger. Conversely, if the acquired firm continues its operation as an independent legal entity, it becomes a subsidiary firm in the economic group of which the acquirer is the owner. See Phat, 'Cac Khia canh Phap ly ve Tap trung Kinh te', above n 144.

[173] This case is regarded as a form of capital contribution to another firm and thus it will not be considered as a concentration. This is also different from joint ventures.

credit institution.[174]

With regard to control over the acquired firm, the *Enterprises Law 2005* does not use the concept 'the right of controlling or governing another firm', rather, 'the holding – subsidiary relationship' is stipulated as meaning that the ownership relationship occurred as the result of acquisition or contribution of capital.[175] Although the legal meaning of the provisions in these two laws is similar, the basis on which to determine the control or influence of the acquirer as well as its practical significance is different. While the *Enterprise Law 2005* uses the amount of capital or shares owned by the acquiring firm, or the degree to which the acquiring firm can decide on issues relating to management and administration, to determine the control or influence of the acquirer, the *Competition Law 2004* applies the value of the voting rights.[176] This approach is similar to that of the *ECMR*. Besides, the *Enterprise Law 2005* also uses the right to make decisions to amend the charter as one of the factors to establish the relationship between the holding firm and its subsidiaries. The *Competition Law 2004*, on the other hand, uses the right to influence financial policy and the operations of the acquired firms as a basis to determine the control or influence of the acquiring firm.

Fifth, forming a joint venture is regarded as an act whereby two or more enterprises jointly contribute part of their property, rights, obligations and legitimate interests to the

[174] According to Article 35 of the *Decree No. 116/2005/ND-CP*, 'If an insurance enterprise or a credit institution acquires another enterprise with the aim of re-selling it within a maximum period of one year, such acquisition shall not be deemed to be a concentration if the acquiring enterprise does not exercise the right to control or govern the acquired enterprise or only exercises such right in a compulsory context in order to achieve the aim of re-sale'.

[175] According to Article 4(15), a company is entrusted as a holding company if it:

a) owns more than 50 per cent of total registered capital or total number of ordinary shares issued by another company; or

b) is competent to appoint or dismiss directly or indirectly the majority or all members of the Member's Council, the Director or the general director of another company; or

c) has the right to amend or supplement the charter of another company.

[176] Article 34 of the *Decree No. 116/2005/ND-CP* stipulates that:

> Controlling or governing all or one of the trades of another enterprise means an enterprise (*controlling enterprise*) obtains ownership of the assets of another enterprise (*controlled enterprise*) sufficient to give the controlling enterprise fifty (50) per cent of the voting rights at the general meeting of shareholders, the board of management or other levels sufficient according to law or the charter of the controlled enterprise to enable the controlling enterprise to govern the financial policies and operations of the controlled enterprise aimed at receiving economic benefit from the business operations of the controlled enterprise.

establishment of a new enterprise.[177] Therefore, apart from being regulated by competition law, joint ventures are governed by provisions regarding business registration, investment registration and evaluation in these laws. Additionally, as the *Competition Law 2004* does not mention the element of 'nationality' of the parties in a joint-venture enterprise, it is understood that joint ventures can only be established between Vietnamese parties, or between one or more Vietnamese parties and one or more foreign ones, provided that a new firms is created after the joint venture is established.

Sixth, the law provides that some other acts of concentration which are not currently covered in the Law can later be regulated by competition law provisions.[178] In fact, the provision mentioned in Article 16(5) aims to control concentration activities occurring in the securities market.[179] This reflects the viewpoint held during the formulation of competition law that the intention of concentration is to control and influence other firms so that this can be done in ways that are currently not stipulated in the Law, for example through the securities market.[180]

Seventh, the current thresholds for concentration control are intended to demonstrate the existing concentration ratio in Vietnam's market and to reflect the extent to which a concentration can cause adverse effects on competition, as well as corresponding to the size of Vietnamese firms. A concentration would be allowed if the total market share of the participating firms does not exceed 30 per cent. Conversely, concentrations in which total market share is over 50 per cent will be strictly prohibited by the law. In both cases corresponding provisions of the law will be applied without taking into account any anti-competitive or pro-competitive effects they may have. The notification obligation is simply a necessary step by which the competition authority can decide on possible

[177] See Article 17(4) of the *Competition Law 2004*. Joint-venture as a form of concentration provided in the *Competition Law* has the same nature as the act of contribution of capital stipulated in a number of laws, including *the Enterprises Law, Investment Law, Cooperatives Law and Law on Credit Institution.*

[178] According to Article 16(5), other forms of concentration stipulated by law can be subject to competition law. This provision reflects the popular method of building up the law in Vietnam. The law is often enacted based principally on a listing of behaviour, while reserving an opening clause which allows modifications and supplements later.

[179] A practical reason is that at the time the Law was enacted the *Securities Law 2006* was under preparation.

[180] This problem is illustrated by the provisions of the *Securities Law 2006* regarding limiting the amount of capital contribution in a certain firm, or limiting the participation of investors in each listing section, as well as obligations to announce principal shareholders of the issuer to the State Securities Commission. See further *Securities Law 2006* arts 29-32-69. See Phat, 'Cac Khia canh Phap ly ve Tap trung Kinh te', above n 144, 53-54.

measures to be taken. This may lead to a situation in which a concentration would create a firm or a group of firms having a dominant position, or the possibility of causing substantive restraint of competition, while the market shares of participating firms in this concentration do not exceed 50 per cent, thus escaping from the application of the law.[181]

Competition laws of countries, however, often set up a mechanism for analysis of the competitive effects of a merger (concentration).[182] This normally consists of two stages, in which the first stage is to determine whether the merger in question raises any competitive concerns and the second stage proceeds if the possibility of competitive harm is identified and will include a more complete examination.[183] This mechanism is intended to identify whether the merger concerned will 'substantially harm competition',[184] and thus the merger may be declared as unlawful and should be blocked by the competition authority. The competition authority is authorized to interpret and employ standard for analysis of this concept and this is usually provided by guidelines for analysing mergers, particularly horizontal mergers.[185] This can be seen in the UNCTAD Model Law on Competition,[186] the practices of the US,[187] and the EU.[188]

---

[181] Le Hoang Oanh, *Binh luan Khoa hoc Luat Canh tranh* [Critical Comments on the Law on Competition] (National Political Publishing House, 2005) 87.

[182] This test is often called 'the substantive lessening of competition test- SLC'.

[183] OECD, *A Framework,* above n 31, 45.

[184] There are several similar concepts that are being used in the competition laws of other countries, such as 'substantial lessening of competition' as used by the *Australian Merger Guidelines 1999*, or 'significantly impede effective competition', as stipulated in the *ECMR*.

[185] OECD, *A Framework,* above n 31, 46.

[186] In the Model Law of Competition proposed by the UNTACD, the 'market share' criterion is not mentioned as the basis for considering whether or not a concentration is prohibited. Instead, particular forms of concentration such as mergers, takeovers, joint ventures or other acquisitions of control, including interlocking directorships, whether of a horizontal, vertical or conglomerate nature, should be prohibited, relying on the determination of whether or not the proposed transaction substantially increases the ability to exercise market power (e.g. to give the ability to a firm or group of firms acting jointly to profitably maintain prices above competitive levels for a significant period of time); and the resultant market share in the country, or any substantial part of it, relating to any product or service, will result in a dominant firm or in a significant reduction of competition in a market dominated by very few firms. See UNCTAD, *Model Law*, above n 8, 49.

[187] For example, in the five-step process laid down in the US Department of Justice and Federal Trade Commission *Horizontal Merger Guidelines 1997*, the fundamental criteria in the assessment of market definition and description are : the identification of firms that participate in the relevant market and their market shares; the identification of potential adverse effects that may arise from the merger concerned; the analysis of the simplicity of market entry; and the identification of efficiencies that might arise. See the US Department of Justice and Federal Trade Commission *Horizontal Merger Guidelines 1997* <http://www.justice.gov/atr/public/guidelines/hmg.htm>.

Under *ECMR*, it is required that all concentrations having a Community dimension to be assessed to determine whether or not they are compatible with the common market.[189] The Commission will consider a number of other factors, including the need to ensure that effective competition is maintained and developed in the common market; the position of the undertaking concerned in the market, their economic and financial strength and the options available to suppliers and consumers.[190] Moreover, the definition of a significant impediment to effective competition will be extended to cover joint ventures; therefore a joint-venture will be caught by the *ECMR* if the result of the assessment proves that such a joint venture will significantly impede effective competition within the common market.[191]

In general, the assessment will elucidate the possible effects on competition and whether the concentration in question will be likely to bring about two anti-competitive conducts, namely abuse of dominance and restrictive agreements. Two categories of anti-competitive effects are often seriously taken into consideration: unilateral[192] and

---

[188] In the EU the control of mergers aims to prevent increases in market power which significantly impede effective competition. An assessment of merger cases will focus on the impact of the merger on future competition and therefore it involves a market forecast of how competition will develop. To assess the impact of a particular merger transaction, the analysis must take into account possible changes in an industry in the future, because structural changes in an industry will be likely to lead to a higher level of potential competition, or market delineation may be about to change. The assessment will be the basis for the Commission to determine whether a merger will lead to a critical increase in market power. See Faull and Nikpay, above n 70, 468.

[189] Article 2(2) reads as follows: 'a concentration which would not significantly impede effective competition in the common market or in a substantial part of it, in particular as a result of the creation or strengthening of a dominant position, shall be declared compatible with the common market'. Article 2(2) is interpreted as meaning that a concentration is declared compatible with the common market if it would not significantly impede effective competition in the market or in a substantial part of it. Such impediment is regarded as resulting in a creation or strengthening of a dominant position of the undertakings after concentration is performed. The consideration of the impediment impact of a concentration must rely on a number of indicators where market share is regarded as the main, but is not the only indicator of significantly impeding effective competition. See Lennart Ritter and Braun W David, *European Competition Law: A Practitioner's Guide* (Kluwer Law International, 2005) 545.

[190] *ECMR* art 2 (1)(a)-(b).

[191] This is an innovation of the *ECMR* and replaces the old approach under Regulation 4064/89/EEC, in which the factor 'creation or strengthening of a dominant position that would impede competition in the EC' was seriously focused on. See Slot and Johnson, above n 58, 167.

[192] OECD, *A Framework*, above n 31, 42.

coordinated effects.[193] These effects are often found in horizontal mergers.

From these practices, it is clear that the analysis of effects on competition plays a central role in the control of the concentration process. Such a complete assessment of effects on competition helps to identify accurately which concentrations must be prohibited and which might be allowed under proper supervision by the competition authority, based on an analysis of the competitive effects of the concentration concerned. However, this presents the competition authority with difficulties in terms of organization and the legality of its assessments, as well as being time consuming.

Such an assessment mechanism is necessary for Vietnam in dealing with any concentrations having foreign elements (cross-border mergers). The possibility of gaining market share in Vietnam by means of concentration conducted by foreign firms will be hard to detect if the competition authority merely relies on the criterion of combined market share. In this case, this criterion may not be applicable if the combined market share of acquirers is not over 50 per cent, or the concentration is undertaken by the legal presence in Vietnam of an overseas parent company which market share in Vietnam of this foreign firm's subsidiary is small. The application of the 'market share' criterion also does not cover cases where concentration is implemented by means of obtaining a substantial number of voting rights which are sufficient to take control over the firms (through acquisition and joint ventures). In this regard, an assessment of impacts on effective competition will be important for the competition authority to exercise control over concentration and prevent anti-competitive conducts in the future.

8.4.2.2 Levels of concentration control

The control of concentration is designed in the law on competition in an escalating manner, based on prescribed thresholds. Thus concentration can be divided into the following cases:

[193] A precise conclusion about such effects will help to prevent anti-competitive conducts to be undertaken in the future. For example, in the *United States Horizontal Merger Guidelines* (US Guidelines), the notion 'unilateral effects' is discussed as below:

> A merger may diminish competition even if it does not lead to increased likelihood of successful co-ordinated interaction, because merging firms may find it profitable to alter their behaviour unilaterally following the acquisition by elevating price and suppressing output. Unilateral competitive effects can arise in a variety of different settings. In each setting, particular other factors describing the relevant market affect the likelihood of unilateral competitive effects. The settings differ by the primary characteristics that distinguish firms and shape the nature of their competition.

- **Completely free concentration (Article 20 (1))** There are two cases:

(i) All concentration in which the total combined market share of participating firms is less than 30 per cent will not be prohibited and no obligation to notify the competition authority is required.

(ii) Any concentration in which the total combined market share of participating firms is between 30 and 50 per cent will not be prohibited and no obligation to notify the competition authority is required, provided that the firms after implementing concentration are still of small or medium size, as prescribed by law.

These provisions are constructed on the grounds that when the total combined market share of participating firms concerned constitutes only 30 per cent of the relevant market, this concentration does not enable the firm in question to have a dominant position after the concentration. In this case a merger, consolidation, acquisition or joint venture is simply regarded as a means for restructuring a business or regular capital investment. Hence, it does not contain threats to the competitive environment.

- **Concentration subject to notification and approval**

This case involves concentration which is not prohibited by default, but may be approved by the competition authority, after completing the notification procedure.[194]

In this case the competition authority must reply in writing to inform the submitting firms whether the concentration falls into one of the following categories:

a) The concentration concerned does not fall within the prohibited category; or

b) The economic concentration concerned is prohibited under the provisions of

[194] Pursuant to Article 20(1), if participating firms in a concentration have a combined market share of between 30 and 50 per cent in the relevant market, their lawful representatives must notify the competition authority before implementing concentration. Failure to comply with this obligation may lead to a fine imposed on the firm which is from 1 to 3 per cent of the total turnover of the previous financial year before the year of committing the breach of this obligation by participating firms. See Article 29 of the *Decree No. 120/2005/ND-CP* on 30/09/2005 on handling violations in competition.

Article 18 of the Law.[195] In this case, the reason for such prohibition must be clearly stated in the written reply.

A concentration must be rejected only if the combined market share of participating firms is over 50 per cent in the relevant market, or they are not categorized as small and medium sized firms.[196] This provision gives rise to the concern that it may not be implemented and will be a reason for the firm concerned to not comply with the notification obligation if it belongs to the category stipulated in Article 20(1). When the threshold depends on the market share of the firm in the relevant market, it is the responsibility of the firm concerned to determine whether or not its market share in the relevant market is more than 50 per cent, which will be costly and time consuming.

- **Concentration subject to exemption**

There are two specific cases in which exemptions can be given within a time limit. According to Article 19, a prohibited concentration may be considered for exemption in the following cases:

(1) One or more of the participants in the economic concentration is/are in danger of dissolution or bankruptcy.[197]

(2) The economic concentration has an effect of expanding exports or contributing to socio-economic development, technical and technological advances.[198]

In both cases, decisions to grant exemption or disapprove an exemption dossier must be in writing and within a time limit. In this case, the procedure for applying for exemptions will be followed, replacing that for notification. This is also similar to the procedure for

[195] Article 18.- Prohibited cases of economic concentration

> Economic concentration shall be prohibited if the combined market share of enterprises participating in economic concentration accounts for over 50 per cent on the relevant market, except for cases specified in Article 19 of this Law or the case where enterprises, after implementing economic concentration, are still of small or medium size as prescribed by law.

[196] According to *Decree No. 90/2001/NĐ-CP* on 23/11/2001, small and medium sized enterprises (SMEs) 'are independent business entities, which have registered their business in accordance with prevailing laws, with registered capital of not more than VND10bn (approx. US$637,000 as of 2005) or the annual average number of labourers of not more than 300 people'.

[197] In this case it falls within the competence of the Trade Ministry to decide and consider giving exemptions. See the *Competition Law 2004* art 25(1).

[198] The competence to consider and decide to grant exemptions is that of the Prime Minister. See *Competition Law 2004* art 25(2).

applying for exemptions in the case of anti-competitive agreements.[199]

However, the firms in question may argue on the grounds that the aim of implementing concentration is to pursue or have the effect of expanding exports or contributing to socio-economic development, technical and technological advances as prescribed in Article 19(2). The difficulty facing the competition authority in this case is that it has to verify that such concentration satisfies the criteria for granting exemption as prescribed in Article 19(2). Conversely, when refusing an application for granting exemption, the competition authority must prove that such a concentration may entail adverse effects on the competitive environment in the market where these firms are operating.[200]

- **Concentration prohibited with no exemptions**

Apart from the above cases, concentration falling into this category will be strictly prohibited, with no exemptions to be granted. Besides, all concentrations which have been implemented before will be proclaimed as invalid (complete invalidity).[201]

It is generally observed that the legal regime for the control of concentration under Vietnam's competition law is basically the same as the mechanism for controlling concentration in the EU (*ECMR*). This mechanism is built on the basis of creating a legal framework to control and prevent the impact of a concentration through the notification procedures and the role of competition agencies in the review and evaluation notification of concentration.

- **Conclusion**

In Vietnam, state economic groups and a number of state general corporations have been created in key industries. They are in the nature of concentrations and fall within the scope of the Competition Law. Even though created in a purely administrative manner, such formations give rise to the same concerns about effects on competition as other kinds of concentration. In this context, the control of concentration is considered as a measure to prevent the achievement of a monopoly position by state firms. However, this

[199] Procedures applying for exemptions are provided in the *Competition Law 2004* arts 35-38.

[200] Thai, above n 134.

[201] According to Article 18, 'economic concentration shall be prohibited if the combined market share of enterprises participating in economic concentration accounts for over 50 per cent in the relevant market …'

may be constrained for political reasons. A strict application of competition restrictions relating to concentration can be claimed to obstruct the attainment of the leading role of state monopolies and to impede their enlargement of economic scale and scope.

In terms of 'law-matter' concerns, the question therefore arises of whether, when a state monopoly conducts a concentration which enables it to operate in a different market, the Law will apply. That the Law currently does not concern itself with vertical and conglomerate concentrations leads to the fear that state monopolies may conduct businesses in different areas without being caught by the *Competition Law*. Other effects on competition can be seen, such as the possibility of excluding competitors, setting up barriers for entry or the facilitation of state monopolies conducting pricing strategies. Finally, market opening under Vietnam's WTO obligations facilitates foreign firms' ability to conduct mergers and acquisitions with Vietnamese firms, including state firms.

Chapter 9

THE ENFORCEMENT OF COMPETITION LAW WITH REGARD TO STATE MONOPOLIES

This chapter deals specifically with the enforcement of competition law concerning state monopolies. The first part provides a comparative study of competition law enforcement mechanisms.[1] As the details of such a mechanism are not the main focus of this chapter, it merely covers common issues, such as organisational matters of a competition authority, its powers, procedures and sanctions. The next part discusses the implementation of anti-monopoly provisions with regard to state monopolies. It refers to issues occurring in the competition law enforcement process, difficulties during the handling of competition cases and causes. The last part reviews Vietnam's competition law enforcement mechanism. For the purpose of this thesis, the 'enforcement issue' will be limited to 'anti-competitive behaviour' and focused on state monopolies.

9.1 An overview of competition law enforcement mechanisms

9.1.1 Competition authority

In general, a competition authority should be empowered with adequate functions and powers; its operation must be highly reliable; its independence in operating and making decisions must be guarranteed; and the conduct of its tasks must be transparent.[2] These criteria are examined in this section according to four main isues: (i) the position of the competition authority, (ii) its tasks and powers, (iii) its relations to other governmental

[1] This part of the chapter is based considerably on the contents of the UNCTAD, *Model Law on Competition* (TD/RBP/CONF.5/7/Rev.3, United Nations, 2007) <http://www.unctad.org/en/docs/tdrbpconf5d7rev3_en.pdf> and UNCTAD, *Model Law on Competition – Chapter X* (2010) <http://www.unctad.org/en/docs/tdrbpconf7L10_en.pdf>.

[2] Francine Matte, Speech given at the Workshop on Competition Authority organized by Vietnam's Ministry of Trade in conjuction with the Canadian Policy Implementation Assistance Project in Hanoi 8 - 9/7/2003. These criteria are commonly mentioned in documents of OECD and UNCTAD regarding optimal design of a competition authority.

bodies including sectoral regulators and issues relating to its influence and independence.[3]

9.1.1.1 Organizational issues of competition authorities

In most countries, the competition authority is a governmental agency.[4] However, the structural setting varies. It may be designed as an independent ministry,[5] a ministerial organ which is fully independent from other agencies and ministries,[6] a body placed directly under the Government[7] or Prime Minister,[8] or a body legally independent from and outside the executive branch of government.[9] A competition authority may be established under the Paliarment. In general, it is set up by the appointment and nomination of the Parliarment.[10]

---

[3] This structure is based extensively on an OECD report regarding optimal design of a competition agency and Commentaries on UNCTAD *Model Law on Competition* of 2007 and 2010. See OECD, *Optimal Design of a Competition Agency* (2003) <http://www.oecd.org/dataoecd/58/29/2485827.pdf >; UNCTAD, *Model Law*, above n 1; UNCTAD, *Model Law on Competition – Chapter X*, above n 1.

[4] UNCTAD, *Model Law*, above n 1, 66.

[5] For example, in Russia, the Ministry of the Russian Federation for Antimonopoly Policy and Support of Entrepreneurship (MAP Russia) was established in 1998 and it was succeeded by the Federal Antimonopoly Service (FAS Russia) in 2004.

[6] For example, Brazil has a similar body in charge of antitrust law enforcement, which is an office belonging to the Ministry of Justice. Similarly, the Canadian Competition Bureau is a ministerial organ under the Ministry of Industry. In Mexico, the Federal Competition Commission is an administrative entity of the Ministry of Economy. The Norwegian Competition Authority is structured as a 'subordinated body to the Ministry of Labour and Government Administration'.

[7] For example, the Antimonopoly Committee of Ukraine is subordinate to the President of Ukraine and accountable to the Supreme Rada (Parliament) of Ukraine under the Antimonopoly Committee of Ukraine 1993. This model can also be seen in Germany, Jamaica and the Netherlands, Cameroon and Zambia.

[8] The Japan Fair Trade Commission (JFTC) See <http://www.jftc.go.jp/e-page/aboutjftc/role/role_1.pdf>; The Korea Fair Trade Commission (KFTC) is a ministerial-level central administrative organization under the authority of the Prime Minister and also functions as a quasi-judiciary body. <http://eng.ftc.go.kr/about/overview.jsp>.

[9] Examples for this are the Australian Competition and Consumer Commission. See Australian Competition and Consumer Commission <http://www.accc.gov.au/content/index.phtml/itemId/54165> and Switzeland, New Zealand, Romania and South Africa.

[10] For example, in the United States the Antitrust Division is an agency belonging to the Department of Justice. The Antitrust Division has the function to implement the *Sherman Act* and *Clayton Act*. The Division is headed by an Assistant Attorney General who is appointed by the Senate by the President's nomination. See Mark R Joelson, *An International Antitrust Primer: A Guide to the Operation of United States, European Union and Other Key Competition Laws in the Global Economy* (Kluwer Law International, 3rd ed, 2006) 31.

A similar body is found in the Italian Antitrust Authority which was established by Law No. 287 of 10 October 1990 (The *Competition and Fair Trading Act*). The Authority is composed of several members who take their decisions by majority vote. It has a Chairman and four Members appointed jointly by the Presidents of the Senate and the Chamber of Deputies. See Autorita' Garante Della Concorrenza E Del Mercato <http://www.agcm.it/eng/index.htm>.

The reason why a competition authority is designed as a quasi autonomous or independent governmental body is, to guarantee the independence and objectiveness of the competition law enforcers and to ensure that its activities will not be affected by other bodies and political influence.[11] A competition authority can have both the nature of a typical administrative body and of a semi-judicial one. It has powers to declare whether or not a practice is a breach of competition law and to impose a wide range of competition sanctions.

Competition authorities are empowered to enforce anti-monopoly laws (behaviour in restraint of competition) and unfair competition laws (consumer protection). Many countries design a single competition authority, but there are generally two separate sections dealing with each of these practices (a two-tier structure).[12] A few countries have set up two separate competition bodies, of which one is often responsible for investigation, giving advice and making necessary recommendations, while the other is principally in charge of handling cases.[13] In some cases, competition law enforcement consists of several agencies, based on specific kinds of behaviour,[14] with each body making its own decisions regarding the cases in question.[15]

[11] Regardless of its legal position in the state apparatus and its title, the organization of a competition authority is effective if it is structured as a quasi autonomous or independent body of the government equipped with strong judicial and administrative powers. This allows the competition authority to conduct investigations and apply sanctions while at the same time, it can provide for the possibility of recourse to a higher judicial body. See UNCTAD, *Model Law*, above n 1, 66.

[12] For example, in Australia, France, Lithuania, Hungary, New Zealand, Norway, Poland, the Russian Federation, the UK and Italy. In the United States, the FTC deals mostly with unfair competition acts while the Antitrust Division enforces the *Sherman* and the *Clayton Acts*, which are against restrictive competition behaviour. See Joelson, above n 10, 31.

[13] An example of this is the case of France and Vietnam.

[14] For example, the enforcement of the Chinese *Anti-Monopoly Law* is carried out by three agencies. The Antimonopoly Bureau of the Ministry of Commerce (MOFCOM) is in charge of merger control, the National Development and Reform Commission (NDRC) is responsible for price-related monopoly agreements and abuse of dominance. The last one, the State Administration for Industry and Commerce (SAIC) deals with other monopoly agreements and abuse of dominance that are not price-related. A similar set-up can be seen in the United States, Canada and Brazil.

[15] The best example is that of the United States, where the Antitrust Division covers cases involving criminal violations, mergers and acquisitions, while Federal Trade Commission deals only with violations concerning unfair competition and customer interests. In both cases, the Division and the FTC conduct investigations and handle cases falling within their jurisdiction. See Joelson, above n 10, 31.

In addition, an appellate tribunal may be established to deal only with appeals of decisions made by the competition authority.[16] While mostly dealing with competition law issues, they are sometimes authorized to cover other issues, such as trade remedies or regulatory supervision.[17]

9.1.1.2 Functions and powers of a competition authority

A competition authority conducts a wide range of actitivities, including the implementation of competition policy and compliance with competition law. The functions and powers of a competition authority are generally as follows:[18]

- *Making inquiries and investigations, including as a result of complaints.*

These functions apply to both anti-competitive and unfair competition behaviours. Making investigations regarding violations of competition law is the common power of a competition authority.[19] In general, it is authorised to conduct investigations either on its own initiative or as a result of complaints against a person or a firm.[20] It is able to apply a number of *interim measures* once such an investigation is commenced.[21] It also has the power to request relevant information in assisting the investigation process, including the right to call for and receive testimony and other legal measures to seek necessary infomation.[22]

---

[16] For example, the division between the UK Office of Fair Trading (OFT) and the Competition Appeals Tribunal (CAT). See Mark Furse, *Competition Law of the EC and UK* (Oxford University Press, 4th ed, 2004); Similar examples can be found in Canada and Australia.

[17] For example, Peru and the Netherlands. The Vietnam Competition Administration Department (VCAD) is an example. VCAD currently deals with competition law issues, together with a number of tasks involving international trade. Moreover, VCAD is responsible for certain other tasks, such as promoting a fair competition environment, preventing unfair competition practices and establishing a fairer competition environment for domestic industries. See *Competition Law 2004* art 49 and VCAD website <http://qlct.gov.vn/Web/AboutUs.aspx?zoneid=40&lang=en-US >.

[18] UNCTAD, *Model Law*, above n 1, 68.

[19] OECD, *Optimal Design of a Competition Agency,* above n 3.

[20] For example, Turkey, China, New Zealand, Vietnam.

[21] For example Italy, Vietnam.

[22] If such information is not fully supplied, it can deploy a search warrant or seek for a court order where applicable, in order to require that information to be furnished. In several countries, for example China, Australia, Germany, Italy, the Russian Federation and the European Community, competition investigators are empowered to enter into premises where information is believed to be located.See UNCTAD, *Model Law*, above n 1, 69.

- *Making the necessary decisions, including the imposition of sanctions, or recommending the same to a responsible minister.*

A competition authority can employ a number of necessary measures if violations are detected after finishing its investigation, i.e. the launch of competition proceedings, the call for the discontinuation of certain practices and the imposition of a number of necessary sanctions. It also fulfils other tasks involving the control of mergers and acquisitions or requests for exemptions, such as the issuance of forms and maintains a register (or registers) for notifications.[23]

- *Undertaking studies, publishing reports and providing information to the public.*

Apart from major tasks for ensuring competition law compliance, a competition authority may conduct a wide range of studies of competition issues and guarantees transparency in the implementation of the state competition policy. It may also obtain expert assistance for its own studies, or commission studies from outside.[24] Some countries require the publication of its operations and allow for access to information relevant to handled cases, except for cases where business information is not publicly released.[25]

- *Making and issuing necessary regulations*

A competition authority has competence to issue necessary regulations involving implementation matters, or guidance which is significant for its tasks.[26] Dealing with the enforcement of competition law makes it possible to identify practical problems and to suggest solutions. Besides, it is possible to propose to remove or modify regulations issued by regulatory bodies if it considers these to be hindering and obstructing the implementation of competition law.[27]

[23] For example, Czech Republic.

[24] UNCTAD, *Model Law*, above n 1, 71.

[25] For example, Brazil, Ukraine.

[26] For example, Taiwan.

[27] UNCTAD, *Model Law*, above n 1, 70. For example, Vietnam's Competition Competition Administration Department. See *Decree 06-2006-ND-CP* of the Government dated 9 January 2006 on Functions, Duties, Powers and Organizational Structure of Competition Administration Department, art 2(1), (3).

- *Preparing, amendments or reviewing legislation on restrictive competition practices or on areas of regulation and competition policy*

As a competition law enforcer, it is necessary for a competition authority to be involved with the competition law legislative procedure. In particular, it must play a key role in the drafting process or act as a main drafting body. It can also give advice for the drafting regulations dealing with competition law and conduct studies and submit appropriate proposals for the amendment of any legislation concerning competition.[28]

9.1.1.3 The independence of a competition authority

An effective enforcement of a competition mechanism is not a matter of how the competition authority is organised, but rather how it is independent from other governmental bodies and politics.[29] This ensures that law enforcement and policy decisions can only be made under competition principles.[30] This is also important when a competition authority carries out competition advocacy in the privatization of SOEs and deregulation, because it can represent the interests of the general consumers without being pressured by other interest groups.[31] To this end, competition authorities in many countries are established by a specific law which clearly provides its functions and tasks, the relationship with other government bodies and the limits of intervention by outside institutions such as interest or political groups.[32] Many countries are particularly careful with the appointment of the head of their competition authority.[33] Besides, the independence of a competition authority is guaranteed by its financial resources, which

[28] For example, Bulgaria, Portugal, Spain, Hungary.

[29] According to *Black's Law Dictionary*, 'independent is defined as: (1) not subject to the control or influence of another, (2) not associated with another (often larger) entity and (3) not dependent or contigent on something else. See *Black's Law Dictionary* (Thompson West, 8th ed, 2004).

[30] OECD, *The Objectives of Competition law and Policy and the Optimal Design of a Competition Agency, contribution from Korea* (2003) <http://www.oecd.org/dataoecd/57/12/2486747.pdf>

[31] Ibid.

[32] For example, in a specific Law, the Antimonopoly Committee of Ukraine established in 1993 defines the structure, competence, the organisation of activities and the accountability of the Antimonopoly Committee of Ukraine.

[33] It is common that the head of the competition authority is appointed by the head of government. For example, in the US five commissioners of the FTC are appointed by the President on the advice and consent of the Senate with tenure of seven years and one of them is chosen by the President as the chair. Similarly, the Antitrust Division is headed by an Assistant Attorney General who will be appointed by the Senate under the President's nomination. See Joelson, above n 10, 25.

normally come directly from the state budget or theparliament.[34]

9.1.2 Investigation and competition proceedings

This part covers the most significant issues concerning the enforcement of competition law, including the investigation process, hearings and the review of decisions.

9.1.2.1 Investigation

Investigation is required to detect whether or not a breach of competition law has been constituted and to consider what enforcement measures will be sought. An investigation is often initiated after a complaint is lodged with the competition authority against a suspected contravention to competition rules. A competition authority can also conduct investigations against a firm or within a sector itself, when it suspects there is evidence of a breach of competition law.[35] For example, the European Commission may act 'on the complaints or its own initiative' in detecting whether or not there has been a breach of Article 101 and 102 *TFEU* (ex Articles 81 and 82 *TEC*).[36] In the other case, if it sees good reasons to believe that an infringement of EU competition rules has been constituted, it then undertakes an investigation equipped with broad powers for pursuing this task.[37] Similar provisions can be found in several key competition statutes such as those of the UK[38] and Australia.[39]

---

[34] For example, Italy, South Africa. See also OECD, 'Regulatory Reform: Stock-taking of Experience with Reviews of Competition Law and Policy in OECD Countries and the Relevance of Such Experience for Developing Countries' (Global Forum on competition, CCNM/GF/COMP (2004)1, 2004), 26 <http://www.oecd.org/dataoecd/22/32/25501344.pdf>.

[35] These ways of commencing an investigation can be found in the competition legislation of many countries, such as the EU, Australia, the UK.

[36] According to Article 7(2) of the *Regulation No. 1/2003*, this coincides with the powers and procedures of national competition authorities prescribed by the national laws of the EU member. In the case where a natural or legal person files a complaint, they must include a list of required information, including details of the alleged infringement and evidence and the grounds on which a legitimate interest is claimed. In such a case, the Commission will decide on complaints within a reasonable time and then consider starting the investigation process. It will have to give the complainants its reasons and comments for rejecting the complaint. See Joelson, above n 10.

[37] In particular, they include the right to request the undertakings or associations concerned to provide all necessary information (Article 18 of the *Regulations No. 1/2003*), to interview and take statements from the persons who consent to be interviewsed (Article 19) and to conduct inspections of premises and transportation means (Article 20).

[38] In the UK, within its jurisdiction, the Office for Fair Trading (OFT) may commence an investigation with respect to anti-competitive behaviour on the basis of a complaint from a third party, or on the receipt of a communication from a cartel participant who wishes to be granted exemptions from the Leniency Program or on noticing a significant market development on its own. See Joelson, above n 10, 493.

9.1.2.2 Hearing

In competition proceedings, a hearing is necessary to provide the parties with opportunities to supplement their written submissions and present their views.[40]A hearing is important to ensure that the case is processed fairly and objectively and that thus penalties will be imposed appropriately. In the EU, based on the findings and conclusions of the Commission in the investigation, the enforcement proceeding normally takes place in the form of a hearing. The firm concerned and other persons having related interests may be requested to submit documents in written form expressing their position and views, arguments for their complaints and justifications. A hearing is often in an oral form, where all concerned parties will be present.[41] This can be seen in the Australian competition law.[42]

9.1.2.3 Appeal

To guarantee the legitimate rights of individuals and firms, most countries provide in their competition law that decisions may be appealed to a higher institution.[43] In some other

---

[39] Australian competition law uses the same methods as other legislations do. Besides, in carrying out its functions the Commission (ACCC) can also use wide powers to gather material from a person that it has reason to believe to be capable of furnishing information, producing documents or giving evidence relating to a matter that constitutes or may constitute a contravention of the *Competition and Consumer Act 2010* (Cth) – *CCA* (formerly the *Trade Practices Act 1974* (*Cth*)). This is provided in the *CCA* s 155.

[40] Joelson, above n 10, 276.

[41] In the EU, hearing procedure is set out in the Commission Regulation 773/2004 relating to the conduct of proceedings by the Commission pursuant to Articles 101 and 102 *TFEU* (ex Articles 81 and 82 *TEC*). A hearing takes place before 'a Hearing Officer in full independence'. This Officer is responsible for monitoring the hearing, fixing the time, place and duration and deciding what fresh documents may be admitted and witnesses heard. See Article 14 of the *Commission Regulation 773/204*. He/she will then report to the competent Commissioner on the hearing and will submit a draft of the conclusion to the Commission which is also made available for the addressees. Before rendering a formal decision, the Commission is required to consult the Advisory Committee on Restrictive Practices and Dominant Positions, which consists of representatives of the member state's competition authorities. See *Regulation No. 1/2003* art 14. The case may be closed with no formal decisions made, or with a decision on any one or more of a variety of substantive or procedural grounds. See Joelson, above n 10.

[42] In Australia, as stipulated in Section 8A (4) of the *CCA 2010* there is a similar process called oral examination before the Commission. An oral examination may be either conducted before the ACCC or before a member of the ACCC delegated by the Chairperson to exercise the powers of the ACCC on a specified matter to hear the evidence under Section 25 of the Act. It may take place before a member of the staff assisting the ACCC who is an SES employee and is specified in the notice ACCC, 'Section 155 of the *Trade Practices Act 1974*' (2008) 16 <http://www.accc.gov.au/content/item.phtml?itemId=263816&nodeId=bddb41d17c73039c533bde461c4615e6&fn=Section%20155%20of%20the%20TPA.pdf>.

[43] For example, Russian Federation, Lithuania.

countries, this is interpreted as a principle of law and may exist automatically in the civil, criminal or administrative procedural codes.[44] Appeals can be made to administrative courts,[45] to judicial courts[46], to an ordinary court, or to a court of arbitration.[47] In some countries, the review of a competition authority's decisions is undertaken by the Supreme Court or the High Court.[48] In others, appeals are handled by a special Court set up to perform judicial reviews to decisions involving all subject matters. Decisions relating to cartels or mergers may be reviewed by a special court or institution.[49]

9.1.2.4 Limits of investigation powers of competition authorities

The imposition of sanctions against violators and the application of deterrent measures depend greatly on how the necessary information and evidence are obtained. They can be collected from several sources; for example from the complainants, or from third parties. Those obtained from the firms committing the violations and their staffs should be the

---

[44] UNCTAD, *Model Law*, above n 1, 75.

[45] As in Lithuania, Colombia, Venezuela or Zambia.

[46] As in Ivory Coast, Panama, Switzerland, Ukraine and Spain. See UNCTAD, *Model Law*, above n 1, 75.

[47] For example, the Russian Federation.

[48] As in India, Pakistan and Peru. In Peru, appeals go directly to the Supreme Court of Justice.

[49] For example, in Austria decisions involving mergers made by the Administrative Authority will go to the Superior Cartel Court at the Supreme Court of Justice. Appeals in the European Community will be made to a specialized institution known as the Court of First Instance. This Court can be regarded as an appellate body which has jurisdiction to review all decisions taken by the Commission. See Joelson, above n 10, 277.

In the UK, the Competition Appeal Tribunal (CAT) is created under the *Enterprise Act* as an independent tribunal. The CAT was created by Section 12 and Schedule 2 to the *Enterprise Act 2002* which came into force on 1 April 2003. Not only has the CAT powers to review decisions made by the Office of Fair Trading (OFT) under the *Competition Act 1998* and its amendments, it reviews decisions made by the regulators in the telecommunications, electricity, gas, water, railways and air traffic service sectors. Besides, it functions to hear actions for damages and other monetary claims under the Competition Act 1998; to review decisions made by the Secretary of State, OFT and the Competition Commission in respect of mergers and market references, or possible references under the *Enterprise Act 2002*. See <http://www.catribunal.org.uk/242/About-the-Tribunal.html>.

In Australia, the Australian Competition Tribunal (ACT) is a quasi-judicial review body constituted under the *Competition and Consumer Act 2010* (Cth) (formerly the *Trade Practices Act 1974* (*Cth*)) <http://www.ilsac.gov.au/www/ilsac/RWPAttach.nsf/VAP/(3273BD3F76A7A5DEDAE36942A54D7D90)~AustralianCompetitionLawsystemandlegalpracticeexperience-by_Wang_Yi-Research_Paper.pdf/$file/AustralianCompetitionLawsystemandlegalpracticeexperience-by_Wang_Yi-Research_Paper.pdf >. The ACT reconsiders decisions of the Australian Competition and Consumer Commission (ACCC) regarding certain matters if a person who is not satisfied with the ACCC decisions involving authorization (whether or not granting immunity) or revocation of authorizations or notifications. It also reviews the determinations of the Commission in granting or refusing clearances for company mergers and acquisitions and also hears applications for authorisation of company mergers and acquisitions which would otherwise be prohibited under the Act. See Competition Tribunal of Commonwealth of Australia website, *Australian Competition Tribunal* <http://www.competitiontribunal.gov.au/about.html>.

most useful. A competition authority has the power to request information from the firms concerned and their staff.[50] However, a firm or person may claim privilege against self-incrimination[51] to reject providing that which the competition authority needs.

How far the firms concerned can make use of this right to reject certain questions in order to avoid being incriminated themselves is a difficult question.[52] The provision of information is often hard to compel, unless the firms and their staff members voluntarily provide such information under a leniency program in exchange for immunity or reduction of punishment.[53] In some types of violations such as the secret fixing of price cartels, the firms concerned and their staff may be the only persons that keep information which is subsequently necessary for the competition authority to detect and punish such violations.[54] In the case of state monopolies, it seems to be more difficult because staff members may hold (or have previously held) important positions in the government.

---

[50] Wouter P J Wils, 'Self-incrimination in EC Antitrust Enforcement: A Legal and Economic Analysis' (2003) 26 (4) *World Competition*: *Law and Economics Review* 567-588. Such a request can be either for handing over existing information, or providing answers to questions and can be in the form of a simple request or a decision. This is illustrated by Article 18 of the *Regulation No.1/2003* of the European Commission.

[51] The privilege against self-incrimination refers to 'the constitutional right of a person to refuse to answer questions or otherwise give testimony against him/herself which will subject him or her to an incrimination' *(Barron's Law Dictionary)*. This privilege appears mostly in criminal cases and can exist in different forms. 'Self-incrimination' is defined as:

> [a]cts or declarations either as testimony at trial or prior to trial by which one implicates himself in a crime. The Fifth Amendment, US Constitution as well as provisions in many state constitutions and laws, prohibit the government from requiring a person to be a witness against himself involuntarily or to furnish evidence against himself.

See *Black's Law Dictionary* (Thompson West, 8th ed, 2004).

This principle is also found in a number of legislations, such as in Canada, under Section 11(c) of *Charter of Rights and Freedoms 1982* which states that any person charged with an offence has the right '… [n]ot to be compelled to be a witness in proceedings against that person in respect of the offence'. In the UK, under the so called 'the right to silence', a defendantin a criminal trial may choose whether or not to give evidence in the proceedings. Further, there is no general duty to assist the police with their inquiries.

Similarly, in Australia, the privilege against self-incrimination refers to the right to silence. Although the right to silence is not constitutionally mentioned, it is recognised broadly by State and Federal Crimes Acts and Codes and is considered by the courts as an important common law right. Under this right, any criminal suspect in Australia has the right to refuse to answer questions that they might be asked by police before trial and even has the right to reject giving evidence at trial.

[52] Piet Jan Slot and Angus Johnson, *An Introduction to Competition Law* (Hart Publishing, 2006) 218.

[53] This matter falls under the application of the Leniency Program which can be found in the EU competition law and the US Antitrust law.

[54] Wils, above n 50, 2.

To deal with this question, countries may stipulate that a privilege against self-incrimination is only applicable in criminal cases; or the competition authority is entitled to conduct investigation without it being considered as contradicting this privilege; or there may be a declaration of inapplicability or an abrogation of this principle in competition law. In other words, this privilege does not apply for certain competition cases, which ensures that information regarding such cases is disclosed. In *Orkem v Commission,*[55] the ECJ disregarded self-incrimination as a principle for avoiding being investigated by the competition authority with regard to infringements of competition law.[56] However, the power of the commission in compelling information to be disclosed is limited to the extent that it should respect the right of defence of the firm concerned and will not 'compel an undertaking to provide it with answers which might involve an admission on its part of the existence of an infringement which it is incumbent upon the Commission to prove'.[57] Similar provisions can be found in the case of Australia[58] and

[55] *Orkem v Commission* (C-374/87) [1989] ECR 3343.

[56] It was held by the Court that:

> In general, the laws of the Member States grant the right not to give evidence against oneself only to a natural person charged with an offence in criminal proceedings. A comparative analysis of national law does not therefore indicate the existence of such a principle, common to the laws of the Member States, which may be relied upon by legal persons in relation to infringements in the economic sphere, in particular.

Although this may create a contradiction to Article 6 of the *European Convention on Human Rights* (ECHR), the Court also stated that 'although Article 6 of the ECHR may be relied upon by an undertaking subject to an investigation relating to competition law, no judgment of the European Court of Human Rights existing at the time indicated that this provision upholds the right not to give evidence against oneself'. Hence, the Court accepted the broad power of obtaining information of the European Commission with regard to competition cases.

It was held by the Court that:

> The Commission was allowed to use its mandatory powers of investigation to secure factual information, such as the circumstances in which meetings of producers were held or the subject matter of measures taken by the undertakings concerned and that the Commission could also require the disclosure of documents in the undertaking's possession, but that the Commission could not require an undertaking to answer questions relating to the purpose or the objectives of measures taken which would compel it to admit its participation in a violation of EC antitrust law.

See *Orkem* v *Commission* (C-374/87) [1989] ECR 3343, 30, 37-40 and *Société Générale* v *Commission* (T-34/93) [1995] ECR II-547, 75-76.

[57] *Orkem* v *Commission* (C-374/87) [1989] ECR 3343, 34-35.

the UK.[59]

9.1.3 Competition sanctions (penalties)

In general, sanctions (penalties) are made available to both individuals and firms that have committed a breach of competition law. Penalties apply principally to anti-competitive behaviour and are also available for violations of procedural rules, such as the failure to comply with orders or decisions of the competition authority and judicial body; the failure to provide information and documents as required by competition authority within a definite time or the provision of incorrect information or statements, which the firm knows, or has any reason to believe, to be false or misleading in any material sense.[60] Penalties are civil in nature, but in some jurisdictions they are criminal.[61]

---

[58] Similarly, in Australia, the *Competition and Consumer Act 2010* (Cth) – *CCA* (formerly the *Trade Practices Act 1974* (*Cth*)) enables the ACCC to avoid the privilege against self-incrimination, as mentioned in the *Pyneboard* case.The privilege against self-incrimination was abrogated to enable the information furnished, the documents produced and the evidence given to be admissible in the section 76(1) proceedings for a pecuniary penalty. See *Pyneboard Pty Ltd v TPC* (1983) 152 CLR 343.

The Act contains some provisions regarding this question. Under Section 155(7) of the *CCA*, it is provided that a person is not excused from 'furnishing information' or 'producing or permitting the inspection of a document' on the grounds that the information or document may tend to incriminate them. See *CCA* s 155(7). Section 159 also provides that a person appearing before the ACCC to give evidence or produce documents is not excused from answering a question or producing a document on the grounds that the answer to the question or the document may tend to incriminate them. See *CCA* s 159.

Finally, the refusal or failure to comply with a notice requested by the Commission can face a person with criminal prosecution action for fines or imprisonment. See *CCA* s 155(5).

However, the Commission must respect the secrecy of information and it is obligated under a number of provisions with regard to the disclosure of information. It is provided that the ACCC must not disclose protected information, except in the circumstances outlined in section 155AAA. Protected information includes information which was given to the ACCC in confidence, or obtained by the ACCC through its coercive powers under the Act, including section 155**.** The ACCC is permitted to disclose protected information in certain circumstances to designated ministers, Royal Commissions and other enforcement agencies and bodies. It is also permitted to disclose of protected information that relates to the affairs of a person where the person has consented to the disclosure of the information, protected information which is publicly available and summaries and statistics based on protected information, if they are not likely to enable the identification of a person. See *CCA* s 155AAA. See ACCC, *Summary of the Trade Practices Act 1974* (2003), 55 <http://www.accc.gov.au/content/item.phtml?itemId=792145&nodeId=7280e033d73230524e1066b6cc2fa0b5&fn=Summary+of+the+Trade+Practices+Act.pdf >.

[59] In the UK, the Office for Fair Trading is authorized to request documents or information relating to a competition case. However, this power will be limited to the extent that such requests for information will not involve an admission of infringement. See Pier Jan Slot and Angus Johnson, *An Introduction to Competition Law* (2006) 218.

[60] UNCTAD, *Model Law*, above n 1, 72.

[61] Such penalties commonly include a pecuniary fine; imprisonment which is basically applied for serious violations which are committed deliberately by a natural person; interim orders or injunctions; divesture or rescission applied in cases involving mergers and acquisitions; restitution to the customers.

The power to impose penalties in countries varies and depends on the specific kinds of penalties. The imposition of fines appears to be the most common.

9.1.3.1 Fines

The imposition of fines can be within the power of competition authorities,[62] judicial bodies[63] or both, with a clear division of powers between them.[64] A number of criteria are often taken into account when considering the imposition of fines: types of violations or the nature and extent of the violations and the loss or damage suffered;[65] the size of the violating firm;[66] whether an anti-competitive behaviour is committed wilfully or negligently;[67] a specific figure and/or the minimum of reference salary;[68] profits made as a result of the infringement;[69] and the repetition of the violations.[70] Examples of these can be found in Australia.[71]

A fine is generally imposed according to a percentage of annual turnover of the violators,[72] or to a fixed ceiling rate, as in the United States and Chile. However, such a fixed amount may become outdated, or would not ensure the effectiveness of the penalty in the case of inflation. To deal with this problem, countries such as the United States lay down the possibility of adjusting the fine corresponding to the changing situation.[73]

Australia applies different methods for imposing fines to violations contravening the provisions of Part IV of the *Competition and Consumer Act 2010* (Cth) (formerly the

---

[62] For example, in the EC, Russia Federation, Switzeland the power to impose fines is vested in the competition authority.

[63] For example, in the US and Australia, the power to impose fines is vested in the courts.

[64] UNCTAD, *Model Law*, above n 1, 72.

[65] For example, India and Portugal.

[66] For example, Australian *Competition and Consumer Act 2010 – CCA* (Cth) (formerly the *Trade Practices Act 1974* (*Cth*)) s76 (1).

[67] For example the EU and Germany.

[68] For example, Brazil, Mexico, Peru, the Russian Federation.

[69] For example, China, Germany.

[70] For example, as in Peru, a recurrence may lead to a double of fine will be imposed.

[71] For example, the Australian *CCA 2010* (Cth) s 76(1).

[72] This is employed in the EU, where a maximum fine that European Commission can impose will not exceed 10 per cent of the annual turnover. Vietnam employs the same approach. See *Competition Law 2004* art 118(1).

[73] Note 190, UNCTAD, *Model Law*, above n 1, 73.

Trade Practices Act 1974 (*Cth*)).[74] If the court can determine the value of benefits obtained by the firm concerned, or any firm related to the firm and that is reasonably attributable to the act or omission, a fine will be imposed which is not to exceed three times that value.[75] If the court cannot determine the mentioned value of that benefit, a fine can be imposed which does not exceed 10 per cent of the annual turnover of the firm concerned in the period ending with the end of the month in which the act or omission occurred.[76]

Additionally, immunity or reduction from fines can be applied under the system called Leniency Program.[77] This system applies commonly for violations involving cartels,[78] and is available in the US,[79] EU[80] and some other countries.[81] The purpose of such a leniency program is to provide an opportunity for those firms[82] to exchange immunity for a reduction in fines by confessing their anti-competitive behaviour to the competition authority at an early stage, provided they are not the principal instigator in committing

[74] In particular, for an act of omission in breach of Part IV, the maximum fine imposed on a firm can be up to 10 million Australian dollars under Section 76(1A) and a fine of up to 500,000 Australian dollars under Section 76(1B). In very serious collusion cases that have been handled recently, the fine was imposed at a higher rate, at 15 million Australian dollars. See also *ACCC v Roche Vitamins Australia Pty* (2001) ATPR 41-809. However, these fines are much less severe than those under the *Sherman Act* in the US, where a fine of up to US$ 100 million can be imposed. The maximum fine that can be imposed on a corporation which is engaged in an illegal cartel has been increased from US$ 10 million to US$100 million. See *The US Antitrust Criminal Penalty Enhancement and Reform Act* (2004) <http://www.justice.gov/atr/public/speeches/206479.htm>

[75] For example, Australian *CCA 2010* s 76(1B).

[76] For example, Australian *Competition and Consumer Act 2010* s (Cth) 76(1B).

[77] The term 'leniency' refers to immunity as well as a reduction of any fine which would otherwise have been imposed on a participant in a cartel. This is set out to provide for the firms participating in an illegal agreement the opportunity to exchange such immunity and reduction for the voluntary disclosure of information regarding the cartel which satisfies specific criteria prior to or during the investigative stage of the case.

[78] UNCTAD, *Model Law*, above n 1, 73.

[79] In the US, Leniency Policy is applied to both corporate and individual parties under the Corporate Leniency Policy and the Leniency Policy for Individuals. Leniency, according to these Policies, means not charging the firm or the individual criminally for their participation in the activity being reported.

[80] The Leniency Program was firstly issued by the *Commission Notice in 1996* and was then replaced by the current Notice issued in 2002.

[81] For example, several European countries, in line with the European competition law, have adopted leniency programs, such as Hungary, Italy and Austria.

[82] In fact, the Lenniency Program may be extended to the individuals concerned if a criminal proceeding may apply to them. See Joelson, above n 10, 32-33.

unlawful activities.[83]

9.1.3.2 Imprisonment

In those countries where criminal liability is made available for individuals who conduct anti-competitive behaviour, imprisonment is regarded as a competition penalty.[84] In this case, the power to sanction imprisonment is vested in the court.[85] However, the offenders must previously have committed clearly *per se* violations of competition law and it is only applied for particular anti-competitive behaviour.[86]

---

[83] In the US, the purpose of the Leniency Policies is to encourage people engaging in an illegal activity under antitrust laws to report this activity at an early stage to the Antitrust Division. Full leniency will be granted the corporation if the corporation concerned satisfies some of the conditions. Such conditions are that the Division has not already received information about the activity from another source; complete candor and cooperation is accorded to the Division in the matter; and the reporting corporation or individual clearly has not been the leader in, or originator of, the unlawful activity. And if a corporation qualifies for leniency, all directors, officers and employees of the corporation who admit their involvement as part of the corporate confession will be granted leniency. See Joelson, above n 10, 32-33.

In the EU, the purpose of the LeniencyProgram is to offer an incentive for firms participating in secret cartels to stop that activity and step forward to advise the authorities about the existing illegal agreements. See Joelson, above n 10, 271. According to the current Notice of the Commission on Leniency Program, firms can be eligible for full immunity from fines, or a reduction in fine may be given to them. For example, full immunity from fines will be given if the firm (a) is the first of a previously undetected cartel to provide the Commission with sufficient evidence to enable it to carry out surprise inspections on the cartel members; (b) it cooperates 'fully, on a continuous basis and expeditiously throughout the Commission's administrative procedure…' (c) it ends its involvement in the cartel immediately; and (d) it was not an instigator of the cartel who coerced the other members into participation. See the European Commission, *Notice of the Commission on Leniency Program 14 February 2002*. This appears to be the same as the US Leniency Policies.

Normally, full immunity will be granted before the commencement of investigation by the Commission, but even if such an investigation is launched, full immunity is still available if the firm coming forward is the first to provide the Commission with sufficient evidence to enable it to establish an infringement of Article 101 *TFEU* (ex Article 81 *TEC*) with respect to the suspected cartel affecting the Community. If the firms concerned does not meet the conditions for which they are eligible for full immunity, they still benefit from a reduction in fine. In this case, they must (a) provide the Commission with evidence of the suspected infringement which represents 'significant added value' with respect to the evidence already in the Commission's possession; and (b) terminate their involvement in the suspected infringement no later than when they submit the evidence. The level of reduction is determined by whether the firm concerned was the first, second or subsequent provider of evidence that constitutes significant value added. See Joelson, above n 10, 271-272.

[84] This is illustrated in the case of the United States, Canada, Argentina and the UK.

[85] For example, in Argentina and Canada the courts have the power to impose prison sentences which can be up to five years (Canada) or six years (Argentina).

[86] For example, in the US, conducts for which imprisonment may be imposed are limited to those that are manifestly anti-competitive, including price fixing, bid rigging and market allocation and criminal penalties are only provided in the *Sherman Act* for violations to Sections 1 and 2. In this case, both types of penalties can apply to the firm concerned (corporate fine) and individuals (an imprisonment of up to three years). In the UK, under the *Enterprise Act 2002*, persons who participate in certain clearly defined anti-competitive offences may be subject to criminal sanctions. See UNCTAD, *Model Law*, above n 1, 74.

9.1.3.3 Divestiture and rescission

Both of these are remedies applied principally to merger and acquisition cases and, to some extent, to unlawful contracts. Divesture applies to completed mergers and acquisitions, while rescission applies to ongoing ones.[87] In the US, divesture is a structural remedy requiring some dismantling or sale of the corporate structure or property which contributed to the continuing restraint of trade, monopolizationor acquisition and divestiture refers to a situation where the defendants are required to divest themselves of property, securities or other assets.[88] This penalty aims to de-concentrate completed mergers and acquisitions and can be applied to a part or a whole of the case concerned.[89]

9.1.3.4 Restitution to customers

Individuals and firms are also under an obligation to compensate customers' losses caused by their anti-competitive behaviour. Compensation is a civil sanction available in many countries and often decided by the competition authority or judicial body in charge of handling cases through a public mechanism (public enforcement).[90]

The second variation of competition law enforcement is that it can be pursued by persons who have suffered losses or damages as the result of an act that contravenes the competition law. This is referred to as private enforcement of competition law and is more popular in the United States.[91] The significance of the distinction is that private enforcement will only be concerned with the recovery of loss or damage actually suffered. In public enforcement, the competition authority aims to recover pecuniary

[87] For example, in the US, divesture is a structural remedy in cases of unlawful mergers and acquisitions and it could be extended to include dominant positions. Information provided by the Government of the United States, noted in UNCTAD, *Model Law*, above n 1, 107.

[88] Chesterfield Oppenheim, Weston and McCarthy, *Federal Antitrust Laws* (West Publishing, 1981) 1042; Bureau of Competition of the Federal Trade Commission, *A Study of the Commission's Divesture Process* (1999) <http://www.ftc.gov/os/1999/08/divestiture.pdf>.

[89] For example, in Mexico, the Commission can order 'partial or total de-concentration' of the merger. See Mexican *Federal Law on Economic Competition of 1992* art 35(I). In Australia, divestiture applies when a contravention of section 50 or 50A of the *Competition and Consumer Act 2010* (Cth) is found. Section 81 provides divestiture where a merger contravenes section 50 or 50A, while Section 81A is concerned with divestiture where a merger is done under clearance or authorization granted on false information.

[90] The term 'public enforcement' refers to the process by which the settlement of cases is conducted by the state organs i.e. competition authorities. This is regarded as one of the ways to enforce competition law for anti-competitive behaviour.

[91] S G Corones, *Competition Law in Australia* (Thomson Reuters, 3rd, 2004).

penalties, or to apply a remedy that will be beneficial to competition and to customers in the public interest.[92]

In this regard, some countries such as the United States, Canada and Australia lay down a similar mechanism which allows an individual, a firm or even the state on behalf of an individual to bring a suit against behaviour constituting breaches of competition law with the aim to recover damages suffered, including costs and accumulated interest. This mechanism is actually undertaken through civil proceedings conducted through appropriate judicial authorities, as in the European Community.

9.2 The enforcement of competition law for state monopolies

This part argues that the enforcement of competition laws with regard to state monopolies is complicated due to their characteristics and special position in the market and the link with the implementation of economic policies of the state.[93] Furthermore, state monopolies have generally maintained a strong link with the sectoral regulators.[94] This part discusses the usual close relationship between state monopolies and their sectoral regulators and the question of the independence of a competition authority. They are two main criteria that influence on a competition authority's effectiveness in carrying out its activities: to ensure competition law is applies fairly and objectively to all entities, it is suggested that a competition authority must be independent and have actual competence. Besides, the relationship between sectoral regulators and competition authority must be properly resolved.

9.2.1 The existence of a close relationship between state monopolies and their sectoral regulators

There generally exists a reciprocal relationship between state monopolies and their

[92] Ibid 623.

[93] State monopolies have often been operating for a long time in association with the state. They are often created by the state;assigned specific responsibilities; or are granted favourable conditions in order to hold the lead in a number of key economic sectors; to become the pillars of the economy, or simply to become natural monopolies to provide public services. See UNCTAD, *Model Law,* above n 1, 76. It is observed that even in cases where privatization has reached a high degree, which transforms most State firms into multi-ownership ones, or after privatisation, where the state will only account for a majority of shares in a number of previously state owned firms, the presence of state monopolies in the important sectors which provide 'public services' remains quite common.

[94] ICN,*Experience of Enforcement in Regulated Sectors* (2004) <http://www.internationalcompetitionnetwork.org/uploads/library/doc379.pdf>.

sectoral regulators. Because of their special position in the economy, they tend to receive much support from the state and state monopolies are often managed by ministries (state management bodies or sectoral regulators).[95] In many natural monopolies, the regulation by sectoral regulators existed before competition rules were introduced.[96] This even occurs after deregulation in a series of heavily regulated markets, such as telecommunications, energy and transport, where firms operating in these markets (mostly state monopolies) may now be subject to competition law, while at the same time continuing to be regulated by sector specific regulators.[97] The traditional bond between state monopolies and their 'former' regulators can make it difficult for a competition authority to apply competition laws.[98] These difficulties are explained in subsequent paragraphs.

Firstly, sectoral regulators are entrusted with a number of management tasks i.e. to regulate market entry and exit; to issue regulations providing or adjusting economic and technical policies relating to their fields; to carry out price setting functions and other tasks such as to reinforce privatization policies. There is an overlapping among the tasks of regulators, designed to provide regulations for access to essential facilities and the competition authority, as a competition law enforcer, in terms of disputes over access.[99] Additionally, they may be involved in the formulation of policies and drafts of laws relating to their fields. This makes it possible for them to create barriers to entry to limit the participation of other firms in competition with formerly managed state monopolies operating in their field.[100] Economic benefits gained from business operations of state

[95] To perform the function of providing technical and economic regulations, these regulators often have a unit designated to be responsible for managing and monitoring the activities of state monopolies operating in their field.

[96] OECD, 'Regulatory Reform', above n 34, 21-22.

[97] Pedro Pita Barros and Steffen Hoernig, *Sectoral Regulators and the Competition Authority: Which Relationship is Best?* (2004), 2 <http://ppbarros.fe.unl.pt/My%20Shared%20Documents/CEPR-DP4541.PDF>.

[98] For example, infrastructure is the most common setting for special competition policy regimes.Competition law was irrelevant to natural monopoly state-owned utilities until competition began to appear for some of their services or functions. See OECD, *Global Reports of the Forum on Competition* (2004) 25.

[99] OECD, 'Regulatory Reform', above n 34, 21-22.

monopolies can become an important driving force for these industries, so that such industries tend to seek all possible measures to protect themselves, regardless of the fact that they may contravene competition law.[101]

Consequently, sectoral regulators have strong incentives to favour state monopolies. Anti-competitive behaviour can be committed under the guidance of industries or in the form of a green light flashed by ministries.[102] Such guidance may also be conducted through the staff assigned by ministries to these businesses. The activitities of state monopolies aimed at blocking or restricting market entry of other firms into their domains, especially essential facilities, are thus not only motivated by their wish to strengthen their monopoly position, but also by support from their sectoral regulators.

A number of justifications for this support may be given, such as the roadmap for liberalization in these fields, the need for guaranteeing market stability, the need for public services which are better delivered by state firms, security and defense etc. Besides, the need for stability in the operation of state monopolies may also be a justification, as their services are related to the interests of society as a whole and are easily affected if they are disrupted. In these cases, the decisions of the competition authority are influenced by political will and the consideration of public interests which may be outside its purview.

---

[100] For example, discrimination may be found in regulations issued by a management agency stipulating conditions of entry to a market under their manegament field. Such regulations may contain provisions that create discrimination between state monopolies and other firms or may bring competitive advantages for these state monopolies, such as conditions for market entry that only or state monopolies or a few firms can fulfil. In such cases, the competition authority only suggest or recommend the issuing agencies to review the regulations.

[101] Alice Pham, 'The Development of Competition Law in Vietnam in the Face of Economic Reforms and Global Integration' (2006) 26 *Northwestern Journal of International Law and Business* 561.

[102] An example from Vietnam provides a good illustration of this. There was a commitment given by the representative of Ministry of Finance at a conference on Insurance activities in 2010 that the Ministry would consider imposing a minimum rate of insurance fees. This commitment was given on the grounds that competition in the insurance sector was mostly related to the reduction of insurance fees. Such an imposing of a minimum rate would prevent insurance companies from lowering their insurance fee. However, this may be a good reason for insurance companies and their association (known as Association of Insurance Companies) to set minimum fees, which may constitute a breach of competition law (fixing prices).

State monopolies may take advantage of regulations issued by their sectoral regulators,[103] through either lobbies or corruption, to gain more favorable conditions, thereby strengthening their existing monopoly positions and taking advantage of them to carry out anti-competitive behaviour.[104] The successful implementation of business goals (profits, the completion of the annual target, etc) would be a motivation for them to seek more support from the management industries. Additionally, a desire for protection from the regulators is presumable.[105] Such protection may easily arise if sectoral regulators also function in monitoring and handling anti-competitive behaviour within their fields of management (according to the competition law regulation model of some countries).

From the above analyses, it can be concluded that the handling of competition cases potentially leads to conflicts of interest between the common interests (the demand to ensure compliance with competition law) and private interests (the interests of the industries). The benefits of particular industries can even be leveled up by justifications such as the common interests of the country or the entire society must be given priority.[106] It is also presumable that the intervention of the competition authority in such cases is difficult. For example, the conclusion of violations of competition by the authority may contradict the provisions issued by sectoral regulators, even though these provisions may create the prerequisites for the conduct of anti-competitive behaviour of state monopolies. Moreover, a declaration of violations may even conflict with the the common interests justified by regulators and state monopolies.

---

[103] For example, the *Decree No. 58/2005/QD-BNN* dated 03/10/2005 of Vietnam's Ministry of Agriculture and Rural Development on the enactment of the Statute for coordination in producing and distributing sugar and sugar-cane can be used as the ground for the fixing of buying prices or allocation of the market. According to Article 4, the Vietnam Sugar and Sugar Cane Association is responsible for holding meetings with sugar producers, negotiating to fix minimum/maximum prices and figuring out methods for buying sugar from farmers. Article 6 also stipulates that the Association may organize regular or unscheduled meetings with sugar producers in the case of fluctuations in the sugar market in order to design mutual plans for distributing sugar and fixing minimum/maximum selling prices to guarantee the interests of sugar producers and customers.

[104] ICN, *Antitrust Enforcement in Regulated Sectors,* above n 94, 14.

[105] As competition policy is often influenced by rent-seeking activities, the wish for a greater potential for monopoly profit is the motivation for seeking influence over decision-makers to gain or protect that profit. See OECD, *Reports of the Global Forum on Competition* (2004) 25.

[106] For example, when an economic concentration entailing a breach of a prohibited threshold is about to be conducted; or some acts can also be argued as the need to create stronger and more capable firms carrying out competition in the international sphere etc. Another assumption can be made in cases involving competition between state monopolies and foreign business partners, where excessive advocacy for the state-owned firms can limit the objectives of competition law enforcement.

Secondly, other than being governed by competition law, state monopolies are also supervised and regulated by other specialized laws such as those concerning prices, contracts, technical standards etc. These specialized laws may define the responsibilities of state management agencies specialized in monitoring and supervising the activities of the firms falling within their fields. This leads to another possible conflict between competition law and specialized laws, with the former serving as the general law and the latter acting as specific laws. According to the commonly accepted principle stipulating the superiority of specific law over general law (*lex specialis derogat legi generali*),[107] specialized laws may be the bases for the handling of violations. In that case, a particular regulator may become the first place authority to deal with violations by means of administrative procedures.[108]

An issue arising here is that a state monopoly, because of its awareness or wish, could seek help from its governing body, by lodging claims or requesting the case to be handled by relevant regulators, thus ignoring the role and competence of the competition authority.[109] Hence, before implementing its function as a settlement body, a competition authority may firstly have to resolve the identification of competence for handling the competition case between two state agencies, or claim back the case, although the law has clearly allocated handling competition cases to them. The case can even be lodged with a higher state body i.e. the government or the Prime Minister, regardless of the fact that this

[107] The principle *lex specialis derogat legi generali* is a generally accepted technique of interpretation and conflict resolution in international law. It suggests that whenever two or more norms deal with the same subject matter, priority should be given to the norm that is more specific. UN International Law Commission, *Conclusions of the work of the Study Group on the Fragmentation of International Law: Difficulties arising from the Diversification and Expansion of International Law* (2006) <http://untreaty.un.org/ilc/texts/instruments/english/draft%20articles/1_9_2006.pdf>.

[108] For example, a state monopoly may seek a settlement of disputes with its partner if such disputes are related directly to the management domain of a sectoral regulator. The 'ask for help' of VNPT with regard to interconnection issues to its regulator the Ministry of Informatics and Telecommunications in Vietnam in 2006 was a good illustration. However, this problem is often solved by a provision in the competition law or a right in the specicialised law which states clearly which law and measures will be applied and which agency will be responsible for resolving the competition cases concerned. Usually, the competition authority and competition law will be appointed to handle violations of competition. For example, Article 5 of Vietnam's *Competition Law* identifies cases related to acts in restraint of competition and unfair competition under the jurisdiction of the agency and the law applicable is the *Competition Law 2004*, although a number of other specialized laws also have relevant provisions. Article 5 stipulates that 'Where there are differences between the provisions of this Act and other provisions of law restrictions on competitive behavior, in unfair competition the provisions of this Law shall apply'.

[109] This can be illustrated by the dispute between Viettel and VNPT in Vietnam or EVN and VNPT as discussed in the previous chapter.

obviously contradicts the regulations on competition proceedings.[110]

Thirdly, state monopolies often operate in areas that are closely linked to the provision of essential needs such as electricity, water, oil, gas and public transport. The investigation and handling procedure must not cause disruption or discontinuance in the delivery of public services which affect the welfare of the whole society. Consequently, a competition authority faces another difficulty in the application of preventive measures and remedies or the imposition of penalties against state monopolies, for example, the mandate to separate the firms in a merger case, or the restructure or revocation of the business licences of violating firms. These difficulties may be cited by state monopolies to oppose sanctions against them or used to justify the seeking of favours from their sectoral regulators. Competition cases involving state monopolies operating in the same area may be delayed due to the interference of related industries, or the need to wait for comments, or even directives from the government.[111]

9.2.2 The independence of competition authority

The second problem concerning the enforcement of competition law is the independence of the competition authority. The independence of the competition authority is important to protect its enforcement tasks from being influenced by legislature or government as the result of rent-seeking activities. This is because monopolies have incentives to influence decision-makers to obtain or to protect their profit.[112] Generally, there are two criteria required for to the independence of the competition authority. First, the competition authority should have an independent position in organisational settings, i.e. it should have no influential relationship with other state bodies.[113] Second, the mechanism for the enforcement of competition law must be designed as a separate mechanism.[114] However,

[110] Ibid.

[111] For instance, where there are disputes about the connection between the two state groups providing telecommunication services in Vietnam, there is the participation of the two ministries in charge, the Ministry of Posts and Telecommunications and the Ministry of Industry. For example, there has been the dispute over the suspension cables of telecommunication poles recently between the two these state groups. Both cases have to wait for the final comments of the Prime Minister.

[112] OECD, 'Regulatory Reform', above n 34, 25.

[113] Ibid. The independence of a competition authority in this regard may be ensured by taking into consideration such matters as the appointment of personnel, the allocation of enforcement tasks with regard to investigation, making recommendations and settlement of cases, funding and budgets for its operation and so on.

[114] OECD, 'Regulatory Reform', above n 34, 25.

there are a number of cases where the enforcement of a competition authority may be hindered by obstacles which challenge its independence.

The first case is where the competition authority detects that a regulation issued by a sectoral regulator may entail anti-competitive consequences. For example, a regulation may favour a state monopoly operating in a particular field, thus creating an unfair competitive environment. This regulation may also facilitate the state monopoly in engaging in anti-competitive behaviour, or enable it to maintain a monopoly position.[115] In this case, a competition authority might not be able to declare the invalidity of that regulation. Because this function is within the purview of the legislative organ, it can only conclude that there are breaches of competition law and apply sanctions to violators.

Furthermore, the competition authority cannot require the issuing agencies to repeal or alter such policies. Rather, it is limited to the making of requests or recommendations for reconsidering these provisions. Thus, it is observed that the imposition of remedies to restore the original state before a policy is adopted appears to be impossible. As a result, the prevention of a monopolisation possibility brought about by existing policies is also difficult to implement. The settlement of competition cases and sanctions imposed on violating firms, if successful, still can not properly solve the deep-rooted cause from which anti-competitive behaviour is committed.

The second case is related to the enforcement of competition authority in merger cases. As discussed in chapter 8, mergers involve structural matters that often are influenced by a country's industrial policy; hence enforcement may co-exist with intervention which may result in a constraint in the enforcement task of the competition authority. In particular, decisions regarding mergers may be made by a ministry, or a government,[116] and thus fall outside the reach of a competition authority. If a minister is specified as being involved in the merger control, the minister may have the discretion not to refer a proposed merger to the competition authority and make their own decision. The minister and government may also reverse or override the decisions of a competition authority at

[115] For example, for security reasons, the Post Office - Telecom may issue policies to limit the import of certain types of specialized equipment by imposing a number of conditions and import licenses. The result of this provision is that only state firms operating in telecommunications sector may be able to import.

[116] For example, according to Vietnam's *Competition Law 2004* art 25(1), the Minister of Industry and Trade (MOIT) and the Prime Minister have the discretion to grant exemptions to certain merger cases, even though VCAD is the body responsible for supervising the economic concentration process.

the appeal stage, based on public interest justifications or policy goals.[117] In these cases, the independence of the competition authority is affected.[118]

The third problem related to the independence of a competition authority concerns appeals against its decision/judgment relating to a competition case. As the nature of a competition proceeding is administrative, such appeals must be taken to a higher administrative agency to review. As a result, there are two possible situations that may arise.

In the first situation, the competition authority is designed as a unit under the jurisdiction of a minister, who is also a regulator (e.g. Ministry of Trade). A concern arises when a state monopoly appeals a decision of the competition authority concerning an anti-competitive behaviour.[119] In this case, appeals will be sent to this ministry, which is now acting as the higher state body of that competition authority.[120] Whether or not the decision of the hearing panel handling the competition is subject to a veto depends on this ministry. The decision on appeal may be affected by the lobbying activities of the firm concerned, or be influenced by the relationship between the firm and the Ministry.

In the second situation, the competition authority is set up independently and is not under the jurisdiction of the Ministry when handling of appeals. In this case, the appeal process is normally dealt with either by different state agencies or by the court. In the former case where the appeal is to the Ministry of Trade or a particular state organ, the same concerns appear as in the first situation. In both cases, the objectivity and reliability of the review of appeals are of concern.

9.3 Competition law enforcement mechanism in Vietnam

During the drafting process of *Competition Law 2004*, different models of competition authority and competition law enforcement mechanisms were discussed. The final choice

[117] For example, the head of Vietnam's Competition Authority (VCAD) is authorised to reply to economic concentration notifications where such a concentration is allowed to proceed or otherwise prohibited (art 22, 23). These decisions may be appealed to the MOIT Minister (art 107(2))

[118] OECD, 'Regulatory Reform', above n 34, 25.

[119] For example, a state monopoly under the state management of the Ministry of Trade and the competition authority is also under that Ministry of Trade.

[120] For example, in the *Competition Law 2004*, if the firms disagree with part or the whole of the decisions issued by the head of the Vietnam Competition Authority (VCAD), they may lodge an appeal to the Trade Minister (Article 107 (2)). However, VCAD is an agency belonging to the Ministry of Industry and Trade.

of a two tier model of competition authority resulted in a corresponding mechanism for enforcement of competition law to anti-competitive behaviour. This section discusses the model of competition enforcement which applies to deal with the 'state monopoly' issue in Vietnam. The question arising is whether the common types of enforcement mechanisms in countries such as the EU and Australia are unavailable in Vietnam?

This part starts with a study of competition authorities in Vietnam: their legal position and nature, powers and tasks with regard to ensuring competition law compliance and the handling of competition cases. It also discusses the relationship between competition authoritites and relevant sectoral regulators. The next section briefly reviews the mechanism for enforcement of competition law and procedures for handling violations. It also deals with the role of competition authorities at specific stages of the enforcement period. It ends with a study of competition sanctions as the means for ensuring the enforcement of competition law.

9.3.1 Competition law enforcement authorities

Vietnam's competition authorities as provided in chapter IV of the *Competition Law 2004* are the Vietnam Competiton Administration Department (VCAD)[121] and the Vietnam Competition Council (VCC).[122] Competition law procedure for anti-competitive behaviour, therefore, is divided into two levels: the VCAD is responsible for conducting investigations of anti-competitive behaviour,[123] while the VCC is in charge of handling cases investigated by the VCAD.[124] Additionally, there is a division of tasks between the two authorities.[125]

9.3.1.1 The Vietnam Competition Administration Department - VCAD

Established by the government, VCAD is a department belonging to the Ministry of

[121] *Competition Law 2004* art 49.

[122] Ibid art 53.

[123] Ibid art 49(1)(c), Article 2(4)(a) of the *Decree No 06/2006/ND-CP* of Government on 09/01/2006 on functions, responsibilities and organizing structure of Competition Administration Department.

[124] *Competition Law 2004* art 53(2).

[125] As stipulated in the *Competition Law 2004* art 49(2), cases involved in anti-competitive agreements fall within the jurisdiction of theVietnam Competition Agency – VCAD. The VCAD jurisdiction regarding anti-competitive agreement cases is limited only to carrying out investigations and then reaching a conclusion. Judgments will be made by the Vietnam Competition Council – VCC.

Trade, which clearly is an executive institution.[126] The Head of VCAD is appointed by the Prime Minister upon the recommendation of the Trade Minister.[127] VCAD is a multi-functioning body. First, it functions as an administrative body which supervises the economic concentration process, assesses files for requests of exemption and forwards them to the Minister of Trade or to the Prime Minister.[128] Second, it acts as an investigation agency which conducts investigations of both practices in restraint of competition and unfair competition acts.[129] Third, it is also an executive body which has jurisdiction in imposing sanctions for unfair competition practices.[130] Apart from its main duties, dealing with trade remedies is currently assigned to VCAD.[131] The execution of enforcement of competition law for both anti-competitive behaviour and unfair competition practices is thought to limit its effectiveness.[132]

9.3.1.2 Vietnam Competition Council

The Vietnam Competition Council (VCC) functions as an institution responsible for the handling and settlement of appeals in anti-competitive cases.[133] The Law only mentions that the VCC is relatively independent in its relationship with the Ministry of Trade.[134] It is noted that the model of the VCAD in general and the VCC in particular, is relatively new in Vietnam and without precedent.[135]

---

[126] *Competition Law 2004* art 49(1). See also VCAD website <http://www.qlct.gov.vn/Web/AboutUs.aspx?zoneid=2&lang=vi-VN>.

[127] *Competition Law 2004* art 50.

[128] Ibid art 49(2).

[129] Ibid.

[130] Ibid.

[131] *Decree 06-2006-ND-CP* of the Government dated 9 January 2006 on Functions, Duties, Powers and Organizational Structure of the Competition Administration Department, art 2.

[132] CUTS, *5 Nam Thuc thi Luat Canh tranh: Boc lo Nhieu Bat cap* [Five Years of the Implementation of Competition Law: Sufficiencies have arisen] <http://www.cuts-hrc.org/index.php?option=com_content&view=article&id=627%3A5-nm-thc-thi-lut-cnh-tranh-bc-l-nhiu-bt-cp&catid=78%3Avietnamese-news&Itemid=215&lang=vi>.

[133] *Competition Law 2004* art 53.

[134] Le Danh Vinh and Hoang Xuan Bac, 'To chuc Bo may Thuc thi Luat Canh tranh, Dieu tra Xu ly Vu viec canh Tranh' [Organisation and Mechanism for the Implementation of Competition Law, Investigation and Handling of Competition Cases] (2005) 4.

[135] Nguyen Nhu Phat, 'Bao cao Tong hop De tai "Xay dung The che Canh tranh Thi truong o Viet Nam"' [Overall Report of Working Paper of the Project "Building up a Market Competition Institution in Vietnam"] (2005); Le Danh Vinh, Hoang Xuan Bac, Nguyen Ngoc Son, *Giao trinh Luat Canh Tranh* [Textbook on Competition Law] (Hochiminh City National University Publishing House, 2010) 207.

The VCC has both executive and quasi-judicial characteristics. First, as it is established by the government, the VCC is an executive body.[136] This is illustrated by Article 107 (1), stipulating VCC competence in reviewing decisions of the handling panel.[137] Decisions of the VCC are final and if the parties involved still disagree, they have to bring the case to the court.[138] Second, it is a quasi-juridical body. VCC functions as a 'trial' body which handles anti-competitive cases based on the VCAD's investigation results.[139] VCC decisions in a trial result from an application of law and a reasoning procedure; its decisions are enforceable immediately and can only be reviewed by the court.[140]

VCC's settlement of competition cases is conducted on a majority vote basis. In a trial, there will be 5 members from the Council's list selected by the VCC President to form a trial panel (Competition Case-Handling Council). The final decision of this panel will be made by a majority vote of the members.[141] However, its decisions cannot be appealed through an administrative procedure, even though the VCC is an executive body.[142]

9.3.1.3 The relationship between Vietnam's competition authorities and sectoral regulators

This part discusses the relationship between Vietnam's competition authority and state management bodies in specific sectors (sectoral regulators) regarding competition law enforcement. As the VCC is a permanent institution responsible for the handling of anti-competitive cases, it is mostly concerned with the Vietnam Competition Administration Department (VCAD).

Currently, there are some major regulatory bodies in charge of conducting state management in specific sectors where their functions and powers are related to

[136] According to Article 53(1), Vietnam's Competition Council shall be composed of between eleven and fifteen members appointed or dismissed by the Prime Minister at the proposal of the Trade Minister.

[137] *Competition Law 2004* art 107.

[138] Ibid art 115.

[139] Ibid art 53.

[140] Vinh and Bac, above n 134, 5.

[141] *Competition Law 2004* art 80.

[142] Vinh and Bac, above n 134, 5.

competition.[143] Such bodies include the Ministry of Industry and Trade[144] (formerly Ministry of Industry[145] and Ministry of Trade[146]), Ministry of Planning and Investment,[147] Ministry of Finance,[148] Ministry of Communication and Information,[149] and Ministry of Transports.[150]

As the Law notes, the VCAD has independence in its relationship with other state organs in dealing with competition law issues and there is a division of labour among them in

[143] OECD, 'The Relationship between Competition Authorities and Sectoral Regulators: Contribution from Vietnam' (Global Forum on competition, DAF/COMP/GF/WD (2005)8, 2005) 5-6 <http://www.oecd.org/dataoecd/49/29/34285298.pdf>.

[144] The Ministry of Industry and Trade was established by merging the Ministry of Trade and the Ministry of Industry in 2007. See MOIT website <www.moit.gov.vn>.

[145] The Ministry of Industry was previously established by the Government which, under *Decree No. 55/2003/NĐ-CP* on 28-5-2003, was responsible to the Government for state management of the industrial sector, namely mechanical engineering, metallurgy, new energy, renewable energy, oil and gas, minerals mining, chemicals (including pharmaceutical industry), industrial explosion materials, consumer-goods industry, foodstuff industry and other processing industries throughout the country; for implementing state management of public services and representing state ownership in state shared enterprises in the industries managed by the Ministry under the Law.

[146] The Ministry of Trade was previously established by the Governmentand, under *Decree No. 29/2004/ND-CP*, was an official body of the Government in charge of state management of trade, public services and is presented as a representative of state ownership in state-owned enterprises under the Ministry's management in accordance with laws, involving both foreign trade and domestic trade.

[147] The Ministry of Planning and Investment (MPI) is a government agency which, under *Decree No. 61/2003/ND-CP*, is in charge of state management of the domain of planning and investment, that consists of: providing comprehensive advice on country-level socio-economic development strategies, programs and plans, on economic management mechanisms and policies for the national economy and for specific sectors, on domestic and foreign investments, industrial and export-processing zones, on management of official development assistance sources (ODA), national-wide control of procurement, enterprises and business registration. The Ministry is also entrusted with exercising the role of state management over public services provided in sectors belonging to the Ministry's mandate under valid legislation. See MPI website <www.mpi.gov.vn>.

[148] The Ministry of Finance (MOF) is a Government agency which, under *Decree No. 116/2008/NĐ-CP* on 14 November 2008, has the function of implementing State management in finance, State budget, taxation, fees and other revenues of the State budget, national reserves, State financial funds, financial investment, corporate finance and financial services (generally called financial-budgetary fields), customs, accounting, independent auditing, prices of nation-wide and public services in the field; and conducting the ownership rights to the State's investment capital in enterprises according to regulations of the Law. See MOF website <www.mof.gov.vn>.

[149] The Ministry of Information and Communications (MIC) is a Government agency which, under *Decree 178/2007/NĐ-CP* on 03 December 2007, is the policy making and regulatory body in the fields of media, publishing; posts; telecommunications and Internet; transmission; radio frequency; information technology, electronics; broadcasting and national information infrastructure; management of related public services on behalf of the government. See MIC website <www.mic.gov.vn>.

[150] The Ministry of Transport (MT) is a government agency which, under *Decree No. 51/2008/NĐ-CP* (replacing the *Decree No. 34/2004/NĐ-CP*), is in charge of state management of land transport (highways, railways), inland waterway transport and maritime transport nation-wide. See MT website <www.mt.gov.vn>.

carrying out competition law protection and sectoral regulation. The VCAD is currently in charge of competition enforcement, while sectoral regulators are responsible for providing technical regulation via economic regulation.[151] This setting seems to allocate clearly the functions and powers of each state body, which ensures transparency and specialisation in carrying out their activities.

However, the possibility of a duplication of tasks is a concern. For example, the competition authority may need to seek sectoral knowledge when dealing with a specific case, or to request additional information before commencing its investigation regarding a competition case.[152] Besides, the VCAD has the competence to detect provisions that may contravene competition law and to suggest modifications.[153] However, as this competence is applicable to regulations that have already been enacted, it limits the contribution of the VCAD in removing provisions that potentially cause or facilitate the commitment of anti-competitive behaviour before they are adopted.

The second issue concerning the independence of the competition authority is the relationship between the VCAD and the Ministry of Trade (currently Ministry of Industry and Trade – MOIT). This was an issue during the drafting process of the *Competition Law 2004*. The placement of the VCAD within the MOIT was thought to handicap its specialisation, fainess, transparency and accountability.[154] The fact that MOIT held ownership and control of many SOEs was a reason leading to public skepticism about VCAD's future attitudes towards SOE behaviour, as MOIT might act at the same time as both 'the players on the ground and the referee'.[155] Besides, this setting could restrict the VCAD's power in disciplining conduct in restraint of competition by SOEs currently owned and managed by line ministries with close relationships with the government.[156] Even though the drafters successfully convinced the National Assembly to keep the

[151] OECD, 'Competition Authorities and Sectoral Regulators', above n 143, 5-6.

[152] This was given at the conference co-organised by the VCC and EU-Vietnam Multilateral Trade Assistance Project (MUTRAP) 'Five Years of the Implementation of Competition Law regarding Anti-competitive Behaviour' in December 2010.

[153] Article 2(3) of the *Decree No 06/2006/ND-CP* of Government on 09/01/2006 on Functions, Responsibilities and Organizing Structure of Competition Administration Department.

[154] Pham, above n 101, 559.

[155] VN Express, 'Co quan Quan ly Canh tranh Phai Dung Doc Lap' [The Competiton Authority Must Stand Independently] (2004) <http://vnexpress.net/gl/kinh-doanh/2004/06/3b9d32d2/>.

[156] Pham, above n 101, 560.

VCAD within the MOIT structrure when the Law was passed, its position remains a concern.

First, the power of the VCAD and VCC may be constrained by the MOIT Minister. For example, while the VCAD is authorised to monitor economic concentration activities,[157] the grant of exemptions in this regard is vested in the Minister.[158] This gives rise to concerns that exemptions may serve as a safe harbour for state firms that are on the edge of dissolution or bankruptcy. When a decision for the settling of competition issues falling within the competence of the VCAD is disputed by the firms concerned, the Minister of MOIT, responsible for the review of appeal, has the power to dismiss or request a re-settlement of cases. Second, the chief personnel of the VCAD and VCC are appointed by the Prime Minister upon recommendation of the MOIT Minister.[159] The Law also provides that VCAD's investigators are also appointed by the MOIT Minister.[160] Third, activities of the VCAD and VCC are financed directly by the state budget through MOIT.[161] Finally, the VCC consists of representatives from ministries which are meant to reconcile conflicts of interest of industries. This gives rise to concern about interference by ministries during the settlement of competition cases, as they may lobby for their industries.

Article 5(1) of the *Competition Law 2004* reserves the VCAD's competence in dealing with anti-competitive practices, thus removing the disparity between the provisions of the Law and other laws concerning anti-competitive behaviour or unfair competition acts.[162] A competition procedure is clearly specified to apply for anti-competitive cases.[163] Moreover, the Law prohibits a number of acts of state management agencies (sectoral

[157] *Competition Law 2004* art 49(2)(a)

[158] Ibid art 25(1)

[159] *Competition Law 2004* art 50 and *Decree 06-2006-ND-CP* on Functions, Duties, Powers and Organizational Structure of Competition Administration Department, art 4; *Competition Law 2004* art 54(1) and *Decree 05-2006-ND-CP* on Functions, Duties, Powers and Organizational Structure of Vietnam Competition Council art 5.

[160] *Competition Law 2004* art 51.

[161] *Decree 06-2006-ND-CP* on Functions, Duties, Powers and Organizational Structure of Competition Administration Department, art 1(2) and *Decree 05-2006-ND-CP* on Functions, Duties, Powers and Organizational Structure of Vietnam Competition Council art 1.

[162] Article 5(1) of the *Competition Law 2004* stipulates that if there is any disparity between the provisions of the Law on competition and those of other laws governing anti-competitive behaviour or unfair competition acts, the provisions of the Law shall apply.

[163] *Competition Law 2004* art 56.

regulators) during the competition process.[164] This provision is to limit state management agencies from intervening in the activities of firms on the market, which obviously targets the state monopolies, ministries and provincial authorities. However, the interference of ministries, as mentioned in the previous part, remains a concern even after the Competition Law has been in effect for over five years.

9.3.2 The enforcement of the competition law mechanism

Article 3(9) requires a specified competition procedure to apply to competition cases.[165] 'Competition case' (*Vu viec Canh tranh* in Vietnamese) is defined as a case showing signs of violation of the provisions of the Law, which is investigated and handled by a state competent agency.[166] This concept is narrow, because 'competition procedure' in this understanding is always linked with a violation of the Law. However, there are cases that are not necessarily related to breaches of competition law, such as the application and procedures for granting exemption; and any investigation carried out by the competition authority to determine 'relevant market', 'market shares' or 'combined market shares' of the firms. Besides, the enforcement of competition law can also be undertaken by firms. This is illustrated by a firm's active engagement in the settlement of anti-competitive agreements[167] and economic concentration.[168] Hence, it appears that a number of actitivities of the competition authority are excluded from the coverage of the 'competition procedure' concept, according to the way the criterion 'signs of violation of competition law' is prescribed in Article 3(8).

---

[164] Ibid art 6

[165] Article 3(9) defines competition procedures as 'activities carried out by agencies, organizations and individuals according to the order and procedures for settling and handling competition cases prescribed by this Law'.

[166] *Competition Law 2004* art 3(8).

[167] According to *Competition Law 2004* art 26, parties intending to participate in competition restriction agreements or economic concentration will have to submit their application dossiers for exemption. On the basis of the submitted applications, the VCAD presents its opinions to the Trade Minister for a decision or submission to the Prime Minister for a decision (Article 30). Any firms which previously applied for exemption can also withdraw their dossiers by simply notifying the VCAD in writing if they wish to do so (Article 33).

[168] According to *Competition Law 2004* art 20, if the firms participating in economic concentration have combined market shares of between 30 and 50 per cent oin the relevant market, they must notify the VCAD before implementing economic concentration activities and shall be accountable for the truthfulness of their dossiers (Article 21(2)). This obligation requires the firms concerned to be aware of their current position in the market, including the assessment of their market shareThefirms will be free to conduct concentration if their maket share, based on their own assessment, meets the threshold for economic concentration.

The above analysis shows a lack of clarity in the Law, because competition procedure should be regarded as a part of the process, consisting of a wide range of administrative and economic acts relating to competition and the enforcement of competition law.[169] In the following sections the enforcement of competition law is discussed according to two approaches: by the firms concerned and by the competition authority. The enforcement of competition law on state monopolies is also considered during the discussion.

9.3.2.1 The enforcement of competition law by the firms

A list of prohibited behaviour in the Law is necessary to ensure the constitutional right to do business because firms are free to conduct anything that is not clearly prohibited by law.[170] This creates a self-regulating mechanism which enables the firms to comply with the law themselves, while the competition authority focuses on monitoring the competition process and ensuring compliance with the Law. Under this mechanism, market participants are required to know what behaviour is prohibited and the possibility of being sanctioned if they do not abide by these prohibitions.[171]

The firm's enforcement of competition law is initiated when its legitimate rights and interests are infringed upon by acts in breach of the provisions of the Law. The firm may lodge complaints with the VCAD to request a commencement of the investigation and settlement process within two years from the date when the anti-competitive practice was implemented, or where there has been a sign of abuse of market dominance.[172] Contents of a complaint file are stipulated in Article 45 of *Decree No. 116/2005/NĐ-CP* and must provide appropriate reasons for the complaint.[173]

It appears that the commencement of an investigation with regard to anti-competitive agreements and abuse of market dominance is principally performed by infringed firms. In this regard, a successful enforcement of competition law depends on two essential criteria. The first criterion is the awareness of the firms about the Law. This consists of

[169] Nguyen Nhu Phat, 'Phap luat canh tranh o VN hien nay' [Existing Law regulating Competition in Vietnam] (2005) 44.

[170] Phat, 'Bao cao Tong hop', above n 135.

[171] Countries like Australia currently employ a self-regulation approach using Braithwaite's pyramid.

[172] *Competition Law 2004* art 58(1).

[173] A complaint file is required to include evidence showing that complaint application is well-founded and legitimate and other information that the complainant considers necessary for the resolution of the competition case. *Decree No. 116/2005/NĐ-CP* art 45.

two factors: (i) the capability of the firms having due knowledge about the Law and (ii) the dissemination of the Law to the firms by the competition authority. Second, it requires the comprehensibility, transparency and accessibility of the Law and the documents providing guidances for its implementation.

However, this has been a difficult issue in Vietnam. First of all, the weak enforcement of anti-competitive provisions is due to the limitated knowledge about the Law by Vietnam's firms,[174] especially small and medium firms, because they lack law professionals,[175] and have inadequate awareness of their rights and responsibilities.[176] Second, because of inaccurate perceptions, firms are often afraid of 'collision' with their partners and of being involved in legal issues.[177] Many firms are aware of the impact of anti-competitive behaviour on their legitimate rights and interests; however, they rarely bring such cases to the competition authority because of the fear of taking responsibility for assembling relevant materials and evidence. For small and medium firms, the collection of information from relevant state agencies is not easy.[178] Third, there is little belief among firms about their chances of winning cases if they face state firms. There is also the fear of losing partners when the case is brought to the competition authority,

[174] Truong Hong Quang, 'Co quan Quan ly Canh tranh o Vietnam: Nhung Bat cap va Phuong huong Hoan thien' [Competition Authority in Vietnam: Limitations and Proposals for Its Improvement] (2011) *Nghien cuu Lap phap* [Legislative Studies] < http://www.nclp.org.vn/thuc_tien_phap_luat/co-quan-quan-ly-canh-tranh-o-viet-nam-nhung-bat-cap-va-phuong-huong-hoan-thien/?searchterm=T%C6%B0%20duy%20ph%C3%A1t%20tri%E1%BB%83n>.

[175] After one year since the Law on Competition came into effect, only 30% of firms knew about the Law, the remaining 70 per cent had no idea at all about the Law. That figure has changed recently, but the number of firms which are aware of the Law and the benefits of using it to protect their interests is still limited. See Dien dan cac Doanh nghiep Vietnam (VBonline), 'Luat Canh tranh: 4 Nam Van Qua Moi' [Vietnam's Competition Law: 4 Years but Still New] (2009) <http://tintuc.vibonline.com.vn/Home/xdpl/2009/10/5116.aspx>.

[176] A recent survey conducted by the VCAD shows a concern that many firms still do not know which court the should go to if they are not satisfied with the decisions of the handling committee. There were only 44.8 per cent of interviewed firms that answered this question correctly. Another example is that many firms are not fully aware of how much the maximum penalty is for violations of the competition law. See VCAD, 'Report on the Research and Survey on Community's Awareness Level about Competition Law' (2009) 29-30.

[177] Saga, 'Thuc te Viec Ap dung Luat Canh tranh o Vietnam' [Practice of the Application of Competition Law in Vietnam] (2009) <http://www.saga.vn/Luatkinhdoanh/17752.saga>.

[178] Ibid. VCAD, 'Report on the Research and Survey', above n 176, 29-30.

especially when the infringer is their key and unchangeable partner.[179] As a result, there is a hesistation among Vietnam's firms (most of which are small and medium) to get involved in competition cases.[180]

The confidence of Vietnam's firms in the activities of the competition authority also appears so limited. This is because of the ambiguous relationship with state agencies that may affect the independence of the competition authorities. This is important because Vietnam's state monopolies have maintained a close relationship with their former sectoral regulators. Further, the assignation of VCAD and VCC officers causes a likelihood of a lack of confidence in the competition authorities by the firms.[181] Most members of the Competition Council are generally unknown to enterprises.[182] Such concerns about the independence and effectiveness of Vietnam's competition authorities are understandable.

There is also the fact that many Ministries, particularly the Ministry of Trade, have significant influence in the competition process and the implementation of competition law.[183] Hence, firms may incorrectly believe that such ministries are responsible for the

[179] It is found that small and medium firms tend to avoid conflicts with state monopolies which are their principal suppliers/buyers For example, many firms are currently suffering from the monopoly of the Vietnam Electricity Corporation (EVN) involving the unannounced cut off of electricity supplies or increase of electricity prices. However, they do not want to take any action against EVN or sue EVN with the competition agency. The reason is that they want to avoid conflict with this monopoly firm and are concerned that if such a remedy is taken, they cannot continue to buy electricity from EVN, as this is the monopoly supplier. See Ho Quang Phuong, 'Thuc thi Luat Canh tranh de Tang Tinh Ran de' [Enforcing Competition Law to Increase Deterrance] *Quan doi Nhan dan* (Online) [People's Army] (2009) <http://www.qdnd.vn/QDNDSite/vi-VN/61/43/2/98/98/91427/Default.aspx>.

[180] Saga, above n 177.

[181] As discussed in the previous chapter, the Vietmam Competition Agency is an agency belonging to the Ministry of Trade and the Vietnam Competition Council is an agency consisting of members from Ministries.

[182] Saga, above n 177.

[183] Article 7 of the *Competition Law 2004* stipulates that the Ministry of Trade is the state management body of competition, while Ministries, ministerial-level agencies and provincial/municipal People's Committees have to coordinate with the Trade Ministry in performing state management of competition. In performing their functions for state management of competition, Ministries also form agencies to supervise and manage competition issues for themselves. This has been shown from recent laws in specialized fields, which were created or modified together with the formation of specialized management agencies, a trend for creating sectoral agencies in charge of regulating competition in specialized fields. In the drafting process of laws, sectoral ministries working as drafting bodies purposely assign the responsibility for the handling of competition cases to their specialised inspector agencies, such as those that are in charge of such particular areas as posts and telecommunications and credit, securities and insurance. See OECD, 'Competition Authorities and Sectoral Regulators', above n 143, 5-6.

handling of competition cases in the first place, instead of the VCAD.[184] Understandably, when a competition case arises, firms tend to seek guidance from particular laws governing specific areas for their reference and rely on agencies involved in competition matters within ministries, i.e. a department in charge of supervision of competition within the ministry, without being aware of the fact that the competition authority and competition procedure must first be sought.[185]

9.3.2.2 The enforcement of competition law by the competition authority

The enforcement of competition law includes a wide range of activities undertaken by the competition authority.[186] As provided by the Law, the VCAD is the body to monitor competition activities[187] and to be involved in handling the processing of violations. Apart from initiatives taken by the firms, VCAD conducts investigations if it detects signs of anti-competitive acts within two years from the date such acts were committed.[188] Upon the result of the investigation and the recommendations of the VCAD in a particular case, a panel is then set up by theVCC to settle the case.[189]

However, the initiation of investigations by the VCAD has not been carried out actively. Consequently, there has been an inadequacy in the enforcement of the competition law, particularly in dealing with anti-competitive behaviour. This inadequacy is explained by a number of factors. First, it has resulted from the lack of the VCAD's personnel,

---

[184] Firms involved in the dispute often seek advice or decisions from the ministries in charge of the industry in question (sectoral regulators), instead of dealing with the competition agency or commencing litigation procedures according to the *Competition Law 2004*. See Dien dan Doanh nghiep, 'Thuc thi Luat Canh tranh: Doanh nghiep Khong the Tho o' [Enforcing Competition Law: Businesses Cannot be Indifferent] (2009) <http://dddn.com.vn/20091112084331671cat103/thuc-thi-luat-canh-tranh-dn-khong-the-tho-o-!.htm>.

[185] Ibid. The case in which Viettel sued VNPT for connection in 2005 - 2006 provides a good example. Instead of logging complaints with the VCAD, Viettel did so withthe Ministry of Posts and Telecommunications (currently Ministry of Information and Communications). When the issue seemed to be unsolvable, the Ministry of Posts and Telecommunications handed it over to the Prime Minister to solve, while the VCAD, founded by the government to act as a referee to settle competition cases, stood outside that case.

[186] In a narrower sense, the enforcement of a competition law is generally understood as the use of legal measures for violations against the competition law to ensure compliance with competititon rules. Enforcement, for that reason, refers to the application of sanctions and remedies to violating firms under legal procedures.

[187] Article 49 provides that the VCAD will be responsible for controlling economic concentration processes and dealing with application dossiers for exemptions.

[188] *Competition Law 2004* art 65.

[189] Ibid art 99.

specialization and working experience.[190] Second, its independence in relation to other state organs is limited and that causes another obstacle in the investigation process, especially when this behaviour is conducted by state firms operating under the management of sectoral ministries.[191] As the targets of investigation are activities in restraint of competition in the market, many state monopolies and state firms are officially within the reach of the VCAD.[192] In the four years since the Law came into effect, the VCAD had only conducted one investigation into a violation which was brought to it by a complainant.[193] Third, as mentioned above, while complaints brought to the VCAD as a basis for commencing an investigation are not likely to be common, the proactive initiation of investigation by VCAD is important.[194]

However, the reliance of the VCC on investigations initiated by the VCAD in anti-competition cases could delay the application of the competition law.[195] Hence, if the investigation process is prolonged and is not conducted properly, the VCC cannot handle the case in a timely fashion.In fact, if the VCAD found that there was not sufficient evidence to continue a case, it could not itself terminate that case once the case was pending for theVCC to decide.[196]

The VCAD and VCC, however, appear to be active regarding the control of economic concentration. In particular, the VCAD is the body which accepts notification dossiers[197]

---

[190] Quang, above n 174.

[191] The question arises as to how the VCAD will behave if it detects infringement signs of state monopolies which are under the management of the Ministry of Trade to which VCAD also belongs. Similarly, in the case of agreements made by decisions of industrial associations led by state firms operating under state management Ministries, another question is how the VCAD implements investigations and makes judgments against such infringements.

[192] Quang, above n 174.

[193] The case between VINAPCO and Jetstar Pacific in 2009.

[194] This was raised at a conference co-organised by the VCC and the EU-Vietnam Multilateral Trade Assistance Project (MUTRAP) 'Five Years of the Implementation of Competition Law regarding Anti-competitive Behaviour' in December 2010. See also, Saigon Tiep thi, *Thuc thi Luat Canh tranh: Phat de Canh bao, Khong de Thu tien* [Implementating Competition Law: Penalties Aim to Warn, not to Collect Money] < http://www.baomoi.com/Home/KinhTe/sgtt.vn/Thuc-thi-luat-Canh-tranh-Phat-de-canh-bao-khong-de-thu-tien/5459996.epi >.

[195] While the Law stipulates VCC as the body in charge of settlement of anti-competitive cases, in fact its activities depend largely on the work of the VCAD. See Quang, above n 174.

[196] *Competition Law 2004* art 101.

[197] In the case that the firms intend to participate in an economic concentration and the firms' combined market share is of between 30 and 50 per cent on the relevant market. See Article 20 (1) of the Competition Law 2004.

or dossiers for exemptions.[198] It is responsible for notifying the firm concerned about issues regarding a concentration application[199] and preparing its opinions for the Trade Minister or Prime Minister to make the necessary decisions.[200] The VCAD may request the applicants for exemptions to provide supplementary documents or ask for additional explanations on unclear matters.[201] It may also request the applicants to supply information on anti-competitive agreements or economic concentrations which it is handling.[202] Finally, the VCAD will accept forms for withdrawing exemption applications.[203]

Currently, the VCAD is responsible for conducting investigations regarding economic concentration. The VCC is authorized to impose administrative sanctions and fines in accordance with the Law and *Decree No. 120/2005/ND-CP* on 30/09/2005 on handling with violations in competition.

9.3.3 Procedures for handling anti-competitive cases

This section reviews the current procedure of settlement of anti-competition cases.[204] It focuses on the applicable mechanism in the cases where violations of competition law occur, including competition proceedings and sanctions. It is observed that competition procedure under the Law consists of a mixture of civil and administrative procedures.

---

[198] *Competition Law 2004* art 49(2)(b).

[199] The VCAD must notify the firms submitting notifications in writing within seven working days after receiving the economic-concentration notification dossiers. The VCAD's notification will include the validity and completeness of their dossiers; where a dossier is incomplete, the competition-managing agency shall have to clearly point out the contents that have to be supplemented. The VCAD must reply in writing to the applicants whether or not their concentration falls within prohibited cases and the reasons for the prohibition under Article 18. See *Competition Law 2004* art 22.

[200] As in the situation of anti-competitive agreements, theVCAD will put forward its opinions to the Trade Minister for a decision or submit to the Prime Minister for a decision. See Article 30 (1) of the Competition Law 2004.

[200] *Competition Law 2004* art 30(1).

[201] Ibid art 31.

[202] Ibid art 32(1).

[203] Ibid art 33(1).

[204] Violations in terms of anti-competitive agreements are practices precluded in Article 8 of the Law; violations regarding abuse of market dominance are stipulated in Articles 13 and 14 of the Law; violations of provisions on economic concentration can be categorizedas : (i) failure to submit economic concentration notification dossiers; (ii) conducting economic concentration before acceptance by competent authorities regarding exemption application dossiers; and (iii) conducting economic concentration acts where such concentration is prohibited by the law.

9.3.3.1 Investigation of competition cases

Investigation is important for the VCAD to determine whether or not there is a breach of competition law and to establish the basis for the settlement of the case by the VCC.[205] The investigation of anti-competitive violations is divided into two stages: preliminary and official ones. An additional investigation may be conducted if necessary after the official investigation is finished.

Preliminary investigation applies for both cases involving anti-competitive and unfair competitive behaviour. Such a preliminary investigation is commenced by the decision of the head of the VCAD following either a complaint of a firm or the detection of violation signs by the VCAD.[206] Within the time limit,[207] investigators must complete the preliminary investigation and report to the head of the VCAD.[208] Prelimary investigation may result in two consequences. First, if signs of violations of competition law are not fully detected, the investigation will stop at the decision of the head of the VCAD. Second, an official investigation will commence and may lead to the application of legal measures.[209]

With regard to anti-competitive practices, an official investigation targets identifying the relevant market; verifying the investigated party's market share in the relevant market and collecting and analyzing evidence of violation acts.[210] Once an official investigation is finished, investigation reports and the dossiers related to anti-competitive behaviour concerned are submitted to the VCC[211] to set up a panel (Competition Case-Handling Council) to commence the trial. However, the VCC may decide to stop the handling

---

[205] Vinh and Bac, above n 134, 28.

[206] *Competition Law 2004* art 86.

[207] A preliminary investigation is conducted within thirty days as from the date of issuance of preliminary investigation decisions. See Article 87 of the *Competition Law 2004*. If the basis for commencing an official investigation is not adequate, an additional investigation will be requested to be conducted within a time limit of sixty days. *Competition Law 2004* art 96.

[208] *Competition Law 2004* art 87.

[209] Ibid art 88.

[210] *Competition Law 2004* art 89(1). In the case of unfair competition, investigators must identify the grounds to deem that the investigated parties have performed or are performing unfair competition acts. *Competition Law 2004* art 89(2).

[211] The report must contain the following principal contents: (i) a brief account of the case; (ii) verified circumstances and evidence; and (iii) proposed handling measures. See *Competition Law 2004* art 93.

process in one of the following situations:[212]

- there is not enough evidence of acts of violation of the Law and the panel considers this discontinuance is justified;

- the investigated party has voluntarily terminated its violation acts, remedied consequences and the complainant has voluntarily withdrawn its written complaint;

- the investigated party has voluntarily terminated its violation acts, remedied consequences and the head of the VCAD proposes to stop settling the case. This applies when an investigation has been conducted by the VCAD as prescribed in Article 65(2) of the Law.

9.3.3.2 Hearing

A hearing is significant because parties have the chance to bring their own views and to present arguments to the other side and the panel. It also helps to avoid the arbitrary imposition of the decisions of the panel on the parties.[213] Article 98 stipulates that all anti-competitive cases must be handled through hearings.[214] This provision is a breakthrough in Vietnam's legal system because it is the first time hearing has been recognised as a compulsory procedure undertaken by an administrative organ.[215] A hearing is held in public, but it may be held behind closed doors if the contents are related to national or business secrets.[216] After hearing the opinions and arguments presented by the participants, the panel shall discuss, cast secret votes and make a decision by majority vote.[217]

9.3.3.3 Penalties and remedies

The principal penalties in Vietnam's competition sanctions are warnings and monetary fines. Additional penalties may be applied, depending on the nature and seriousness of the

[212] *Competition Law 2004* art 101(1).

[213] Vinh and Bac, above n 134, 32.

[214] *Competition Law 2004* art 98.

[215] Vinh and Bac, above n 134, 30.

[216] *Competition Law 2004* art 104(1).

[217] Ibid art 104(3).

firm's violations, including: (i) withdrawal of business registration certificate and revocation of the right to use a licence or practising certificate; (ii) confiscation of material evidence and facilities used to commit the breach of the laws on competition.[218] The adoption of competition penalties is considered to be another breakthrough of the *Competition Law 2004*, especially in dealing with anti-competitive behaviour.[219]

- **Warning**

This penalty reflects the lowest degree of response by the law and serves as the first legal measure. A warning should be provided as the first level of sanctions and whenever a warning appears to be unsuccessful, a monetary fine will be employed. However, there is currently a lack of detailed provisions about which cases such a warning should be imposed on and the legal consequences for the firms if they ignore the warning and continue to commit violations. Besides, while the other penalty (i.e. monetary fine) is provided in detail for application in particular cases, warning is currently not clearly interpreted in either the Law or Decrees giving guidances for its implementation.

- **Monetary fine**

In Vietnam's system of sanctions, monetary fines are common, particularly in administrative law. In general, a fine is sanctioned by the court based on different fixed levels. However, this creates difficulties for the court because the levels by which a fine is calculated may become outdated and thus the purpose of fines is not always achieved. The first time a monetary fine sanction is provided on a percentage basis according to the degree and type of violation of the firm (s) concerned appears in the *Competition Law 2004*.[220] Only fines according to specific levels on a percentage basis are applicable to

[218] *Competition Law 2004* art 117(1).

[219] Vinh and Bac, above n 134.

[220] *Competition Law 2004* art 118. As stipulated in Decree *No. 120/ND-CP/2005*, a specific fine will be sanctioned depending on particular cases and the types of competition behaviour committed. For example, a fine of from five up to ten per cent of the total revenue in the financial year prior to the year in which the breach was committed shall generally apply to breaches of provisions regarding anti-competitive agreements, abuse of dominant/monopoly position and economic concentration; and from 5 per cent up to 10 per cent in other cases such as the firm participating in an anti-competitive agreement with a combined market share of thirty per cent or more in the relevant market. See Section 1 Articles 10 – 17; Section 2, Articles 18-24; Section 3 Articles 25-29 of the *Decree No. 120/2005/ ND-CP* on 20/09/2005 on Dealing with Breaches in the Competition Sector.

anti-competitive behaviour.[221]

The maximum 10 per cent of fine imposed on the turnover of violating firms is said to be an effective deterrence for the firms in the market.[222] Monetary fines are divided into two levels i.e. 5 per cent and from 5 per cent up to 10 per cent.[223] This provision, however, gives rise to a concern in the case where a violating firm is operating in different areas and an anti-competive behaviour is committed in one of these areas and thus a fine imposed on its turnover of the previous years (composed of its turnover in all areas) may be insufficient.[224]

It is obvious that warnings and fines are two administrative penalties. The Law only provides these principal sanctions and does not give details about how to impose such sanctions and the criteria for the handling committee to do so. This is provided in detail in *Decree No. 120/ND-CP/2005*.[225] Other than fines, compensation for the losses resulting from the violation of the competition law will be also imposed on the violating firms.[226] However, it is unclear whether compensation is a principal penalty that can be applied separately or is another additional penalty. Finally, there is an absence of provisions regarding the application of criminal measures for violations of anti-competitive behaviour, while such measures do appear in the case of unfair competition.

---

[221] *Decree No. 120/2005/ ND-CP on 20/09/2005* on Dealing with Breaches in the Competition Sector arts 5 (1)-(2).

[222] Vinh and Bac, above n 134, 33-34.

[223] *Decree No. 120/2005/ ND-CP on 20/09/2005* on Dealing with Breaches in the Competition Sector chapt II. In VINAPCO case of 2009, VCC fined VINAPCO for its abuse of market dominance an amount of appx. VND 3,4 billions, which was 0,05 per cent of VINAPCO turnover in the financial year of 2007.

[224] This view was raised by Mr. Nguyen Trong Nghia, Head of Legal Division, Ministry of Finance in the conference co-organised by the VCC and EU-Vietnam Multilateral Trade Assistance Project (MUTRAP) 'Five Years of the Implementation of Competition Law regarding Anti-competitive Behaviour' in December 2010. See also, Saigon Tiep thi, *Thuc thi Luat Canh tranh: Phat de Canh bao, Khong de Thu tien* [Implementating Competition Law: Penalties Aim to Warn, not to Collect Money] <http://www.baomoi.com/Home/KinhTe/sgtt.vn/Thuc-thi-luat-Canh-tranh-Phat-de-canh-bao-khong-de-thu-tien/5459996.epi >.

[225] In particular, such grounds are: level of restraint of competition caused by the practice in breach; amount of loss caused by the practice in breach; capability of the entity in breach to restrain competition; period of time during which the practice in breach occurred; profits gained as a result of the practice in breach and attenuating or aggravating circumstances as stipulated in article 8 of this Decree. See Article 8 of the *Decree No. 120/2005/ ND-CP* on 20/09/2005 on Dealing with Breaches in the Competition Sector.

[226] Ibid art 6.

- **Additional penalties and competition remedies**

Besides principal and additional penalties, a list of competition remedies is provided in the Law and is given in detail in *Decree No. 120/2005/ND-CP* on 30/09/2005.[227] While principal penalties are administrative measures, such additional penaties and remedies have a civil nature.

There are different remedial measures in the Law. With regard to abuse of market dominance, other than punishments set forth in Article 117(1), (2), a firm can be sanctioned by having to undertake structural remedies.[228] In terms of economic concentration, other than fines, the VCC can impose certain remedial measures, i.e. a recommendation for the division and separation of merged and/or consolidated firms; a decision to resell shares of the acquired firm and the revocation of a granted business license of the violating consolidated firm or joint ventures.[229] These remedies are *ex post* measures, which have the nature of punishments targeted at the firms after their violation.

The application of remedies in a concentration case gives rise to some concerns. First, the purpose of these measures is to restore the situation caused by the consequences of concentration. Article 117 of the Law shows that fines are preferable measures for

[227] Article 4(4) of the *Decree No. 120/2005 ND-CP* on 20/09/2005 on Dealing with Breaches in the Competition Sector provides a list of competition remedies as belows:

- restructure of an enterprise which abused its dominant market position;
- division or split of an enterprise which merged or consolidated; compulsory re-sale of that part of an enterprise which was acquired;
- public retraction;
- removal of illegal terms and conditions from a contract or business transaction
- any necessary measures to address anti-competitive effects resulting from the violating acts
- compulsory use or re-sale of inventions, utility solutions or industrial designs which were purchased but not used;
- compulsory removal of measures which prevent or impede other enterprises from participating in the market or from developing business;
- compulsory restoration of conditions for technical or technological development which an enterprise impeded;
- compulsory removal of disadvantageous conditions imposed on customers;
- compulsory restoration of contractual conditions which were changed without any legitimate reason;
- compulsory restoration of a contract which was cancelled without any legitimate reason.

[228] The restructure of the firm is stipulated in *Competition Law 2004* art 117(3)(a).

[229] *Competition Law 2004* art 117 and *Decree No. 120/2005/ND-CP* on 30/09/2005 on Handling with Violations in Competition arts 25-29.

concentration cases and these remedies can be applied in parallel with fines, depending on the degree of violations. Second, such remedies as prescribed in the Law and *Decree No. 120/2005/ND-CP* are different from those in the competition laws of other countries. Merger remedies are often applied as *ex ante* measures together with certain kinds of exemptions.[230] This issue has not been addressed in the *Competition Law 2004*. Third, as fines are principal measures, while remedies are just provided as additional measures, it is possible that the violating firms may be ready to accept being fined and will continue to conduct anti-competitive behaviour. Fourth, as these measures are only applied *ex post*, the role of the competition authority is correspondingly passive. Due to the absence of these structural remedies in the law, the competition authority may not deal with pro-competition concentrations because it can not recommend that the firms readdress or modify concentration transactions to be in line with the purposes of the competition law, making the most of pro-competitive effects of such concentrations.

9.3.3.4 Appeal against handling decisions

The Law confirms the right to appeal if parties in a competition case are not satisfied with the decisions of the panel.[231] This is a fundamental principle in handling administrative cases where decisions can be appealed to higher bodies. Under Article 107, appeals are made in two cases. First, if the involved parties disagree with part or the whole of the decisions issued by the panel, they may lodge complaints with the VCC. Second, if the involved parties disagree with part or the whole of the decisions issued by the head of the VCAD, an appeal is to be lodged with the Trade Minister.

It is provided that within thirty days after receiving the complaint dossiers, the VCC or the Trade Minister has to settle the complaints; in especially complicated cases the time limit may be extended for another thirteen days at most.[232] If the parties involved still disagree with the settlement of their appeal, they may initiate administrative lawsuits against part or the whole of the contents of such decisions at the competent

---

[230] Tran Thi Thu Phuong and Hoang Thi Bich Ngoc, *Cac Bien phap Khac phuc trong Tap trung Kinh te* [Remedial Measures in Economic Concentration Control] (2009) <http://www.vca.gov.vn/Modules/CMS/Upload/36/2009_9_17/BPKP%20tap%20trung%20KT-%20Ms%20Phuong.doc>.

[231] *Competition Law 2004* art 107.

[232] Ibid art 111.

provincial/municipal People's Courts.[233] This provision, however, may give rise to a concern as to whether courts at this level are capable of reviewing decisions settling anti-competitive behaviour?[234] This is because anti-competitive behaviour may strongly affect the competitive environment and the interests of a whole society. The review often includes several considerations of economics and political matters, which could go beyond the capability of a provincial/municipal court.[235]

- **Conclusion**

Vietnam's competition authority, the core factor in the competition law enforcement mechanism, has only carried out its task for five years since the Law came into force. In general, a legal framework has been basically set up which lays down the necessary features for its operation. However, the desire for a powerful and capable competition authority with an effective enforcement mechanism has not been realised. This explains the weaknesses in the enforcement of the Law, particularly of those provisions concerning anti-competition behaviour. Even though these limits have often been justified for objective reasons, such as its new and unprecedented model, the lack of expertise, of human resources and of experience, the key factor is an institutional matter. In particular, the current setting does not ensure independence, fairness, accountability and transparency. As a result, Vietnam's competition authority is vulnerable to interference from state management agencies and the non-compliance of state monopolies. Lack of knowledge of the Law and the limitations of self-awareness of the business community regarding the use of competition law measures in business activities are other contributing factors. In this regard, reform of the competition authority has become significantly important, together with the correction of imperfections in the current Law.

[233] *Competition Law 2004* art 115.

[234] Quang, above n 174.

[235] Nguyen Ngoc Son, 'Mot so Y kien ve Dia vi Phap ly cua Hoi dong Canh tranh tai Vietnam Hien nay' [Some Ideas regarding Legal Position of the Competition Council in Vietnam] (2006) *Legal Sciences* [Khoa hoc Phap ly] <http://luathoc.cafeluat.com/showthread.php/27457-Mot-so-y-kien-ve-dia-vi-phap-ly-cua-Hoi-dong-canh-tranh-tai-Viet-Nam-trong-dieu-kien-hien-nay>.

Chapter 10

CONCLUSION

10.1 Addressed issues and final significant findings of the thesis

10.1.1 'State monopoly' concept and surrounding issues

This thesis concludes that state monopolies exist as an inevitable consequence of the political determination of Vietnam's Communist Party. Their existence is considered necessary to meet the demand for a market economy with socialist orientation in Vietnam. This, however, facilitates the ability of state monopolies to engage in monopolistic behaviour and creates obstacles for the application of competition law in Vietnam.

The first part of the thesis focused on a definition of state monopoly, its nature and characteristics, surrounding issues, i.e. its role in a market economy; factors affecting the development of state monopolies in Vietnam and rationales for their continuation.

Chapter 2 demonstrated that even though state monopolies exist in many forms and 'state monopoly' can be defined in different ways, there are common criteria. 'State monopoly' often refers to a market situation where there exists an exclusive control of the supply of goods and services by a few state firms. The thesis, however, does not focus on this approach. Rather, it refers to a 'state monopoly' as a 'monopoly firm' or a 'monopolist'. Thus, 'state monopolies' are a type of monopoly firm which are controlled or influenced by the state. The terms 'control' and 'influence' refer to the degrees by which the state may have a significant, even decisive, influence on a monopoly firm.

However, it is contested that the concept of state monopoly in Vietnam has not been defined. How the concept is interpreted and what its elements might be are mostly drawn from empirical work and an analysis of its relevant features. To seek a workable concept of 'state monopoly', chapter 2 borrowed an interpretation and understanding from EU competition law and other jurisdictions. Thus, a state monopoly should be defined as 'an economic entity controlled or influenced by the state which, when achieving sufficient

economic strength, is able to conduct monopolistic behaviour that is subject to competition rules'. Hence, the close link with 'the state' is a significant characteristic. This link determines the nature and development of state monopolies, how they operate and how the state should respond to behaviour exhibited by them.

Chapter 3 focused principally on features and characteristics of Vietnam's state monopolies. This was important for exploring difficulties in the application of competition law as discussed in the subsequent chapters.

Vietnam's state monopolies have good rationales for their existence. This is supported by a review of the historical development of state monopolies in Vietnam from the initial form (union of state-run enterprises) to the current forms, of which 'state economic group' is the most important. First, state monopolies exist for historical reasons as the legacy of the previous economy and a transitional period. Second, they are necessary to guarantee a sufficient supply of public goods. Third, they serve as useful tools for the state to intervene in the economy when needed (in the control of inflation, regulation of increase in prices). Finally, the impact of international economic integration could act as a crucial rationale for the existence of state monopolies in Vietnam.

A significant finding of chapter 3 is that, even though Vietnam's state monopolies have experienced a series of renewals and adjustments, their nature remains unchanged which the close link with the state and the political support for their continuance are basic underpinnings. After the Doi Moi Program, Vietnam's state monopolies have evolved and developed in a different way from the traditional understanding of the nature of a monopoly. They were merely established by administrative decisions, not through free competition, such as the form of state general corporations in mid 1990s and state economic groups in early 2000s. It remains a fact that state monopolies in the form of state economic groups and state general corporations control crucial areas of Vietnam's economy. Besides, as all natural monopoly industries are in the hands of the state, there are almost no differences between a state monopoly and a natural monopoly. It can be concluded that the question of monopolies in Vietnam is principally concerned with state monopolies.

Vietnam's state monopolies have been firmly supported through line ministries. They have benefited from barriers to market entry in forms such as license regulations and

price mechanisms in certain areas (electricity, telecommunication, airlines). The intervention of state authorities in the form of guidance and directions with regard to tendering, quota allocation, etc. is still common. Local monopolies also exist, due to the support of local authorities through barriers for market access, facilitation of local industries or special trading rights. This has resulted in an unfair competitive environment in Vietnam. Both the development of Vietnam's state monopolies and their performance have been strongly influenced by political thinking and determined by the socio-economic context.

It is argued that the deep-rooted reason for the monopoly situation in Vietnam is 'the leading role of the state economic sector' concept. The assertion of 'leading role' is a significant factor explaining the continuing existence of state monopolies and is a cause of difficulty in dealing with anti-competitive behaviour by means of competition law. The transfer from 'state monopoly' to 'enterprise monopoly' has enabled state general corporations and economic groups to turn into state monopolies. They are criticised for abusing their monopoly positions and conducting restrictive competition practices. As remnants of the previous economic mechanism have not been completely eradicated, the monopoly situation has become a worrying issue.

The last part of Chapter 3 introduced empirical evidence to support the arguments raised in chapters 2 and 3 and illustrates problematic issues of the state monopoly situation. Among other things, two significant conclusions were drawn from the survey. First, a number of anti-competitive behaviour, mostly in the form of abuses of dominant/monopoly positions, has been commonly committed by state monopolies. Second, competition law has had little effect on dealing with anti-competitive behaviour. This raises concerns about the effectiveness of competition law and the question of whether a competition authority is capable of dealing with state monopolies.

Chapter 4 introduced basic issues concerning Vietnam's competition law and its anti-monopoly framework. It discussed the development, objectives, fundamental definition and scope of the Law. This chapter demonstrates that Vietnam's competition law recognises and sets up commonly accepted principles of competition law. The making of competition law in Vietnam is a result of the transplantation of the world's competition rules into Vietnam's situation. The anti-monopoly provisions in Vietnam are virtually identical to those of the EU competition law.

The first part of the thesis concluded that competition law in Vietnam appears adequate but does not work well in practice. This was further explained in chapters 6, 7 and 8. Two possible explanations involving the application of competition law to state monopolies are: first, the current regime may not provide enough 'facilities' to deal with state monopolies due to flaws in the law. Second, competition law cannot be applied properly due to the nature and characteristics of state monopolies.

10.1.2 The application of competition law to anti-competitive behaviour of state monopolies

Chapters 5 to 9 examined how competition rules apply to state monopolies' anti-competitive behaviour. The conclusion was that these categories of behaviour have not been regulated effectively. There are shortcomings in the Law and the law should be modified.

Chapter 5 served as a link between the first part of the thesis dealing with Vietnam's country specific issues and the second part concerning the application of competition rules to state monopolies' behaviour. It elucidates underpinnings, principles and implications of the application of competition law. It seeks explanations as to why and how state monopolies can conduct anti-competitive behaviour. It also finds answers to these questions. It argued that state monopolies have the same purposes as other firms to pursue profit maximisation and to strengthen their position on the market. Thus, it contends that competition rules should address state monopolies' anti-competitive behaviour in the same way they apply to other firms. It is noted that there are certain special treatments and exceptions which are determined by the state's political objectives. This causes problems and places constraints on the application of competition rules to state monopolies' market behaviour. In this chapter, the experiences of selected jurisdictions, i.e. the European Union, the United States and Australia, are reviewed. Among other things, the universal application of competition principles to all economic entities, the serious commitment to the neutrality principle and the ensuring of capability, independence, transparency and accountability of a competition authority appear to be the best recommendations for Vietnam. Finally, it examined two implications i.e. 'public choice' and 'public interest consideration' and discussed how they affect the application of competition law to state monopolies via the legislative process and the enforcement process.

The rest of the second part of the thesis was concerned with anti-competitive behaviour of state monopolies. On the basis of features of the EU competition law, those questions are addressed by separate chapters (6, 7 and 8) corresponding to the three pillars of anti-monopoly law. It was suggested that in the application of competition rules, the characteristics of state monopolies in Vietnam are a matter of concern.

The next four chapters (6, 7, 8 and 9) presented significant findings:

- *Anti-competitive behaviour committed by state monopolies is more serious than the same behaviour by other firms*.

This is the main thrust of chapter 6 (part 6.2); chapter 7 (part 7.2) and chapter 8 (part 8.3). The argument is illustrated throughout these chapters.

In Chapter 6, it was found that anti-competitive agreements are easily made among state firms, especially those in the same institution, or between state monopolies and other firms. Agreements to fix prices, to allocate market or to exclude competitors are also made within industrial associations in which state monopolies often play a leading role. More seriously, bid rigging agreements are found in tenders regarding government projects. Chapter 6 showed that the relationship among state monopolies, their influential strength and the link with state management agencies are factors causing the possibility of anti-competitive agreements.

Chapter 7 found that state monopolies are often entrusted to manage and carry out businesses with state assigned capital and large-scale assets. This explains why they find it easier to achieve a dominant position than other firms.[1] It also explains their common abuses of market dominance in both exploitative and exclusive forms. Abusive behaviour is committed by state monopolies to either maximize profits or reinforce their dominant position, with no differences from the same behaviour of other firms. Such abuses are clearly demonstrated by pricing behaviour when there is no competitor in a monopoly domain (state monopolised domains), or when there are few competitors in a particular market. In these two cases, state monopolies are able to apply and adjust the prices of their products/services according to their wishes. We also find that the abuse of

[1] The situation of market dominance in Vietnam confirms an observation made by UNTACD that after equitisation, state firms have advantages for continuing to hold large amounts of capital and assets previously assigned by the state. See UNCTAD, 'Abuse of Dominance' (TD/B/COM.2/CLP/66, 2008), 14 <http://www.unctad.org/en/docs/c2clpd66_en.pdf>.

dominance is common in areas of essential facilities. A monopoly position in these areas makes it possible to exploit profits by applying high charges and imposing unfair terms and conditions in contracts with their partners. Consequently, this forces their customers to accept high fees and limits choices. Lastly, state monopolies have incentives to prevent market entry by other firms in order to maintain their dominance. They can influence the legislative process or lobby for the imposition of market barriers.

In Chapter 8, the relationship between state monopolies and economic concentration activities was viewed from two aspects. First, a concentration can be undertaken directly among state monopolies. Second, a concentration can involve state monopolies. Two questions regarding economic concentration are posed, namely: (i) whether a concentration reinforces current dominance of the state monopolies; and (ii) whether this enables state monopolies to expand their dominance in other areas than monopolised domains. Both cases can entail adverse effects on competition.

As for the first question, concerns arise if a competition authority is not capable of dealing with concentration involving state monopolies, or there is a hesitance in applying competition rules to them. There are some obstacles facing a competition authority which have resulted from the exertion of political wills, or the interference of sectoral regulators, i.e. industrial ministries. For the second question, the desire to expand the scope of business of state monopolies is often justified by the aim of maximising their profits or supporting their current monopoly position, as any other firms. If economic concentration is undertaken between foreign partners and state monopolies, the concern becomes more serious. Such a concentration might be rejected on the grounds of national defence, security or simply for political reasons. However, this can hinder the pace of international economic integration for which market access is always a requirement and the monopoly position of state monopolies in reserved areas is hard to change or even unbreakable. Moreover, this brings more adverse impacts to competition, i.e. the abuse of the monopoly position. Finally, the restriction or prevention of foreign firms in conducting a concentration with state monopolies may be ineffective, because concentration can also be undertaken by other means.

- *Since it was adopted in 2004, the current Competition Law has shown a lack of effectiveness in dealing with monopoly violations. Even though the Law and its sub-laws giving guidance set out platforms for implementation, there is a poor performance of anti-monopoly provisions in practice with respect to state monopolies. It is concluded that the shortcomings of the current law contribute considerably to the limitation of anti-monopoly provisions.*

Having drawn on the study of Vietnam's anti-monopoly provisions in chapters 6, 7, 8 and 9, it is concluded that the poor performance of competition law in dealing with anti-competitive behaviour is caused by a number of shortcomings of the law.

- *The lack of a clear statement of objectives in the Law*

Chapter 5 argued that a clear statement of the objectives of competition law is important. It reflects the goals of the state when it adopts the law. Competition law objectives are closely linked to effective implementation of the law, including institutional arrangements of the competition authority. This assists competition authorities in avoiding vagueness when applying competition law and ensures compliance with the law by the firms on the market and the state management bodies.[2] Regrettably, such an objectives clause is missing in Vietnam's *Competition Law 2004*.

- *The use of the market share criterion*

Chapters 6, 7 and 8 showed that the 'market share' criterion plays an important role in the application of competition rules in Vietnam. 'Market share' is found to be the first and possibly the only criterion to determine market dominance and abuse of market dominance and to analyse other technical issues relating to anti-competitive agreements and economic concentration matters. However, it is observed that the determination of market dominance which is mainly or only based on market share can lead to inaccurate results. Other than the market share indicator, factors such as barriers to market entry, current market structure and collaboration among firms also have remarkable effects on

[2] Economic efficiency, which is one of the major benefits of the competitive process, may be adversely affected by a compromise among conflicting objectives to reflect the interests of different stakeholders and this can also severely hinder the independence of competition enforcement authorities. Similarly, if no objectives are included, or they are stated too broadly or elusively, it may be problematic when the law comes to implementation. See Michal Gal, *Competition Policy for Small Market Economies* (Harvard University Press, 2003) 50 51.

the formation of market dominance. As noted from the practice of the EU and other countries like the US and Australia, not only is market dominance determined by competition rules, it is also recognised by observing the views and conclusions of the courts and tribunals in cases.

In Vietnam, the preference given to 'market share' in determining market dominance/monopoly creates some difficulties. First, although some state monopolies are in monopolised domains, they may fall outside the scope of competition law because the market share of each of them is less than the threshold of 30 per cent as provided in the Law. Second, the lack of transparency and reliable information as well as the limitation of financial funds and human resources of the competition authority are obstacles for comprehensive analyses of such key issues as market share, dominance or abuse of dominance. Third, the determination of 'market dominance' and 'abuse of market dominance' in other jurisdictions is also based on the recognition of the general legal force[3] of the Court's judgments in competition cases. In Vietnam, this is difficult because not many cases have been settled since the Law came into effect and so precedents are limited.

In the same vein, 'market share' is an important criterion to determine whether or not a concentration case is regulated by the Law. However, the fact that 'market share' is determined by evaluating the turnover of purchases and sales of the firm concerned may lead to inaccuracy, because they are only quantitative. Turnover (quantitative factors) is hard to evaluate because it depends on the accuracy and reliability of the information collected. In fact, the market power of a firm in the market also relies on a number of qualitative factors, such as the ability to mobilize capital, the reputation of the firm in terms of business, products, technology, management, etc. By simply using statistical methods, it is difficult to determine exactly the market power of a new firm, particularly when the firm(s) conducting a concentration operates in a number of different markets.

- *Anti-competitive agreement definition*

A clear definition of 'anti-competitive agreements' is not provided either in Article 3(3)

[3] Under the Vietnamese legal system, the Court's judgments are not considered as law. In other words, they are not ranked as one source of law. For this reason, judgments or decisions of Vietnam's competition handling panels will not be applied to future cases or used to interpret a legal issue which will be enforceable as law.

or in Article 8 of the Law. However, while the Law does not define specific forms of anti-competitive agreement, a list provided in Article 3(3) gives some examples. This seems to be a challenge to competition authorities. First, it is hard to conclude whether or not an agreement is in restraint of competition if coordination among competitors is in the nature of a 'concerted practice' in unwritten form. Second, it is unclear whether decisions made by trade associations have the effect of distorting or restricting competition because this matter falls outside in the interpretation in Article 3. Third, as legal precedent is not considered as a source of law in Vietnam, previous settled cases, interpretations, arguments of the settling panel and justifications by involved parties, etc., cannot be referred to for future cases. This does not assist in the interpretation of anti-monopoly provisions.

Additionally, the provisions dealing with bid rigging limit the scope of the application of competition law to this behaviour. A bidding collusion is understood as only occurring among bidders (horizontal agreement). This excludes the application of Article 8 to collusions between bidding organisers and bidders, or other forms of agreement among them to enable one bidder to win the bid.

- *The determination of abuse of dominant/monopoly position*

Chapter 8 showed that the consideration of anti-competitive effects of behaviour of firm(s) is important in the determination of abuse of dominant/monopoly position. This is illustrated through the practices of applying Article 102 *TFEU* (ex Article 82 *TEC*). Such a determination involves a number of assessments with reference to economic theories and legal principles and the views of the court about the case are also important.

The concept of 'abuse of dominant/monopoly position' is not clearly provided in Vietnam's *Competition Law 2004*. As in Article 102 *TFEU* , a list of categories of abusive behaviour is included in Articles 13 and 14. Besides, Article 11 mentions the concept of 'the capability of causing significant anti-competition'. The question arising is: how to clarify what the capability of causing significant anti-competition is? It is argued that the competition authority must take into consideration how a certain abusive behaviour affects competition by applying a competition test. This is particularly important when anti-competitive behaviour may affect not only the infringed firms in question, but also other firms and customers as a whole. However, this task requires a

great deal of professional skill and power.

- *The control of economic concentration activities*

First, there is a lack of an explicit definition of 'economic concentration' in the Law. In Vietnam, this concept is often regarded as 'behaviour of firms', by which a larger firm(s) will be created. Thus, not all concentration cases are regulated by the law, especially in the case of consolidation or joint ventures, or when a firm just simply obtains influence over the strategic issues of another firm. As a 50 per cent threshold is provided in the Law, only concentration cases which generate over 50 per cent combined market share in the relevant market can be considered as entailing potential threats restricting competition. Hence this may exclude a number of concentrations which are harmful to competition.

Second, the Law does not distinguish between horizontal, vertical and mixed 'economic concentrations', as this is often seen in other competition law jurisdictions. The Law should have covered these concentration forms, because a concentration can be undertaken by the firms either operating in the same market, or in different markets. This absence is demonstrated by the provision of concentration forms in Article 17, which are just legal expressions of concentration activities and the use of combined market share in Article 3(6), as a basis for considering concentration. As found in the cases of the US, EU and Australia, a competition authority is generally empowered to conduct a test to determine if a concentration raises any competition concerns and to identify possible harm to competition. After this evaluation process, it may decide whether or not such concentration can proceed, or what measures should be taken to eliminate harmful effects on competition. It is also found that 'market share' is not the only criterion which may determine a prohibition of an economic concentration case.

Chapter 8 argued that such an assessment is crucial in dealing with concentration activities, particularly those having foreign elements (cross-border mergers). In this case, the 'market share' threshold may become inapplicable if the combined market share of acquirers does not surpass 50 per cent. It is difficult to assess if the concentration is undertaken by a legal presence in Vietnam of an overseas parent company where the market share of the subsidiary is smaller. Besides, the mere application of the criterion of 'market share' will not cover a concentration which is implemented by means of

obtaining a substantial number of voting rights.

In this regard, an assessment mechanism of impacts on effective competition will be significant for Vietnam's competition authority to exercise control over concentration and prevent anti-competitive conduct in the future.

- *The independence of competition authorities*

The last substantive chapter contended that the competition authority plays an important role in addressing anti-competitive behaviour of state monopolies. When the law has provided effective instruments, such questions as how to apply the law to deal with state monopolies' anti-competitive behaviour effectively lie in the hands of the competition authority.

However, while a mechanism for the enforcement of competition laws is applicable for both firms and the competition authority, it is found that the enforcement of competition law in Vietnam is exposed to two problems that result in the ineffectiveness of enforcement mechanisms with regard to state monopolies. First, the Law has flaws and appears to have shortcomings. Second, state monopolies still maintain strong links with state management bodies, while the independence of the competition authority is limited by its institutional nature.

The Law does not set out a clear division of tasks between the competition authority (principally the VCAD) and sectoral regulators (ministries in charge of state management in different domains). However, these sectoral regulators are often involved in the competition process and the settlement of competition cases by the competition authority, particularly in the investigation process.

In fact, Article 6 of the Law provides a number of prohibitions for state management bodies. However, this Article does not provide detailed explanations or what mechanism is applicable for these acts. It does not mention the relationship between state management bodies and the competition authority involved in competition matters.

Consequently, it is argued that to enforce competition law effectively and ensure that competition law will be applied fairly to all entities, a competition authority must be independent and have actual competence and the relationship between it and sectoral regulators must be properly resolved. However, such a close coordination between the

competition authority and regulators may be a positive factor that helps to enforce competition law more effectively.

10.2 A summary of directions for future reform

Throughout the thesis, a series of shortcomings and weaknesses of the current Vietnamese legal framework on competition law, especially on state monopolies, have been revealed. Further, it has also become clear that academic studies on competition law in Vietnam are rather weak. While this thesis is not intended to provide recommendations for reform, readers may nevertheless find it useful in identifying some future policy and reform directions as well as areas where further research is importantly needed.

This thesis argues that dealing with a state monopoly situation effectively depends on how the state addresses its political determination of keeping state monopolies as strategic firms in the market and how shortcomings and flaws in existing legislation are fixed. As the former is hard to challenge and may be out of reach of a law thesis, the latter seems to be more practical.

It was demonstrated in previous chapters that the application of competition law to state monopolies is complicated. This results in several obstacles originating from state policies towards SOEs and the political determination of Vietnam's Communist Party. It is reflected in the poor enforcement of competition law and the limited intervention of the competition authority in cases involving state monopolies. There are mounting concerns about whether anti-competitive behaviour committed by state monopolies will be investigated and handled, as the establishment of new state monopolies is a growing trend.

This part summarises directions for future reform regarding the application of competition law to state monopolies.

10.2.1 Vietnam Competition Authorities[4] should be reformed to become more independent and accountable.

Competition rules are effectively applied only if the competition authority is capable of enforcing them. A well designed law remains on paper if the competition authority cannot conduct investigations into suspected firms and impose fines on them.

As the determination to maintain a 'decisive' role for state monopolies in the market remains unchanged, a reform of Vietnam's current competition authorities becomes more practical. The reform subsequently should include adjustments of relevant provisions in the current Law. Among other things, independence and accountability must be the key factors of the reform and consequently will be the core solution for the application of competition law to the state monopolies. Additionally, such a reform should take into account the specific context of Vietnam when building competition law. The new competition authority should be compatible with the common model in the world, which will facilitate Vietnamese learning lessons from other countries and applying their experiences in the future.

Particular directions for the reform should be as below:

First, a number of reforms should be implemented with regard to organisational issues of the competition authority.

The two existing competition institutions should be re-organised as a single ministerial body. This should be undertaken together with a move of current competition authorities from the Ministry of Industry and Trade. As the VCAD and the VCC currently perform a combination of administrative and judicial tasks, this would bring about a more powerful and capable enforcement body dealing effectively with anti-competitive behaviour, especially those conducted by state monopolies. In addition, this would help the Vietnamese competition authority to keep up with the continuing development and greater involvement of state monopolies in the market.

The reform should entail a clarification of the competition authority's position in the

[4] The Vietnam Competition Authority, as discussed in Chapter 9, consists of two bodies: the Vietnam Competition Administration Department – the VCAD and the Vietnam Competition Council – the VCC. In this part, 'competition authority' is used regularly and will refer to both of these bodies as the 'two arms' of the competition enforcement mechanism.

hierarchy of state management bodies. The new competition authority should be placed in the executive branch because it is particularly concerned with administrative tasks. This is because the enforcement of competition law is linked closely to a wide range of laws regulating civil, administrative and criminal activities. Besides, the major objective of competition law is not to restrict or punish monopoly practices; rather it is related to the maintenance of competition.

Second, the reform should improve the effectiveness of Vietnam's competition authority.

Clearly, competition law enforcement involves a wide range of significant tasks. A competition authority must be able to conduct a number of important assessments before taking any necessary action against violators. It is obvious that the effectiveness of the competition authority also depends significantly on the quality of its staff. In particular, a reform in this regard should focus on the following matters:

- The new competition authority should no longer perform tasks concerning international trade issues and those aimed at facilitating a competition environment. This would ensure that the competition authority would concentrate on its major functions: supervision and enforcement of competition law.

- The reform should improve the independence of the competition authority's staff and their effectiveness. In particular, it should enhance institutional arrangements and the working basis of the competition authorities' staff which may affect the independence and quality of their performance.

- There should be an improvement in the quality of staff together with the provision of better working conditions for them in terms of salary and funding. As the competition enforcement consists of a number of complicated tasks, it requires the staff to have multidisciplinary knowledge and skills.

Third, the reform must properly address the relationship between the competition authority and sectoral regulators.

The reform should clarify the relationship between the competition authority and sectoral regulators. Preference must be given to the competition authority in a case where conflicts may occur due to the overlapping of competence between the competition authority and particular sectoral ministries concerned.

Four, the reform should increase powers of the competition authority.

It is argued that an effective application of competition law is decided by the extent to which competition authority can interfere in the competition process; the availability of the powers it can have; and the maximum remedies it can impose. With regard to state monopolies, this requires a powerful competition authority, together with its actual independence. Hence, the law on competition should give more powers to the competition authority. In particular:

- The competition authority should be able to interpret competition law, including its principles and particular provisions; how it can be applied and the validity of these interpretations should be accepted as law.

- It should be able to conduct an 'effects on competition test' with regard to law proposals drafted by regulators. This may involve a series of analyses and examinations to evaluate the effects it may have on competition.

- It should be given more powers in the investigation process, including the right to collect information and take action against the 'self-incrimination' principle; the possibility of imposing criminal sanctions and applying structural remedies in economic concentration cases.

10.2.2 There should be a number of critical modifications with regard to current anti-monopoly provisions

There are a number of flaws in the current Law which may affect the regulation of anti-competitive behaviour. These flaws limit the possibility of the competition law in catching activities in restraint of competition and hindering effectiveness in the operation of the competition authority. The reform must consist of a number of 'technical' modifications. This should bring Vietnam's competition law in line with the common trend in the world[5] and support the aim of enhancing the independence and accountability of the competition authority. In particular:

First, having a clear statement of objectives of the Law

[5] For example, the criminalisation of cartels and the application of a Leniency Program have recently become common trends in competition law jurisdictions.

Such an objectives clause should be inserted in two alternative cases. First, if the law continues to regulate both anti-competitive behaviour and unfair competition practices, the objectives should mention the objectives of the law with regard to both of these. Second, if a separate anti-monopoly law is needed, there should be an objectives clause identifying the purposes of the law in dealing with anti-competitive behaviour.

Second, anti-competitive behaviour should be clearly defined

There are some important shortcomings in the law concerning the definition of types of anti-competitive behaviour, including 'anti-competitive agreement', 'market dominance', 'abuse of market dominance' and 'economic concentration'. Correspondingly, there are critical loopholes in the law, making it difficult for the application of relevant provisions. As a result, some kinds of anti-competitive behaviour are not caught by the law and punishments may not be imposed on them.

In particular, two modifications should be undertaken:

- First, definitions of 'anti-competitive agreement' and 'abuse of market dominance' must be clearly provided in the Law and the criteria introduced by the UNCTAD Model Law of Competition can be employed. Besides, the Law should include a definition of 'market dominance' or 'market power' and should not separate dominant and monopoly positions from that definition.

- The Law should provide a definition of 'economic concentration' which categorises concentrations into horizontal, vertical and mixed economic ones. Besides, this definition should mention the possibility of causing market dominance for post- concentration firms or the possibility of causing significant reductions in competition.

Third, some critical modifications should be made in the reform of anti-monopoly provisions

- 'Market share' should not be considered as the first and the only criterion to decide whether or not a firm has a dominant position in the market. The competition authority must be able to employ some competition analysis.

- Agreements in restraint of competition should be categorised into horizontal and

vertical ones. Besides, the list of agreements in Article 8 should be considered as a non-exhaustive one. The Law should enhance the powers of the competition authority to make use of a Leniency Program and improve the current mechanism for the application of it.

- An assessment regarding 'capability to cause significant restraints to competition' should be employed by the competition authority to declare the invalidity of an anti-competitive agreement among firms and should consider market dominance. The Law should adopt and provide details for a test of effects on competition.

- Similarly, there should be a mechanism for the assessment of effects causing competition in economic concentration. This mechanism will remove the mere reliance on the 'market share' criterion and help to consider pro-effects on competition so that the competition authority can suggest or require 'structural changes' before it approves a particular case to proceed.

Four, mechanism dealing with administrative monopoly

'Administrative monopoly' is another relevant issue regarding monopoly and has been discussed in transitional countries such as China and Vietnam. Administrative monopoly should be prohibited because this affects a healthy competitive environment, restricts the equal right to do business of entities and entails a numbers of negative consequences. As mentioned above, Article 6 just prohibits activities of state management organs and does not provide a specific mechanism and sanctions against this behaviour. Thus, administrative monopoly may be out of the purview of a competition authority.

Hence, when dealing with an administrative monopoly, the competition authority should be empowered to conduct investigations if it has sufficient evidence to conclude there is an act of violation of competition law as stipulated in Article 6. Besides, the law should include a list of sanctions and provide a clear procedure to impose sanctions against violations. The competition authority should be able to recommend corrections or discontinuation of regulations of administrative organs which it considers as being constraints to competition. It should also be able to note the possibility of detrimental effects to competition from decisions made by administrative organs and thus propose corrective amendments. In order to do so, the independence and capacity of the competition authority are critical. Furthermore, this must be effected together with the

enhancement of a mechanism for reviewing of regulatory documents and a clearer definition of administrative and business functions of administrative organs.

10.2.3 Non 'law-matter' directions for state monopoly reform

It may be argued that a competition law should not be separate from its socioeconomic context, oriented political guidelines and the competition policy of the state. The situation of state monopoly in Vietnam discussed in previous chapters reveals that difficulties facing competition law enforcement are not only mere 'law matters' (legal regulation and law enforcement). The consideration of non 'law matter' issues will be another factor contributing to the effective application of competition law to state monopolies.

First, improving and strictly adhering to the national competition policy, particularly the principle of competitive neutrality

The national competition policy consists of a set of policies and laws to serve a wide range of objectives, such as the establishment and maintenance of a competitive order as an end to ensure economic freedom and to foster economic efficiency, technological and economic progress, the provision of a level playing of fair competition and the maintenance of a decentralised structure of supply.[6] In Vietnam, competition policy is regarded as all measures conducted by the state to ensure competition. In particular, such measures aim to create the basis for competition, market opening and removal of barriers to market entry. Besides, they are necessary to deal with the firm's strategies aimed to restrict competition. A competition policy consists of competition law, a mechanism for its implementation and economic policies to encourage competition in the market.[7] Competition policy should be implemented concurrently with the application and facilitation of the competitive neutrality principle, which ensures a fair competitive environment between the state and private firms.

Second, re-defining the concept of the 'leading role' of state sector

The unclear definition of the 'leading role' of the state sector has brought about the belief

[6] Manfred Neumann, *Competition Policy: History, Theory and Practice* (Edward Edgar Publishing, 2001) 1.

[7] Le Viet Thai, 'Chinh sach Canh tranh Mot Cong cu Can thiet Trong nen Kinh te Thi truong' [Competition Policy: A necessary tools in the Market Economy] (1996) *Nghien cuu Kinh te* [Economics Studies] 221; Le Danh Vinh, Hoang Xuan Bac, Nguyen Ngoc Son, *Giao trinh Luat Canh Tranh* [Textbook on Competition Law] (Hochiminh City National University Publishing House, 2010) 27.

that state firms must control key domains in the economy. This is the main reason leading to the establishment of 'giants' in the economy, the continuing support to state firms and the abuse of market dominance by state monopolies. Hence, it is important to re-define the concept of 'leading role' of the state sector. In particular, the state should maintain a monopoly or hold decisive shares only in very strategic domains and areas related to national defence.

Third, clarifying the relationship between state monopolies and their regulators

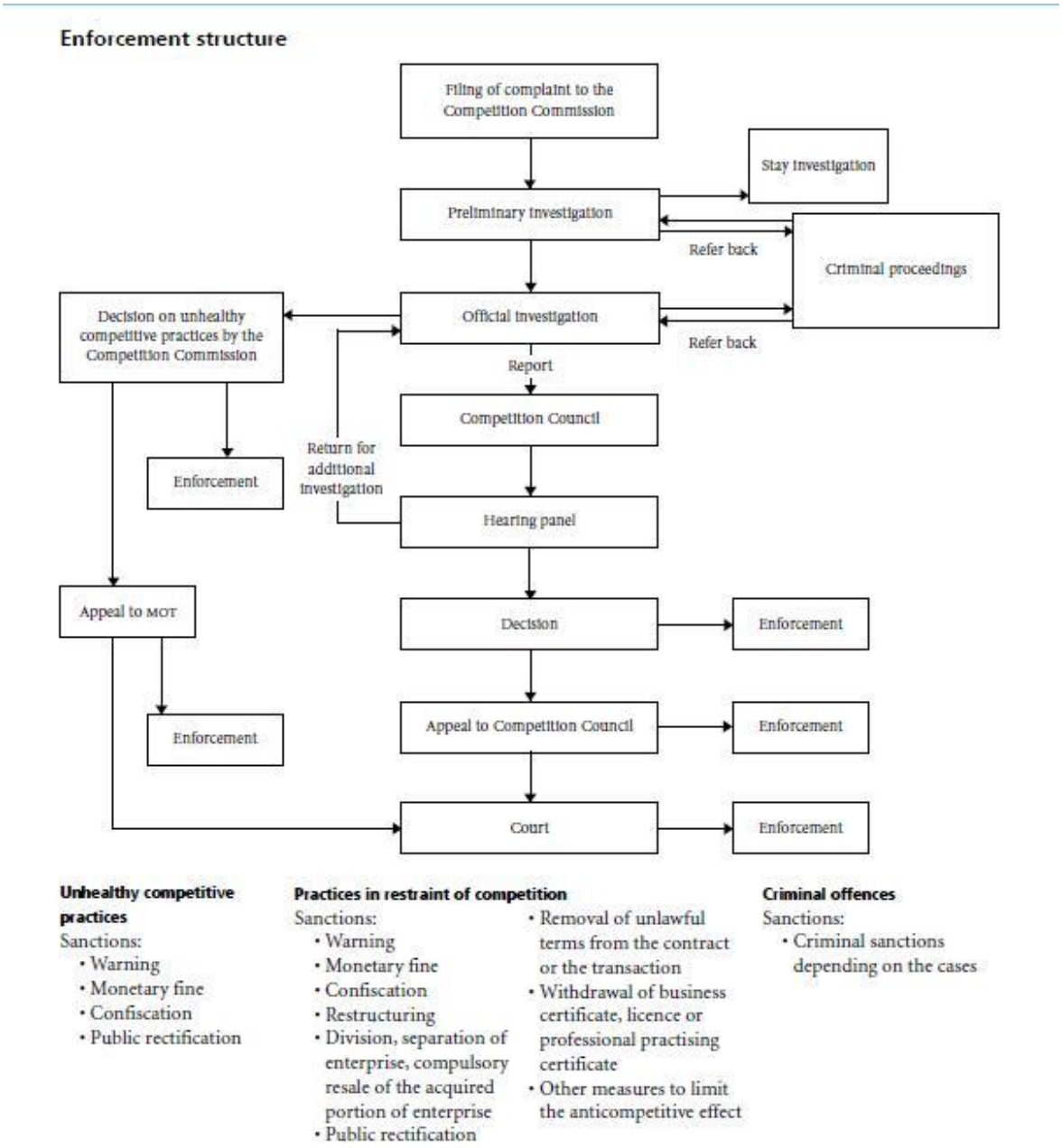
As discussed in Chapter 3, state monopolies in Vietnam are characterised by a long term 'traditional linkage' with state management bodies. To reduce the possibility of state monopolies making use of that relationship, the state should ensure that the management task of regulators over state monopolies is transparent.

Fourth, considering the scope of doing business of state monopolies

Many state economic groups (state monopolies) are expanding their business scope. Concerns arise as to whether or not this creates monopoly positions in a new area or expands market dominance of state firms, both being harmful to competition. Hence, the state should take seriously into consideration the breaking-up of state monopolies into smaller units or separating a number of state firms from large state monopolies. This should be an alternative solution to restrict the abuse of market dominance as the consequence of a monopoly position.

APPENDIX

Enforcement structure under Vietnam's competition law



Source : Freshfields Bruckhaus Deringer, 'Vietnam – New Competition Law (2005) <http://www.freshfields.com/publications/pdfs/practices/10388.pdf>

Vietnam Competition Administration Department (VCAD): Structure

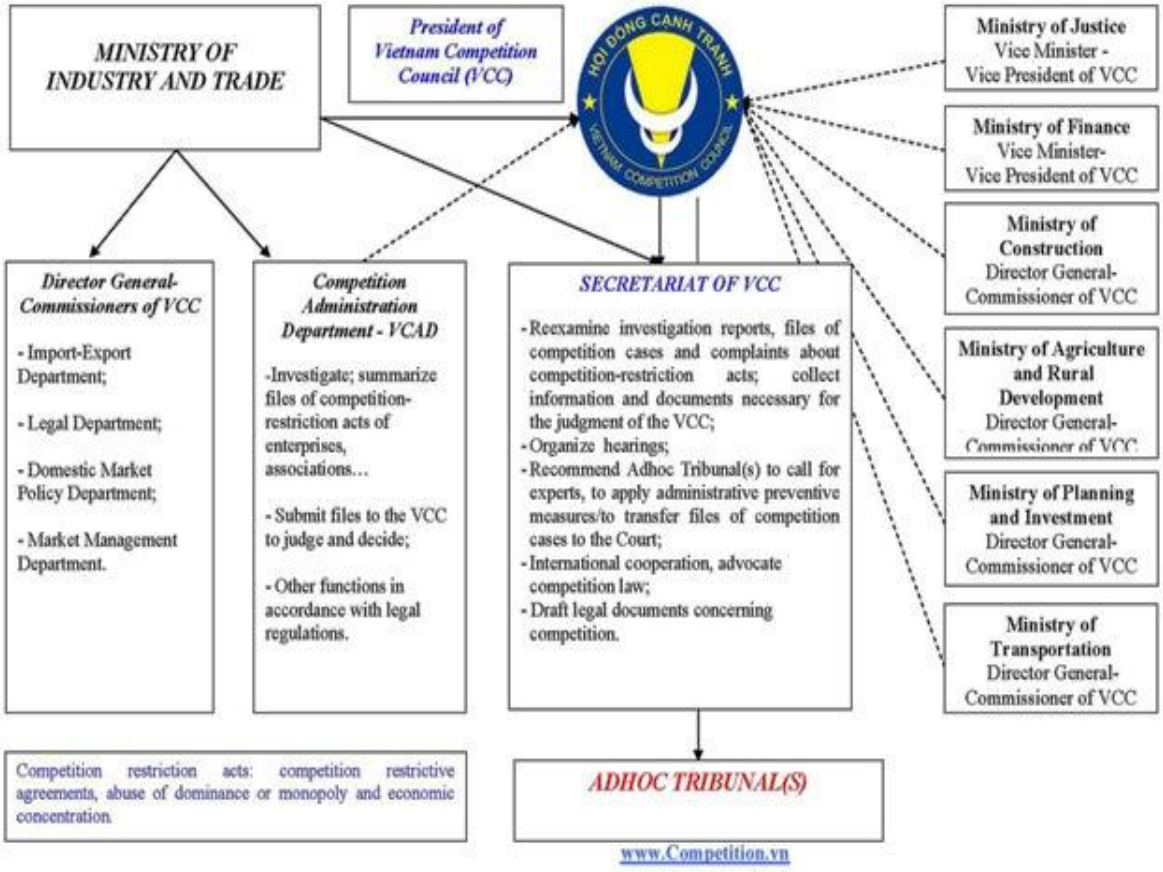
Source: Vietnam Competition Administration Department

Vietnam Competition Administration Department (VCAD): Number of Staff

Year		2007	2008	2009
Number of Staff		40	60	85
Average Age		32	30	29
Specialization	Law	10	20	30
	Economics	20	35	40
	Others	10	15	15
Sexuality	Male	27	42	50
	Female	13	28	35
Degree	Bachelor	33	49	62
	Master	6	10	17
	Doctor	1	1	1

Source: Vietnam Competition Administration Department

Vietnam Competition Council (VCC): Structure



Source: Vietnam Competition Council

BIBLIOGRAPHY

A. ARTICLES/BOOKS/AND REPORTS

ABA Section of Antitrust Law, *Antitrust Law Developments* (6th ed, 2007)

Ades, Alberto and Rafael Di Tella, 'National Champions and Corruption: Some Unpleasant Interventionist Arithmetic (1997) 107 (443) *Economic Journal* 1023

Alese, Femi, *Federal Antitrust and EC Competition Law Analysis* (Ashgate Publishing, 2008)

Alvarado, Fernando L, *Market Power: A Dynamic Definition* (1998) <www.pserc.wisc.edu/documents/publications/papers/1998.../paper1.pdf>

Anh, Vu Thanh Tu, *Competition and Privatization in Vietnam: Substitutes or Complements?* (2006) <http://www.grips.ac.jp/vietnam/VDFTokyo/Doc/2ndConf15Jul06/2EcoSession2VTTAnh.pdf >; CUTS International, *Competition Scenario in Vietnam* (2005) <http://www.cuts-ccier.org/7Up2/pdf/7Up2_Vietnam.pdf>

ANU Centre for Competition and Consumer Policy, *Evaluating the Public Benefit Test Project: An Assessment of the Public Interest Test in Authorisation Determinations by the ACCC* (2005) <http://cccp.anu.edu.au/projects/VijNagaraganPaperSept05PubBenefit.pdf>

Areeda, Phillip E and Herbert Hovekamp, *Antitrust Law: An Analysis of Antitrust Principles and Their Application* (Aspen, 2nd ed, 2000)

Areeda, Phillip, Hebert Hovenkamp and John Solow, *Antitrust Law* (1995)

Arkadie, Brian Van and Raymond Mallon, *Vietnam – A Transition Tiger?* (Asia Pacific Press, 2003)

Arrow, Kenneth J, *Social Choice and Individual Values* (New York, 1951)

Asian Development Bank (ADB), *Vietnam: Private Sector Assessment* (2005)

<http://www.adb.org/Documents/Reports/PSA/VIE/VIE-PSA.pdf>

Australian Government, National Competition Policy Report 2005-2007 (2007) <http://www.treasury.gov.au/documents/1306/PDF/Australian_Government_National_Competition_Policy_Report.pdf>

Bael, Ivo Van and Jean-Francois Bellis, *Competition Law of the European Community* (Kluwer Law International, 2005)

Bang, Nguyen Thanh and Tran Duc Nguyen, 'The Ownership System and Variuos Forms of Business Organisations in the Multi-Sector Commodity Market' in Per Ronnas and Orijan Sjoberg, *Socio-economic Development in Vietnam: the Agenda for the 1990s* (Swedish International Development Agency, 1991)

Barros, Pedro Pita and Steffen Hoernig, *Sectoral Regulators and the Competition Authority: Which Relationship is Best?* (2004) <http://ppbarros.fe.unl.pt/My%20Shared%20Documents/CEPR-DP4541.PDF>

Basu, Prahlad K, 'Reinventing Public Enterprises and Their Management as the Engine of Development and Growth' in United Nations, Department of Economic and Social Affairs, *Public Enterprises: Unresolved Challenges and New Opportunities* (United Nations, 2008)

Bat, Nguyen Tran, 'Xay dung cac Tap doan Kinh te' [Building State Economic Groups] <http://www.chungta.com.vn/Desktop.aspx/ChungTa-SuyNgam/Hanh-Dong/Xay_dung_cac_tap_doan_kinh_te/>

Bendor, Jonathan, Serge Taylor and Roland van Gaalen, 'Bureaucratic Expertise versus Legislative Authority: A Model of Deception and Monitoring in Budgeting' (1985) 79 (4) *American Political Sciences Review* 1041-1060

Bergh, Roger van den and Peter D Camesasca, *European Competition Law and Economics: A Comparative Perspective* (Intersentia, 2001)

Berthold, Daniel, *Development of the Private Sector and State-Owned Enterprises in Vietnam* (2006) <http://www.ncku.edu.tw/~cseas/report%20SEA/VIET/viet8%20daniel%20berthold.pd>

Bich, Duong Ngoc, *Xay dung Cac Co so Phap ly Bao dam Quyen Tu do Canh Tranh Cua Cac Doanh nghiep Trong Nen Kinh te Thi truong Tai Viet Nam* [Building Legal Bases to Guarantee the Right to Competition of Enterprises in Vietnam's Market Economy] (LLM Thesis, Hochiminh City Law University)

Bich, Nguyen Ngoc, 'Tong Cong ty Va Nhung Sai lam Do Thieu thon Kien thuc' [State General Corporations and Mistakes due to the Lack of Knowledge] (2010) *Tuan Vietnam* (Online) <http://tuanvietnam.net/2010-07-13-de-khong-con-mot-vinashin-2>

Binh, Nguyen Duc, 'Xay dung Dang ta that vung manh' [Building our Party to be Genuinely Strong] *Nhan Dan* (Online) (2006) <www.nhandan.org.vn>

Bishop, A Lofaro and F Rosati, 'Turning the Tables: Why Vertical and Conglomerate are Different?' (2006) 27 (7) *European Competition Law Review* 403

Black, Duncan, *The Theory of Committees and Elections* (Cambridge, 1948)

Black, John, Nigar Hashimzade and Gareth Myles, *A Dictionary of Economics* (Oxford University Press, 2009)

Black's Law Dictionary (Thompson West, 8th ed, 2004).

Blum, Françoise and Anne Logue, *State Monopolies under EC Law* (Wiley, 1998)

Blumenthal, *Presentation to State Council Legislative Affairs Office Regarding the Anti-Monopoly Law of the People's Republic of China* (May 24, 2005)

Bös, Dieter, *Public Enterprise Economics: Theory and Application* (Amsterdam, 1989)

Boycko, Maxim, Andrei Shleifer and Robert W Vishny, 'A Theory of Privatization', (1996)106 (435) *Economic Journal* 309

Buchanan, James M and Gordon Tullock, *The Calculus of Consent: Logical Foundations of Constitutional Democracy* (Univesity of Michigan Press, 1962)

Buchanan, James M, *The Limits of Liberty* (Chicago, 1975)

Bueren, Martin Van, *Addressing Water-relaxed Externalities: Issues for Consideration*

(2004) <http://www.thecie.com.au/content/publications/CIE-water_externalities.pdf>

Bureau of Competition of the Federal Trade Commission, *A Study of the Commission's Divesture Process* (1999) <http://www.ftc.gov/os/1999/08/divestiture.pdf>

Cane, Peter and Joanne Conaghan, *The New Oxford Companion to Law* (Online) (Oxford University Press, 2008)

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)

Chi, Nguyen Minh, *To Build Competition Law in the context of the Transition to Market Economy in Vietnam' – Contribution of Vietnam to OECD Global Forum on Competition* (2002) <http://www.oecd.org/dataoecd/18/32/1832367.pdf >

Chiara, Giacomo Dalla, 'A Monopolistic State in Competitive Markets: How State Ownership and State Intervention Affect Competition' (Bachelor Degree Thesis, Luiss Guido Carli University, 2010) <http://tesi.eprints.luiss.it/379/1/dallachiara-tesi.pdf>

CIEM and Swedish International Development Agency (SIDA), *Tiep tuc Xay dung va Hoan thien The che Kinh te thi truong Dinh huong XHCN o Vietnam* [Continuous Building and Perfecting Institutional Framework for Market Economy with Socialist Orientation in Vietnam] (Science and Technology Publishing House, 2006)

CIEM, 'Doi moi Quan ly Nha nuoc Doi voi Cac Loai hinh Doanh nghiep o Vietnam Theo Huong Khong Phan biet Thanh phan Kinh te' [Reform of State Management to the Enterprises towards Non-Discrimination of Economic Sectors in Vietnam] (2006)

CIEM, 'Some Legal and Institutional Issues regarding Competition Policy and Control of Economic Monopolies' (2002) (Report produced within the framework of the UNDO-supported Project VIE/97/016)

CIEM, 'Cai cach, Nang cao Hieu qua Suc Canh tranh cua Doanh nghiep Nha nuoc Trong

Qua trinh Hoi nhap Quoc te [Renewing and Enhancing of State-Owned Enterprises' Competitiveness in the International Economic Integration Process] (2006)

Cinnamond, Anna Riviere, *A Public Choice Approach to the Economic Analysis of Animal Health Care Systems* (2004) <ftp://ftp.fao.org/docrep/fao/010/ag276e/ag276e.pdf>

Clarke, Julie Nicole, *The International Regulation of Transnational Mergers* (PhD Thesis, Queensland University of Technology, 2010)

Cleary Gottlieb website,'Coca-Cola/Huiyuan: First Chinese Prohibition Decision under New Merger Control' <http://www.cgsh.com/files/News/ddcb6c55-e703-4266-9cce-1de9b2fd42d3/Presentation/NewsAttachment/fc2d112f-6ef2-4b5d-9918-9564c7b4f14f/CGSH%20Alert%20-%20Coca-ColaHuiyuan%20-%20First%20Chinese%20Prohibition%20%E2%80%A6.pdf>

Comision Nacional de la Competencia (CNC), *Report on Competition and the Agrifood Sector* (2010) <http://www.cncompetencia.es/Administracion/GestionDocumental/tabid/76/Default.aspx?EntryId=43418&Command=Core_Download&Method=attachment>

Commission of the European Communities, 'The VIIth Report on Competition Policy (Published in conjunction with the Eighteenth General Report on the Activities of the European Union – 1977) (1977) <http://ec.europa.eu/competition/publications/annual_report/ar_1977_en.pdf>

Commission of the European Communities, 'The XIIIth Report on Competition Policy (Published in conjunction with the General Report on the Activities of the European Union – 1983) (1983) <http://bookshop.europa.eu/uri?target=EUB:NOTICE:CB3883823:EN:HTML>

Commission of the European Communities, 'The XIth Report on Competition Policy (Published in conjunction with the Eighteenth General Report on the Activities of the European Union – 1981) (1981) <http://ec.europa.eu/competition/publications/annual_report/ar_1981_en.pdf>

Commission of the European Communities, 'The XIVth Report on Competition Policy (Published in conjunction with the Eighteenth General Report on the Activities of the European Union – 1984) (1984) http://bookshop.europa.eu/uri?target=EUB:NOTICE:CB4184822:EN:HTML

Commission of the European Communities, 'The XIXth Report on Competition Policy (Published in conjunction with the Eighteenth General Report on the Activities of the European Union – 1989) (1989) <http://bookshop.europa.eu/uri?target=EUB:NOTICE:CB5890546:EN:HTML>

Commission of the European Communities, 'The XXIVth Report on Competition Policy (Published in conjunction with the General Report on the Activities of the European Union – 1994) (1994) http://bookshop.europa.eu/uri?target=EUB:NOTICE:CM9095283:EN:HTML

Commission of the European Communities, 'The XXVIIth Report on Competition Policy (Published in conjunction with the General Report on the Activities of the European Union – 1997) (1998) <http://ec.europa.eu/competition/publications/annual_report/1997/broch97_en.pdf>

Commonwealth of Australia, Trade Practices Act Review Committee, *Report to the Minister for Business and Consumer Affairs* (1976)

Commonwealth of Australia, Independent Committee of Inquiry, *National Competition Policy* (the Hilmer Report) (1993) <http://ncp.ncc.gov.au/docs/Hilmer-001.pdf >

Commonwealth of Australia, *Competitive Neutrality Policy Statement* (1996) <http://www.treasury.gov.au/documents/275/PDF/cnps.pdf>

Commonwealth of Australia, Independent Committee of Inquiry, 'Review of the Competition Provisions of the *Trade Practices Act*' (the Dawson Report) (2003)

Communist Party of Vietnam, *Complete Works of the CPV* episode 40 (1979) (National Political Publishing House, 2005)

Communist Party of Vietnam, *Complete Works of the CPV* episode 40 (1983) (National Political Publishing House, 2006)

Communist Party of Vietnam, *Complete Works of the CPV* episode 46 (1985) (National Political Publishing House, 2006)

Communist Party of Vietnam, *Documents of the 7th Meeting of Central Committee Section VII* (National Political Publishing House, 1994)

Cook, C John and Christophe S Kerse, *EC Merger Control* (Sweet & Maxwell, 3rd ed, 2006)

Corones, Stephen G, *Competition Law in Australia* (Thomson Reuters, 5th ed, 2010)

Craig, Paul and Crainne de Burca, *EU Law: Text, Cases and Materials* (Oxford University Press, 4th ed, 2008)

Cramer, Nicholas H, 'Not So Fast: The Competition System Created by the PRC Anti-Monopoly Law and Recent Developments in its Implementation' (2009) <http://ssrn.com/abstract=1552266>

Crew, Michael A and Paul R Kleindorfer, *Privatizing the U.S. Postal Service* (2000) <http://crri.rutgers.edu/pub/wp/Privatization-Cato1.pdf>

Cuc Quan ly Canh tranh (VCAD), *Bao cao Tap trung Kinh te tai Vietnam: Hien trang va Du bao* [Report on Economic Concentration in Vietnam: Status and Forecast] (2009) <http://www.vca.gov.vn/Modules/CMS/Upload/31/2009_3_20/bao%20cao%20tap%20trung%20kinh%20te.pdf>

Cuong, Le Phu, *Monopoly Situation in Vietnam* (2003) <http://www.competitionlaw.cn/upload/05070113295626.pdf>

Cuong, Nguyen Van, 'Illegality of Cartel: Comparative Study of Criteria in the U.S, EC and Japan and their Implications for Vietnam' (LLM Thesis, Niigata University, 2004)

Cuong, Tran Tien, 'Viet Nam Se Co Nhung Tap doan Kinh te Manh?' [Will Vietnam Have Powerful Economic Groups?] <http://www.mof.gov.vn/Default.aspx?tabid=612&ItemID=20841>

Cuong, Tran Tien, 'Restructuring of State-Owned Enterprises and Relation between the State and Stae-Owned Enterprises in Vietnam' in John Stanley (ed), *Commercial Legal Developments in Vietnam: Vietnamese and Foreign Commentaries* (Butterworths, 1997)

CUTS C-CIER, *Public Interest' Issues In Competition Analysis* (Briefing note, 2008) <http://www.cuts-international.org/pdf/CCIER-5-2008.pdf>

CUTS, *A Report on Competition Scenario in Vietnam* (2005) <http://www.cuts-international.org/7up2/Country_Report_Vietnam.doc>

CUTS, *5 Nam Thuc thi Luat Canh tranh: Boc lo Nhieu Bat cap* [Five Years of the Implementation of Competition Law: Sufficiencies have arisen] <http://www.cuts-hrc.org/index.php?option=com_content&view=article&id=627%3A5-nm-thc-thi-lut-cnh-tranh-bc-l-nhiu-bt-cp&catid=78%3Avietnamese-news&Itemid=215&lang=vi >

CUTS, *Competition in Vietnam: A Toolkit* (CUTS International, 2007)

CUTS, *Competition Regime in the World – Bulgaria* (2006) <http://competitionregimes.com/pdf/Book/Europe/65-Bulgaria.pdf>

CUTS, *Competition Scenario in Vietnam* (2005) <http://www.cuts-ccier.org/7Up2/pdf/7Up2_Vietnam.pdf>

CUTS, *Promoting Competition Policy & Law in Vietnam: A Civil and Society Perspective* (2006) <http://www.cuts-international.org/7up2/vietnamCAD.pdf>

D W Carlton and J M Perloff, *Modern Industrial Organisation* (Pearson Addison Wesley, 4th ed, 2005)

Dabbah, Maher M, *EC and UK Competition Law: Commentary, Cases and Materials* (Cambridge University Press, 2004)

Dabbah, Maher M, *International and Comparative Competition Law* (Cambridge, 2010)

Dan Tri Online, 'EVN Telecom: Nan nhan Ket noi Moi' [EVN Telecom - New Connection Victim] (2006) <http://dantri.com.vn/c76/s76-127856/evn-telecom-

nan-nhan-ket-noi-moi.htm>

Dan Tri, 'Vu Kien Nhien lieu: Vietnam Airlines va Jetstar Pacific Lien tuc 'Ra Don' [The Fuel Case: Vietnam Airlines and Jetstar Pacific Continuingly Attack Each Other] (2009) <http://dantri.com.vn/c76/s82-321839/vietnam-airlines-va-etstar-pacific-lien-tuc-ra-don.htm>

Dara, Gabriele, 'Antitrust law in the European Community and the United States: A Comparative Analysis' (1986) 47 *Louisiana Law Review* 765

Dien dan cac Doanh nghiep Vietnam (VBOnline), 'Luat Canh tranh: 4 Nam Van Qua Moi' [Vietnam's Competition Law: 4 Years but Still New] (2009) <http://tintuc.vibonline.com.vn/Home/xdpl/2009/10/5116.aspx>

Dien dan Doanh Nghiep (VBOnline), 'Thi diem Thanh lap Tap doan Dien luc Viet Nam' ['Experimental Formation of Vietnam's Electricity Group] (2006) <http://dddn.com.vn/37948cat119/Thi-diem-hinh-thanh-Tap-doan-Dien-luc-Viet-Nam.htm>

Dien dan Doanh nghiep (VBOnline), 'Thuc thi Luat Canh tranh: Doanh nghiep Khong the Tho o' [Enforcing Competition Law: Businesses Cannot be Indifferent] (2009) <http://dddn.com.vn/20091112084331671cat103/thuc-thi-luat-canh-tranh-dn-khong-the-tho-o-!.htm>

Dimasi, Joe, 'The Role of Competition Policy in Structural Adjustment: An Overview of Recent Australian Structural Reforms' (Paper presented at the APEC High Level Conference on Structural Reform, Tokyo September 2004) <http://www.accc.gov.au/content/item.phtml?itemId=583702&nodeId=2cd7d30c3dad693de87beb0fb2389f4a&fn=20040909%20Dimasi%20APEC.pdf >

Dimgba, Nnamdi,

Introduction to Competition Law: a sine qua non to a Liberalised Economy (2006) <http://www.globalcompetitionforum.org/regions/africa/Nigeria/INTRODUCTION%20TO%20COMPETITION%20LAW.pdf>

Dirlam, Joel B and Alfred E Kahn, 'Antitrust Law and the Big Buyer: Another Look at the A&P Case' (1952) 60 (2) *Journal of Polictical Economy* 118, cited in Daniel

Sokol, *Limiting Anti-Competitive Government Intervention That Benefit Special Interests* (2009) <http://www.coleurop.be/content/gclc/documents/GCLC%20Working%20Paper%2002-09%20-%20Daniel%20Sokol.pdf >

Do, Huy Ha, 'Xay dung Tap doan Kinh te: Giai phap Nang cao Kha nang Canh tranh va Hoi nhap Cua Cac Tong Cong ty Nha nuoc Hien nay' [Building State Economic Groups: Solutions to Enhance Competition and Integration Capability of General State Corporations Today] (2007) *Quan ly Kinh te* [Economic Management] <http://www.ciem.org.vn/home/vn/upload/webimage/image/1190686803136_bai_2.pdf>

Doanh nhan 360, 'Kinh te Nha nuoc Phinh to Thanh The Doc quyen [State Economy Inflates to Monopoly]<http://www.doanhnhan360.com/Desktop.aspx/Thi-truong-360/Thi-truong/Kinh_te_nha_nuoc_thanh_the_doc_quyen/>.

Doanh, Le Dang, *Cac Tap doan Kinh te Lung doan Nen Kinh te Viet Nam* [State Economic Groups Are Cornering Vietnam's Economy] (2008) <http://www.rfi.fr/actuvi/articles/104/article_753.asp>

Doanh, Le Dang, 'Legal Consequences of State-Owned Enterprise Reform' in Ng Chee Yuen, Nick J Freeman and Frank H Huynh (eds), *State-Owned Enterprise Reform in Vietnam: Lesson from Asia* (Institute of Southeast Asian Studies, 1996)

Doi song Phap Luat Online, 'Ket noi EVN Telecom – VNPT: EVN Telecom Chua Thuc hien Dung Thoa thuan Ket noi' [Connection between EVN Tel and VNPT: EVN Tel Has not Implemented Connection Agreement Correctly] (2006) <http://www.doisongphapluat.com.vn/Story/thuongmaitoancau/2006/7/1035.html>

Doern, Bruce G and Stephen Wilks, *Comparative Competition Policy: National Institutions in A Global Market* (Oxford University Press, reprinted 2001)

Drysdale, Peter and Christopher Findlay, 'Chinese Foreign Direct Investment in Australia: Policy Issues for the Resource Sector' (2009) 2 (2) *China Economic Journal* 133

Dunns, John, 'Competition Law and Public Benefits' (1994) 16 *Adelaide Law Review* 258

Edwards, Seanicaa, Albert J Allen and Saleem Shaik, *Market Structure Conduct Performance (SCP) Hypothesis Revisited using Stochastic Frontier Efficiency Analysis* (2006) <http://www.docstoc.com/docs/10381823/Market-Structure-Conduct-Performance-(SCP)-Hypothesis-Revisited-using-Stochastic-Frontier-Efficiency-Analysis>

Eger, Thomas, Michael G Faure and Naigen Zhang (eds), *Economic Analysis of Law in China* (Edward Elgar Publishing, 2007)

Ehrlich, Eugene, *Amo, Amas, Amat and More* (Harper and Row, 1985)

Ellis, Karen et al, *Assessing the Economic Impact of Competition: Findings from Vietnam* (2010) <http://www.odi.org.uk/resources/download/4956.pdf>

Emmert, Frank, Franz Kronthaler and Johannes Stephan, *Analysis of Statements Made in Favour of and Against the Adoption of Competition Law in Developing and Transition Economies* (2005) <http://www.iwh-halle.de/projects/competition_policy/Claims_final.PDF>

European Commission, *Glossary of Terms used in EU Competition Policy* (2002) <http://ec.europa.eu/competition/publications/glossary_en.pdf>

Fabienne Fortanier, 'Foreign Direct Investment and Host Country Economic Growth: Does the Investor's Country of Origin Play a Role?'(2007) 16 (2) *Transnational Corporations* <http://www.unctad.org/en/docs/iteiit20072a2_en.pdf>

Farazmand, Ali, 'Introduction: The Comparative State of Public Enterprise Management' in Ali Farazmand (ed) *Public Enterprise Management: International Case Studies* (Greenwood Publishing, 1996)

Faull, Jonathan and Ali Nikpay, *The EC Law of Competition* (Oxford University Press, 2nd ed, 2007)

Fels, Allan, *The Public Benefit Test in the Trade Practices Act 1974* (2001) <http://www.accc.gov.au/content/item.phtml?itemId=255465&nodeId=3a08785d8fbb217538091dc68f51a187&fn=Fels_NCC_Workshop>

Ferguson, Paul R and Glenys J Ferguson, *Industrial Economics: Issues and Perspectives*

(Newyork University Press, 2nd ed, 1998)

Fforde, Adam and Stefan de Vylder, *From Plan to Market – the Economic Transition in Vietnam* (Westview Press, 1996)

Fox, Eleanor M, 'US and European Merger Policy--Fault Lines and Bridges: Mergers That Create Incentives for Exclusionary Practices' (2001-2002) 10 *George Mason Law Review* 471

Frey, Bruno S, *The Public Choice View of International Political Economy* (1983) <http://www.iiasa.ac.at/Admin/PUB/Documents/CP-83-007.pdf>

Fulbright Economics Teaching Program, *Electricity Power Trading Company (Single Byuer) Case Study* (2008) <http://www.fetp.edu.vn/exed/2008/HaNoi/Docs/Readings/Day%202-2-Single%20Buyer-Case-E.pdf>

Gary, Becker, 'A Theory of Competition among Pressure Groups for Political Influence' (1983) 98 (3) *Quarterly Journal of Economics* 371 <http://www.jstor.org/stable/pdfplus/1886017.pdf>

Geddes, Richard R, 'Case Studies of Anti-competitive SOE Behaviour' in Richard R Geddes (ed) *Competing with the Government: Anti-competitive Behaviour and Public Enterprises* (Hoover Institution Press, 2004)

George, Elizabeth St and Mary Quilty, 'Reconfiguring Socialist Ideology in Vietnam: the 2006 Tenth National Party Congress and the lead-up to Vietnam's Entry into the World Trade Organisation' (Paper presented at the 16th Biennial Conference of the Asian Studies Association of Australia, Wollongong 26 - 29 June 2006)

Geradin, Damien (Ed), *The Liberalization of State Monopolies in the European Union and Beyond* (Kluwer Law International, 2000) ix

Geradin, Damien 'Limiting the scope of Article 82 EC: What Can the EU Learn from the US Supreme Court's Judgment in Trinko in the Wake of Microsoft, IMS and Deutsche Telekom' (2004) 41 *Common Market Law Review* 6

Geradin, Damien, *The Liberalisation of Network Industries in the European Union:*

Where Do We Come from and Where Do We Go? (2006) <http://www.vnk.fi/hankkeet/talousneuvosto/tyo-kokoukset/globalisaatioselvitys-9-2006/artikkelit/Geradin_06-09-20.pdf >

Giang, Khuc Hoang, *Mot so Van de ve Dia vi Phap ly Cua Tong Cong ty Nha nuoc Trong Nen Kinh te Thi truong o Viet Nam* [Some Issues regarding the Legal Position of State General Corporations in Vietnam's Market Economy] (LLM Thesis, Hochiminh City Law University, 2000)

Gillespie, John Stanley, *Transplanting Commercial Law Reform, Developing a 'Rule of Law' State in Vietnam* (Ashgate, 2006)

Goldman, Marshall I, *The New Imperial Russia* (2008) <http://www.demokratizatsiya.org/bin/pdf/DEM%2016-1%20Goldman.pdf>

Goode, Walter, *Dictionary of Trade Policy Terms* (Cambridge University Press, 4th ed, 2003)

Graham, Edward M and David J Richardson (eds), *Global Competition Policy* (Institute for International Economics, 1997)

Green, Jonathan and Gianandrea Staffiero, 'Economics of Merger Control' in *The 2007 Handbook of Competition Economics: Global Competition Review Special Report* (2007)

Grossman, Gene M and Elhanan Helpman, 'Protection for Sale' (1994) 84 (4) *American Economic Review* 833<http://pages.uoregon.edu/bruceb/Andrea.pdf>

Guo, Sujian, *The Political Economy of Asian Transition from Communism* (Ashgate, 2006)

Ha, Pham Hoang, *Boi canh Kinh te cua Chinh sach va Phap luat Canh tranh* (2005) <www.cuts-international.org/7up2/2ndNRGvietnam2.ppt>

Hakkala, Katariina and Ari Kokko, *The State and The Private Sector in Vietnam* (2007) <http://swopec.hhs.se/eijswp/papers/eijswp0236.pdf>

Hakkala, Katariina, Olivia Ho-Kyoung Kang and Ari Kokko, *Step by Step: Economic*

Reform and Renovation in Vietnam before the 9th Party Congress (2001) <http://www.oecd.org/dataoecd/48/32/35233343.pdf>

Hang, Tran Thi Thu, *Vietnam's Experience in Formulating Regulations of Abuse of Dominant Position* (2004) <www.jftc.go.jp/eacpf/05/APECTrainingProgramAugust2004/vietnam.hang.pdf>

Hao, Tran Kim, *Development of Enterprises with Diversified Ownership Formulations and Reforms of State's Economic Management in Vietnam* <http://www.vnep.org.vn/Modules/CMS/Upload/2/Development%20of%20enterprises%20with%20diversified%20ownership%20formulations%20and%20reforms%20of%20State.pdf >

Hao, Tran Kim, *Mot so Y kien Ve Vai tro Chu dao Cua Kinh te Nha nuoc Trong Nen Kinh te Thi Truong Đinh huong Xa hoi Chu nghia o Nuoc ta* [Several Comments regarding the Dominant Role of State Economy in the Socialist-Oriented Market Economy of Vietnam] (2006) <http://www.ciem.org.vn/home/vn/upload/info/attach/11633996416870_Vai_tro_KT_NN_HT_TT_TV.doc>

Harrington, Joanna, *Constitutional Revision in Vietnam: Constitution Renovation but No Revolution* (1994) <www.capi.uvic.ca/pubs/oc_papers/harrington.pdf>

Harris, Stephen H, 'The Making of an Antitrust Law: the Pending Anti-Monopoly Law of the People's Republic of China' *(*2006-7) 7 (1) *Chinese Journal of International Law* 199

Harvard Vietnam Program, John F Kennedy School of Government, *Choosing Success: The Lessons of East and Southeast Asia and Vietnam's Future* (2008) <http://www.fetp.edu.vn/Research_casestudy/PolicyPapers/PP001_Choosing_Success_E.pdf>

Hien, Cao Xuan, *Competition Law and Policy in Vietnam* (2007) <http://www.jftc.go.jp/eacpf/06/6_04_04.pdf>

Hiep, Hoang Phuoc 'Legal reform in Vietnam-Opportunities and Challenges in the Wake of Joining and International Experiences in Handling Legal Issues' (Speech at the

International Workshop on 'WTO's Accession and Legal reform in Vietnam', 2005) <http://siteresources.worldbank.org/INTRANETTRADE/Resources/WBI-Training/288464-1139428366112/Session3HoangPhuocHiep_LegalReformInVietnam.pdf>

Hoai, Vo Thi, *Hoan thien Cac Moi Quan he Phap ly Giua Cong ty Me – Cong ty Con Trong Cac Tap doan Kinh te* [Enhancing Legal Relationships between Parent and Subsidiary Companies in the State Economic Groups] (LLM Thesis, Hochiminh City Law University, 2007)

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

Hong, Phan Thi Van, *Doc quyen va Phap luat ve Kiem soat Doc quyen o Vietnam Hien nay* [Monopoly and Law Concerning Monopoly Control in Vietnam] (LLM Thesis, Hanoi Law University, 2005)

Hovenkamp, Herbert J, 'Antitrust Policy after Chicago' (1985) 84 (2) *Michigan Law Review* 213

Hovenkamp, Herbert J, *Federal and Antitrust Policy: The Law of Competition and its Practice* (Thomson West, 3rd ed, 2005)

Huan, Dang Vu, *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)

Huang, Jin *Industrial Policy and Enforcement of Antimonopoly Law in China in a Time of Crisis* <http://www.asiancompetitionforum.org/download/091207_ACF_ppt/SB2-2_Industrial%20Policy%20and%20Enforcement%20of%20antimonopoly%20in%20a%20time%20of%20crisis-%20Jin%20Huang.pdf>

Hughes, Owen E, *Public Management and Administration: An Introduction* (Palgrave Macmillan, 3rd ed, 2003)

Hung, Nguyen Viet, 'Presentation on Abuse of Dominant Position' (2005) <http://www.jftc.go.jp/eacpf/05/APECTrainingCourseAugust2005/Group1/Nguya

n_adp.pdf> ; Vietnam News, ‘Telecom Industry’s Hostile Competition’ <http://vietnamnews.vnagency.com.vn/showarticle.php?num=01BUS270905>

Hung, Pham Tri, ‘Khung Phap ly Dieu tiet Sap nhap, Mua lai Doanh nghiep o Vietnam’ <http://my.opera.com/qtdn/blog/khung-phap-ly-dieu-tiet-sat-nhap-mua-ban-doanh-nghiep>

Huong, Vu Lien, *The Role of Competition Policy and Approaching Method of Competition Bill of Vietnam* (2003) <www.apeccp.org.tw/doc/APEC-OECD/2003-12/014.pdf>

Huy, Nguyen Van and Tran Van Nghia, 'Government Policies and State-Owned Enterprise Reform' in Ng Chee Yuen, Nick J Freeman and Frank H Huynh (eds), *State-Owned Enterprise Reform in Vietnam: Lesson from Asia* (Institute of Southeast Asian Studies, 1996)

Huyen, Bui Van, *Xay dung va Phat trien Tap doan Kinh te o Viet Nam* [Building and Developing Economic Groups in Vietnam] (National Political Publishing House, 2008)

ICN, *Antitrust Enforcement in Regulated Sector: Report to the third ICN Annual Conference, Soul, April 2004* (2004) <http://www.internationalcompetitionnetwork.org/uploads/library/doc379.pdf>

ICN, *Cases Annex to ICN Unilateral Conduct Working Group: Report on the Analysis of Refusal to Deal with a Rival under Unilateral Conduct Laws* (2009) <http://www.internationalcompetitionnetwork.org/uploads/library/doc611.pdf >

ICN, *Report on the Objectives of Unilateral Conduct Laws, Assessment of Dominance/Substantial Market Power and State-created Monopolies* (2007) <http://www.icn-moscow.org/page.php?id=7>

ICN, *Response of France to Unilateral Conduct Working Group Questionnaire* (2007) <http://www.internationalcompetitionnetwork.org/media/library/unilateral_conduct/questionnaire/FranceQuestionnaireResponse.pdf>

ICN, *Response of New Zealand to Unilateral Conduct Working Group Questionnaire* (2007)

<http://www.internationalcompetitionnetwork.org/media/library/unilateral_conduct/questionnaire/NewZealandQuestionnaireResponse.pdf>

ICN, *Response of the European Commission to Unilateral Conduct Working Group Questionnaire* (2007) <http://www.internationalcompetitionnetwork.org/media/library/unilateral_conduct/questionnaire/EuropeanCommissionQuestionnaireResponse.pdf>

ICN, *Response of the United Kingdom to Unilateral Conduct Working Group Questionnaire* (2007) <http://www.internationalcompetitionnetwork.org/media/library/unilateral_conduct/questionnaire/UnitedKingdomQuestionnaireResponse.pdf>

ICN, *Response of the United States Federal Trade Commission and Department of Justice to Unilateral Conduct Working Group Questionnaire* (2007) <http://www.internationalcompetitionnetwork.org/media/library/unilateral_conduct/questionnaire/US_FTC-DOJ_UCWG_Questionnaire.pdf>; <http://www.internationalcompetitionnetwork.org/media/library/unilateral_conduct/questionnaire/ICC_US_NGA-Howrey.pdf>

Iwantono, Sutrisno, *Economic Crisis and Cartel Development in Indonesia* <http://www.jftc.go.jp/eacpf/01/iwantono_cartels_workshop.pdf>

Izdebski, Hubert, 'Legal Aspects in Economic Reforms in Socialist Countries' (1989) 37 (4) *American Journal of Comparative Law* 730

Jamison, Mark A and Sanford V Berg, *Annotated Reading List for a Body of Knowledge of Infrastructure Regulation* (2008) <http://www.regulationbodyofknowledge.org/documents/bok/chapter2.pdf>

Joelson, Mark R, *An International Antitrust Primer: A guide to the Operation of United States, European Union and Other Key Competition Laws in the Global Economy* (Kluwer Law International, 3rd ed, 2006)

Joint Donor Report to the Vietnam Consultative Group Meeting, 'Aiming High – Vietnam Development Report 2007' (2006) <http://siteresources.worldbank.org/INTVIETNAM/Resources/aiminghigh_englis

h.pdf>

Jones, Alison and Brenda Sufrin, *EC Competition Law: Text, Cases and Materials* (Oxford University Press, 3rd ed, 2008)

Jones, David S, 'Procurement in South East Asia: Challenge and Reform (2007) 7 (1) *Journal of Public Procurement* 3

Joskow, Paul L and Alvin K Klevorick, 'A Framework for Analyzing Predatory Pricing Policy' (1979) (89) 2 *Yale Law Journal* 213

Kachalin, Vladimir, 'State-created monopolies' (Presentation at the 6th Conference of the International Competition Network (ICN) in Moscow, May 2007)

Kahn, Alfred, *The Economics of Regulation: Principles and Institutions* (MIT Press, Reissue Edition, 1988)

Kauzya, John Mary, 'The Question of the Public Enterprise and Africa's Development Challenge: A Governance and Leadership Perspective' in United Nations, Department of Economic and Social Affairs, *Public Enterprises: Unresolved Challenges and New Opportunities* (United Nations, 2008)

Khan, Adil M, 'Reinventing Public Enterprises' in United Nations, Department of Economic and Social Affairs, *Public Enterprises: Unresolved Challenges and New Opportunities* (United Nations, 2008)

Khan, Le and Ashol K Dutt, 'Central Planning and Market Elements in Vietnam's Economy' in Ashok K Dutt et al (eds), *Challenges to Asian Urbanization in the 21st Century* (Kluwer Academic Publishers, 2003)

Khanh, Bui Nguyen, 'Phap luat Chong Canh tranh Khong Lanh manh Tai Vietnam va Mot so Van de Thuc tien) [Unfair Competition Law in Vietnam and Some Practical Issues] (2006)

King, Stephen P, *National Competition Policy* <http://www.core-research.com.au/Papers/ncp22597.pdf>

Kintner, Earl W, *A Robinson-Patman Primer: A Guide to the Law Against Price*

Discrimination (Macmillan, 2nd ed, 1979)

Kintner, Earl W, *A Treatise on the Antitrust Laws of the United States* (Anderson Publishing, 1980)

Knutsen, Hege Merete and Nguyen Cuong Manh, 'Preferential Treatment in a Transition Economy: the Case of the State-Owned Enterprises in the Textile and Garment Industry in Vietnam (2004) 58 *Norsk Geografisk Tidsskrift – Norwegian Journal of Geography* 129 <http://0-www.informaworld.com.alpha2.latrobe.edu.au/openurl?genre=article&issn=0029-1951&volume=58&issue=3&spage=125>

Kokko, Ari and Fredrik Sjoholm, 'Some Alternative Scenarios for the Role of the State in Vietnam' (2000) 13 (2) *Pacific Review* 257

Korah, Valentine, *An Introductory Guide to EC Competition Law and Practice* (Hart Publishing, 8th ed, 2004)

Kovacic, William and Robert Anderson, Contribution to the OECD Forum on 'Collusion and Corruption in Public Procurement' (2010) <http://www.oecd.org/dataoecd/12/1/44456320.pdf>

Krattenmaker, Thomas and Steven Salop, 'Anti-competitive Exclusion: Raising Rivals' Costs to Achieve Power Over Price' (1986) 96 *Yale Law Journal* 209

Lahouel, Mohamed and Keith Maskus, 'Competition Policy and Intellectual Property Rig hts in Developing Countries:Interests in Unilateral Initiatives and a WTO Agreem ent' (Paper presented at a WTO/World Bank Conference in the WTO Secretariat, Geneva Switzerland, 20-21 September 1999) <http://siteresources.worldbank.org/DEC/Resources/84797-1251813753820/6415739-1251814020192/maskus.pdf>

Lan, Pham Chi, 'Tap doan Kinh te: Da Dac quyen Khong the Doi hoi Them Quyen'[Economic Groups Cannot Ask for More than Their Current Privileges] (2008) <http://tuanvietnam.vietnamnet.vn/tap-doan-kinh-te-da-dac-quyen-khong-the-doi-them-quyen >

Landes, William M and Richard A Posner, 'Market Power in Antitrust Cases' (1981) 94

Havard Law Review 937

Lane, Jan-Erik, *Public Administration and Public Management – the Principal-agent Perspective* (Rutledge, 2005)

Lanh, Le Thi, *Groups in Vietnam: Situation and Future Development* (2001) <http://www.ueh.edu.vn/tcptkt/english/2001/thang05/wlanh.htm>

Lao dong Online, 'Mau thuan Ket noi Giua EVN va VNPT: Mot Lan nua Lai Nong' [Connection Conflict between EVN and VNPT: Hot Again] (2006) <http://www1.laodong.com.vn/pls/bld/display$.htnoidung(337,161436)>

Lawan Thanadsillapakul, *The Harmonisation of ASEAN Competition Laws and Policy and Economic Integration* (2004) 5 <www.jftc.go.jp/eacpf/04/thailand_lawan.pdf>

Lee, Hyun-Hoon, 'Korea's Competition Policy and Its Application to Other Asian Economies' in Tran Van Hoa (Ed) *Competition Policy and Global Competitiveness in Major Asian Economies* (Edward Elgar Publishing, 2003)

Leila, Webster and M Reza Amin, *Equitisation of State Enterprises in Vietnam: Experience to Date* (2008) <http://www.ifc.org/ifcext/mekongpsdf.nsf/AttachmentsByTitle/PSDP+3/$FILE/PSDP-No-3-EN.pdf>

Lichtenstein, Natalie G, *A survey of Vietnam's Legal Framework in Transition* (1994) <http://www-wds.worldbank.org/servlet/WDSContentServer/WDSP/IB/1994/04/01/000009265_3961006075511/Rendered/PDF/multi0page.pdf >

Lijie, Chen, 'The Current State and Problems of Anti-Monopoly Legislation in the People's Republic of China' (2004) 3 (2) *Washington Global Studies Law Review* 307

Ljunggren, Borje, *The Challenges of Reform in Indochina* (Harvard University, 1993)

Loc, Truong Dong, *Equitisation and Stock-Market Development: the Case of Vietnam* (PhD in Economics Thesis, University of Groningen, 2006)

Loi, Pham Van et al, ‘De tai Nghien cuu ‘Phap luat Chong Canh tranh Khong Lanh manh o Vietnam: Mot so Van de Ly luan va Thuc tien’) [Report of the Project ‘Law on Unfair Competition in Vietnam: Some Theoretical and Practical Issues’] (2005)

Loyd, Peter J, ‘Competition Law in APEC Economies and in Vietnam’ in Tran Van Hoa (Ed) *Competition Policy and Global Competitiveness in Major Asian Economies* (Edward Elgar Publishing, 2003)

Mai, Pham Quynh, ‘To Regulate and Promote Competition in State Enterprises in Vietnam’ (Paper presented at the 2nd APEC Training Program on Competition Policy, 5-7 August, Hanoi, 2003,) <http://www.jftc.go.jp/eacpf/05/APECTrainingProgram2003/PhamQuynhMai.pdf >

Mako, William P and Zhang Chunlin, ‘State Equity Ownership and Management in China: Issues and Lessons from International Experience’ (Paper presented at the Policy Dialogue on Corporate Governance in Shanghai, China, 2004)

Marshall, Brenda, ‘Regulating Access to Essential Facilities in Australia: Review and Reform of Part IIIA of the Trade Practices Act’ (SJD Thesis, University of Queensland, 2004)

Mason, E S, ‘Price and Production Policies of Large Scale Enterprises’ (1939) 29 *American Economic Review* 61

Mason, E S, ‘The Current State of the Monopoly Problem in the United States’ (1949) 62 *Harvard Law Review* 1265

Massey, Patrick, ‘Market Definition and Market Power in Competition Analysis: Some Practical Issues’ (2000) 31 (4) *Economic and Social Review* 310

Mazyrin, Vladimir, 'Vietnam's International Commitments upon Entry into the WTO: Limits to its Sovereignty?' in Stepanie Balme and Mark Sidel (eds), *Vietnam's New Order: International Perspectives on the State and Reform in Vietnam* (Palgrave Macmillan, 2006)

McGowan, Lee, *The Antitrust Revolution in Europe: Exploring the European Commission’s Cartel Policy* (Edward Elgar Publishing, 2010)

McGrath, Luke Aloysius, 'Vietnam's Struggle to Balance Sovereignty, Centralization and Foreign Investment under Doi Moi' (1996) 18 *Fordham International Law Journal* 2095

McKinlay, Peter, 'State-owned Enterprises and Crown Companies in New Zealand' (1998) 18 (3) *Public Administration and Development* 229

McLean, Iain and Alistair Mc Millan, *The Concise Oxford Dictionary of Politics* (Online) (Oxford University Press, 3rd ed, 2009)

Mekong Economics, *SOE Reform in Vietnam* (2002) <http://www.mekongeconomics.com/Document/Publications/2002/MKE%20SOE%20Reform%20in%20Vietnam.pdf>

Michell, Jerry, 'Public Enterprises in the United States' in Ali Farazmand (ed) *Public Enterprise Management: International Case Studies* (Greenwood Press, 1996)

Miller, Russel V, *Miller's Australian Competition Law and Policy* (Thomson Reuters, 2008)

Ministry of Trade, Canada Policy Implementation Assistance Project (PIAP), *Ky yeu Hoi thao 'Co quan Canh Tranh – Kinh nghiem Quoc te Va Lua chon Cho Viet Nam'* [Proceedings of the Workshop 'Competition Authority – International Experiences and Options for Vietnam'] (2003)

Ministry of Trade, 'Overall Report on Some Issues Have to be Dealt with in Implementation Commitments of Vietnam - US Bilateral Trade Agreement and Vietnam's Process of Accession to the WTO' (2004)

Mitsui, Hisaaki, *Vietnam's State Enterprise Reform; What Phase has it Reached?* (1997) <http://www.springerlink.com/content/l047247011j4vwpq/fulltext.pdf>

Moles, Peter and Nicholas Terry, *The Handbook of International Financial Terms* (Oxford University Press, 1997)

Monti, Gorgio, *EC Competition Law* (Cambridge University Press, 2007)

Moran, Theodore H, *Foreign Direct Investment and Development: The New Policy*

Agenda for Developing Countries and Economies in Transition (Peterson Institute for International Economics, 1998)

MUTRAP, 'Hoi Nghi So ket Thi diem Mo hinh Tap doan Kinh te Thuoc Bo Cong thuong' [Meeting on the Preliminary Wrap-up Report of the Model of Economic Groups belonging to the Ministry of Industry and Trade](2008) <http://www.mutrap.org.vn/Lists/Posts/Post.aspx?List=5276b79d-4e3a-4c5b-a2ad-c903807cc7ea&ID=40>

MUTRAP, *Hanh vi Han che Canh tranh: Mot so Vu viec Dien hinh cua Chau Au* [Practices in Restraint of Competition: Some Typical Cases Law of the EU Competition Law] (2009)

Nam, Nguyen Van, 'Ban hanh Luat ve Doc quyen Nha nuoc la Cap bach' [It is Urgent to Adopt a Law Governing State Monopolies] (2008) <http://www.thesaigontimes.vn/Home/diendan/ykien/22517/>

Nam, Truong Quang Hoai, 'Tom tat Nhung Noi dung Chinh Cua Luat Canh tranh' [Summaries of Some Key Contents of the Competition Law 2004] in Ministry of Trade the Canada Policy Implementation Assistance Project (PIAP), *'Ky yeu Hoi thao 'Co quan Canh Tranh – Kinh nghiem Quoc te Va Lua chon Cho Viet Nam'* [Proceedings of the Workshop 'Competition Authority – International Experiences and Options for Vietnam'] (2003)

Nam, Truong Quang Hoai, 'Competition Policy and Liberalization of Trade and Investment' (2006) <www.jftc.go.jp/eacpf/06/6_01_03.pdf >

National Assembly, 'Du an Luat Canh tranh va Nhung Van de Dat ra'[The Draft of Competition Law: Some Emerging Issues] (2004) <http://www.na.gov.vn/htx/Vietnamese/C1461/default.asp?Newid=4891#2XVo7iWBlrtZ>

National Competition Council, *Assessment of Governments' Progress in Implementing the National Competition Policy and Related Reforms* (2005) x <http://ncp.ncc.gov.au/docs/2005%20assessment.pdf>

Neumann, Manfred, *Competition Policy: History, Theory and Practice* (Edward Edgar

Publishing, 2001)

Newton, Chris 'Do Predators Need to be Dominant?' (1999) 3 *European Competition Law Review* 127

Ngu, Vu Quoc, *A Model of the Behaviour of Vietnamese SOEs during the Reform Period* (2004) <http://dspace.anu.edu.au/handle/1885/40342>

Ngu, Vu Quoc, *The State-Owned Enterprise Reform in Vietnam: Process and Achievements* (2002) <http://www.iseas.edu.sg/vr42002.pdf>

Nguoi Lao Dong (Online), 'Doc quyen Niu Canh Hang khong' (2008) [Aviation Sector Hampered due to Monopoly]<http://www.nld.com.vn/220922P0C1014/doc-quyen-niu-canh-hang-khong.htm>

Nguyen Anh Tuan, Bui, 'Co Can Mot Dao luat Rieng ve Doc quyen Nha nuoc?' (2009) *Thoi bao Kinh te Sai Gon* (Online) <http://www.thesaigontimes.vn/Home/doanhnghiep/phapluat/21427/>

Nguyen, Sy Phuong, 'Tap doan o Vietnam: Cach Giai cuu Khong Giong ai' [Economic Groups in Vietnam: A Strange Rescue] (2010) *Tuan Vietnam* (Online) <http://www.tuanvietnam.net/2010-07-15-tap-doan-o-vn-chi-su-do-vo-la-giong-the-gioi-tap-doan-voi-mau-thuan-luat-thi-truong-va-quan-ly-tap-trung>

Nhiep, Tran Quang, *Fundamental Features of the Socialist Oriented Market Economy in Vietnam* (2007) <netx.u-paris10.fr/actuelmarx/cm5/com/M15_socia_Tran_Quang_Nhiep.rtf>

Niedolistek, Lucas, China's State Administration for Industry and Commerce Adopts Its First Cartel Decision under the Anti-Monopoly Law in the Concrete Production Sector, January 2011, e-Competitions, No34955, <www.concurrences.com>

Niskanen, William A, *Bureaucracy and Representative Government* (Aldine, 1971) 195-223

Nong nghiep Vietnam, 'Dien, Than, Xang dau Dong loat Xin Tang gia' [Electricity, Coal, Petroleum Industries Collectively Ask for Price Increases] (2011) <http://nongnghiep.vn/nongnghiepvn/vi-VN/61/158/1/15/15/64566/Default.aspx>

Oanh, Le Hoang, 'To build competition law in the context of the transition to market economy in Vietnam' (Paper presented at the 1st APEC Training Program on Competition Policy, Bangkok, 6-8 August, 2002) <http://www.jftc.go.jp/eacpf/05/APECTrainingProgram2002/Vietnam1.pdf>

Oanh, Le Hoang, *Binh luan Khoa hoc Luat Canh tranh* [Critical Comments on the Law on Competition] (National Political Publishing House, 2005)

OCED, 'Bringing Competition into Regulated Sectors in Vietnam' (Competition Policy Roundtable on Bringing Competition into Regulated Sectors, DAF/COMP/GF/WD (2005)7, 2005) <www.oecd.org/dataoecd/49/29/34285298.pdf>

OECD, 'Collusion and Corruption in Public Procurement' (Competition Policy Roundtable, DAF/COMP/GF (2010)6, 2010) <http://www.oecd.org/dataoecd/35/19/46235884.pdf>

OECD, 'Competition Policy, Industrial Policy and National Champions' (2009) (Competition Policy Roundtable, DAF/COMP/GF (2009)) <http://www.oecd.org/dataoecd/12/50/44548025.pdf>

OECD, 'Competition, State Aids and Subsidies: Contribution from Spain' (Global Forum on competition, DAF/COMP/GF/WD (2010)49, 2010), <http://www.oecd.org/dataoecd/19/21/44530819.pdf>

OECD, 'How Enforcement against Private Anti-competitive Conduct Has Contributed to Economic Development: Contribution from Lithuania' (OECD Global Forum on competition, CCNM/GF/COMP/WD (2004)1, 2004) <http://www.oecd.org/dataoecd/26/7/21670702.pdf>

OECD, 'Regulating Market Activities by the Public Sector' (Competition Policy Roundtable, DAF/COMP (2004)36, 2005) <http://www.oecd.org/dataoecd/61/5/34305974.pdf>

OECD, 'Regulatory Reform: Stock-taking of Experience with Reviews of Competition Law and Policy in OECD Countries and the Relevance of Such Experience for Developing Countries' (Global Forum on competition, CCNM/GF/COMP

(2004)1, 2004) <http://www.oecd.org/dataoecd/22/32/25501344.pdf>

OECD, 'Roundtable on the Application of Antitrust law to SOEs – Contribution from Poland' (Working Party No.3 on Cooperation and Enforcement, DAF/COMP/WP3/WD (2009)37, 2009) <http://www.uokik.gov.pl/download.php?id=47>

OECD, 'Roundtable on the Application of Antitrust Law to State-owned Enterprises' submission by the European Commission' (Working Party No.3 on Cooperation and Enforcement, DAF/COMP/WP3/WD (2009)42, 2009) <http://ec.europa.eu/competition/international/multilateral/antitrustlaw.pdf>

OECD, 'State-Owned Enterprises and the Principle of Competitive Neutrality' (Policy Roundtable, DAF/ COMP (2009)37, 2009) <http://www.oecd.org/dataoecd/43/52/46734249.pdf>

OECD, 'Summary of Cartel Cases Described by Invitees' (Global Forum on competition, CCNM/GF/ COMP (2001)4, 2001) <http://www.oecd.org/dataoecd/41/30/2491386.pdf>

OECD, 'The Concept of Essential Facilities' (Policy Roundtable, OCDE/GD (96)113, 1996) <http://www.oecd.org/dataoecd/34/20/1920021.pdf>

OECD, 'The Objectives of Competition and Policy – Note by the Secretariat' (Global Forum on competition, CCNM/GF/COMP (2003)3, 2003) <http://www.oecd.org/dataoecd/57/39/2486329.pdf>

OECD, 'The Relationship between Competition Authorities and Sectoral Regulators: Contribution from Vietnam' (Global Forum on competition, DAF/COMP/GF/WD (2005)8, 2005) <http://www.oecd.org/dataoecd/49/29/34285298.pdf>

OECD, *A Framework for the Design and Implementation of Competition Law and Policy* (WB and OECD, 2004)

OECD, *Annual Report on Competition Development in Hungary* (2002) <http://www.oecd.org/dataoecd/22/3/2509542.pdf>

OECD, *Annual Report on Competition Policy Developments in the Czech Republic*

<http://www.oecd.org/dataoecd/55/19/37008264.pdf>

OECD, *Bribery in Procurement, Methods, Actors and Counter-Measures* (OECD Publishing, 2007) <http://www.oecd.org/dataoecd/47/11/44956834.pdf>

OECD, *Competition Law and Foreign-Government Controlled Investors* (2009) <http://www.oecd.org/dataoecd/30/42/41976200.pdf>

OECD, *Corporate Governance of State-Owned Enterprises: A Survey of OECD Countries* (OECD Publishing, 2005)

OECD, *Glossary for Industrial Organisation Economics and Competition Law* (1993) <http://Www.Oecd.Org/Dataoecd/8/61/2376087.Pdf>

OECD, *Guidelines for Fighting Bid Rigging in Public Procurement* (2009) <http://www.oecd.org/dataoecd/27/19/42851044.pdf>

OECD, *Guidelines on the Corporate Governance of State-Owned Enterprises* (OECD Publishing, 2005) <http://www.oecd.org/dataoecd/46/51/34803211.pdf>

OECD, *Objectives of Competition Policy* <http://www.oecd.org/dataoecd/10/9/27122227.pdf>

OECD, *Reviews of Regulatory Reform Australia 2010: Towards a Seamless National Economy* (OECD Publishing, 2010) <http://www.finance.gov.au/deregulation/docs/australia_report_final.pdf>

OECD,'Promoting Competition in Postal Service' (Roundtable on Competition Policy, DAFFE/CLP (99)22, 1999) <http://www.oecd.org/dataoecd/35/36/1920548.pdf>

Office of Policy Planning, Federal Trade Commission, *Report of the State Action Task Force* (Sept. 2003) (FTC State Action Report) <http://www.ftc.gov/os/2003/09/stateactionreport.pdf>

Oppenheim, Chesterfield, Weston and McCarthy, *Federal Antitrust Laws* (West Publishing, 1981)

Olsen, Mancur, *The Logic of Collective Action: Public Goods and the Theory of Groups* (Harvard University Press, 1965)

Owen, Bruce M, Su Sun and Wentong Zheng, 'Antitrust in China 2006: The Problem of Incentive Compatibility' in Belton M Fleisher et al, *Policy Reform and Chinese Markets: Progress and Challenges* (Edward Edgar Publishing, 2008)

Parliament of the Commonwealth of Australia, *National Competition Policy: Overview and Assessment* (1994)

Pearce, David W, *Dictionary of Modern Economics* (MacMillan, 1983)

Penev, Stoyan et al, *Informality and the Playing Field in Vietnam's Business* (World Bank and IMF, 2003)

People's Daily (Online), 'Chinese *Anti-Monopoly Law*' (2008) <http://english.peopledaily.com.cn/90001/90776/90785/6466809.html>

People's Daily (Online), 'Full Article of *Anti-Monopoly Law* of the People's Republic of China' <http://english.peopledaily.com.cn/90001/90776/90785/6466809.html>

Perkins, Dwight H and Vu Thanh Tu Anh, *Vietnam's Industrial Policy*: *Designing Policies for Sustainable Development* (2008) <www.vdf.org.vn/Doc/2008/VDFConf_Presentation3_PaperEng.pdf >

Pham, Alice, 'The Development of Competition Law in Vietnam in the Face of Economic Reforms and Global Integration' (2006) 26 *Northwestern Journal of International Law and Business* 547

Phat, Nguyen Nhu, 'Bao cao Tong hop De tai "Xay dung The che Canh tranh Thi truong cua Vietnam"' [Overall Report of the project: 'Building up Vietnam's Competition Institution'] (2005)

Phat, Nguyen Nhu, 'Cac Khia canh Phap ly ve Tap trung Kinh te va Vai tro cua Co quan Quan ly Canh Tranh' [Legal Aspects regarding Economic Concentration and the Role of Competition Authority] (2007) 4 *Khoa hoc Phap ly* [Legal Sciences] <http://www.hcmulaw.edu.vn/hcmulaw/index.php?option=com_content&view=article&id=322:ckcplvttkt&catid=110:ctc20074&Itemid=110>

Phat, Nguyen Nhu, 'Phap Luat Canh tranh cua Vietnam Hien nay' [Competition Law in Vietnam] in Hanoi Law Univerisity, *Giao trinh Luat Thuong Mai – Tap 1*

[Textbook on Commercial Law – Espisode 1] (People's Public Security Publishing House, 2007)

Phat, Nguyen Nhu, 'Phap luat Canh tranh o Viet Nam Hien nay [Current Provisions on Competition in Vietnam] Material at the Training Course on Competition Law organised by Vietnam Industry and Commerce Chamber (2008)

Phat, Nguyen Nhu, 'The Role of Law during the Formation of a Market-driven mechanism in Vietnam' in John Stanley (ed), *Commercial Legal Developments in Vietnam: Vietnamese and Foreign Commentaries* (Butterworths, 1997).

Phat, Nguyen Nhu 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* [Toward Building up the Law on Unfair Competition and Anti-Monopoly in the Context of Transformation to a Market Economy] (People's Public Security Publisher, 2001)

Phat, Nguyen Nhu and Nguyen Ngoc Son, *Phan tich va Luan giai Cac Quy dinh Cua Luat Canh tranh ve Hanh vi Lam dung Vi tri Thong linh Thi truong, Vi tri Doc quyen de Han che Canh tranh* [Analysing and Interpreting Provisions of the Competition Law concerning Abuse of Dominant/Monopoly Positions to Restrict Competition] (Judicial Publishing House, 2006)

Phat, Nguyen Nhu and Nguyen Thi Hien, 'Canh tranh va Xay dung Phap luat Canh tranh o Vietnam' [Competition and Building up a Competition Law in Vietnam] in Tran Dinh Hao and Nguyen Nhu Phat (eds), *Canh tranh va Xay dung Phap luat Canh tranh o Vietnam* [Competition and Building up a Competition Law in Vietnam] (People' Public Security Publishing House, 2001)

Phat, Nguyen Nhu, *Canh tranh va Xay dung Phap luat Canh tranh* [Competition and Building Law Regulating Competition] <http://www.law-vnu.netnam.vn/html/NNPhat_Canhtranh.doc>

Phuong, Ho Quang, 'Thuc thi Luat Canh tranh de Tang Tinh Ran de' [Enforcing Competition Law to Increase Deterrance] *Quan doi Nhan dan* (Online) [People's Army] (2009) <http://www.qdnd.vn/QDNDSite/vi-VN/61/43/2/98/98/91427/Default.aspx>

Phuong, Hoang Van, 'Clear identification of competition problems and transparent procedures to deal with competition claims – the keys to competition advocacy in the case of Vietnam' (Paper presented at the 2nd APEC Training Course on Competition Policy, Bangkok, 8-10 August, 2006) <http://www.jftc.go.jp/eacpf/05/APECTrainingCourseAugust2006/Group2/Phuong_Vietnam_.pdf>

Phuong, Tran Thi Thu and Hoang Thi Bich Ngoc, *Cac Bien phap Khac phuc trong Tap trung Kinh te* [Remedial Measures in Economic Concentration Control] (2009) <http://www.vca.gov.vn/Modules/CMS/Upload/36/2009_9_17/BPKP%20tap%20trung%20KT-%20Ms%20Phuong.doc>

Pincus, Jonathan and Vu Thanh Tu Anh, 'Vietnam feels the Heat' (2008) 171 *Far Eastern Economic Review* 28 <http://www.viet-studies.info/kinhte/VN_feels_heat_FEER.htm>

Posner, Richard A, *Antitrust Law* (University of Chicago Press, 2nd, ed 2001)

Presentation by Deputy Prime Minister Nguyen Tan Dung to a two-day workshop on state enterprise in March 2002 (as reported in Saigon Times Weekly, 9 March 2002)

Quang, Truong Hong, 'Co quan Quan ly Canh tranh o Vietnam: Nhung Bat cap va Phuong huong Hoan thien' [Competition Authority in Vietnam: Limitations and Proposals for Its Improvement] (2011) *Nghien cuu Lap phap* [Legislative Studies] <http://www.nclp.org.vn/thuc_tien_phap_luat/co-quan-quan-ly-canh-tranh-o-viet-nam-nhung-bat-cap-va-phuong-huong-hoan-thien/?searchterm=T%C6%B0%20duy%20ph%C3%A1t%20tri%E1%BB%83n>

Quiggin, John, 'The Premature Burial of Natural Monopoly: Telecommunications Reform in Australia' (1998) 5 (4) *Agenda* 427 <http://epress.anu.edu.au/agenda/005/04/5-4-A-4.pdf>

Radon, Jenik and Julius Thaler, 'Resolving Conflicts of Interest in State-Owned Enterprises' (2005) 57 (1) *International Social Science* 11

Rees, Ray, *Public Enterprise Economics* (Weidenfeld and Nicolson, 1976)

Ritter, Lennart and Braun W David, *European Competition Law: A Practitioner's Guide*

(Kluwer Law International, 2005)

Rodger, Barry J and Angus MacCulloch, *Competition Law in the EC and UK* (Routledge-Cavendish, 4th ed, 2009)

Rohland, Klaus, Interviewed with Vietnam News Agency, 'State to Tread Fine Line in Boosting Competitiveness' (2006) <http://vietnamnews.vnanet.vn/showarticle.php?num=01COM151206>

Röller, Lars-Hendrik, Johan Stennek and Frank Verboven, 'Efficiency Gains from Mergers' in Fabienne Ilzkovitz and Roderick Meiklejohn (eds), *European Merger Control: Do We Need an Efficiency Defence?* (Edwards Edgar Publishing, 2006)

Rondinelli, Dennis A and Jennie I Litvack, 'Economic Reform, Social Progess and Institutional Development: A Framework for Assessing Vietnam's Transition' in Dennis A Rondinelli and Jennie I Litvack (eds), *Market Reform in Vietnam Market Reform in Vietnam: Building Institutions for Development* (Quorum Books, 1999)

Roosebeke, Bert Van, *State Liability for Breaches of European Law: An Economic Analysis* (Deutscher Universitätsvlg, 2007)

Rua, To Huy, 'Nang Cao Vai tro Chu dao Cua Kinh te Nha nuoc Trong Nen Kinh te Thi truong Dinh huong XHCN' [Enhancing the Dominant Role of State Economy in the Socialist-Oriented Market Economy] (2007) 1 (122) *Communist Review* <http://www.tapchicongsan.org.vn/details.asp?Object=17134728&News_ID=22151242>

Rutherford, Donald, *Dictionary of Economics* (Routledge, 2002)

Saga, 'Thuc te Viec Ap dung Luat Canh tranh o Vietnam' [Practice of the Application of Competition Law in Vietnam] (2009) <http://www.saga.vn/Luatkinhdoanh/17752.saga>

Sai Gon Giai Phong (Online), 'Govt Orders VINAPCO to Charge All Carriers Same Fuel Price' (2008) <http://www.saigon-gpdaily.com.vn/Business/2008/4/62626/>

Sai Gon Giai phong (Online), 'Cac Tong Cong ty Nha nuoc Co Vai tro Quan trong Gop phan On dinh Xa hoi' [State General Corporations Play an Important Role in Stablizing the Society] <http://www.sggp.org.vn/kinhte/2009/2/180496/>. See also Conclusion of the Prime Minister at the Meeting with State Economic Groups, General Corporations on 20/08/2008

Saigon Tiep thi, *Thuc thi Luat Canh tranh: Phat de Canh bao, Khong de Thu tien* [Implementating Competition Law: Penalties Aim to Warn, not to Collect Money] <http://www.baomoi.com/Home/KinhTe/sgtt.vn/Thuc-thi-luat-Canh-tranh-Phat-de-canh-bao-khong-de-thu-tien/5459996.epi>

Saigon Times (Online), 'Giai quyet Thieu Dien Bang Cach Tiet kiem' [Solving Electricity Shortage Simply by Saving] (2008) <http://www.thesaigontimes.vn/Home/thoisu/doisong/5245/>

Saigon Times (Online), 'Lai Tiep tuc Cat dien Vi Thieu Nguon' [Cutting Again due to Electricity Shortage] (2008) <http://www.thesaigontimes.vn/Home/thoisu/doisong/6329/>

Saigon Times (Online), 'Vietnam Airlines Opposes Jetstar Pacific-Proposed Separation of VINAPCO' (2009) <http://english.thesaigontimes.vn/Home/business/other/4247/>

Salop, Steven and David Scheffman, 'Cost-Raising Strategies' (1987) 36 (1) *Journal of Industrial Economics* 19

Salop, Steven and David Scheffman, 'Raising Rivals' Costs' (1983) 73 (2) *American Economic Review* 267

Salop, Steven, 'Strategic Entry Deterrence' (1979) 69 (3) *American Economic Review* 249

Sappington, David E M and Gregory J Sidak, 'Anti-competitive Behavior by SOEs: Incentives and Capabilities' in Richard R Geddes (ed) *Competing with the Government: Anti-competitive Behaviour and Public Enterprises* (Hoover Institution Press, 2004)

Sappington, David E M and Gregory J Sidak, 'Incentives for Anticompetitive Behavior by Public Enterprises' (2003) 22 *Review of Industrial Organisation* 183

<http://www.springerlink.com/content/l510108833125137/fulltext.pdf>

Sappington, David E M and Gregory J Sidak, *Anti-competitive Behavior by State-Owned Enterprises: Incentives and Capabilities* (2004), 2-3 <http://media.hoover.org/documents/081793992X_1.pdf>

Sappington, David E M and Sidak J Gregory, 'Competition Law for State-Owned Enterprises' (2003) 71 (2) *Antitrust Law Journal* 479

Sauter, Wolf, *Competition Law and Industrial Policy in the EU* (Oxford University Press, 1997)

Scheffman, David T and Richard S Higgins, '20 Years of Raising Rivals' Costs: History, Assessment and Future' 12 (2) *George Mason Law Review* (2003) 371 <http://www.georgemasonlawreview.org/doc/12-2_Scheffman-Higgins.pdf >

Scherer, Frederic M and David R Ross, *Industrial Market Structure and Economic Performance* (Houghton Mifflin, 3rd ed, 1990)

Scherer, Frederic M, *Industrial Market Structure and Economic Performance* (Rand McNally, 1970)

Sherer, Frederik M, *Industrial Market Structure and Economic Performance* (Houghton Mifflin, 2nd ed, 1980)

Seddon, Nick, 'Crown Community and the Unlevel Playing Field' 1998 5 (4) *Agenda* 467 <http://epress.anu.edu.au/agenda/005/04/5-4-A-7.pdf>

Sharkey, William W, *The Theory of Natural Monopoly* (Cambridge University Press, 1982)

Shirley, Mary M, 'Managing State-Owned Enterprises' World Bank Staff Paper No. 577 (1983) 2 <http://www-wds.worldbank.org/external/default/WDSContentServer/WDSP/IB/1999/09/17/000178830_98101903415637/Rendered/PDF/multi_page.pdf>

Shleifer, 'State Versus Private Ownership' (1998) 12 (4) *Economic Perspective* 130

Sidak, Gregory J and Daniel F Spulber, *Protecting Competition from the Postal*

Monopoly (AEI Press, 1996)

Sierra, Jose Luis Buendia, *Exclusive Rights State Monopolies EC Law: Article 86 (former Article 90) of the EC Treaty* (Oxford, 2000)

Sivalingam, G, *Competition Policy in Asian* <www.incsoc.net/asean-rep.doc>

Sjöholm, Fredrik, *State Owned Enterprises and Equitization in Vietnam* (2006) <http://swopec.hhs.se/eijswp/papers/eijswp0228.pdf>

Slot, Piet Jan and Angus Johnson, *An Introduction to Competition Law* (Hart Publishing, 2006)

Smith, Adam, *An Inquiry into the Nature and Cause of the Wealth of Nations* (1976) IV.7.175 (5th ed, annotated reprint, Methuen, London 1904) <http://www.econlib.org/library/Smith/smWN.htm>

Smith, Rhonda L, *Competition Law and Policy- Theoretical Underpinnings* <http://www.regulationbodyofknowledge.org/documents/011.pdf>

Sokol, Daniel, *Limiting Anti-Competitive Government Intervention That Benefit Special Interests* (2009) <http://www.coleurop.be/content/gclc/documents/GCLC%20Working%20Paper%2002-09%20-%20Daniel%20Sokol.pdf >

Son, Nguyen Ngoc, 'Kiem soat Tap trung Kinh te theo Phap luat Canh tranh va Van de cua Vietnam' (2008) *Legislative Studies* [Nghien cuu Lap phap] <http://www.nclp.org.vn/chinh_sach/kiem-soat-tap-trung-kinh-te-theo-phap-luat-canh-tranh-va-van-111e-cua-viet-nam/?searchterm=%22lu%E1%BA%ADt%20c%E1%BA%A1nh%20tranh%22>

Son, Nguyen Ngoc, 'Mot so Binh luan tu Thuc tien Giai quyet Vu viec ve Han che Canh Tranh' [Some comments from the Practices of Handling of Competition Cases] (2009) *Legislative Studies* [Nghien cuu Lap phap] <http://www.nclp.org.vn/thuc_tien_phap_luat/mot-so-binh-luan-tu-thuc-tien-giai-quyet-vu-viec-ve-hanh-vi-han-che-canh-tranh/?searchterm=%22lu%E1%BA%ADt%20c%E1%BA%A1nh%20tranh%22>

Son, Nguyen Ngoc, 'Mot so Y kien ve Dia vi Phap ly cua Hoi dong Canh tranh tai Vietnam Hien nay' [Some Ideas regarding Legal Position of the Competition Council in Vietnam] (2006) *Legal Sciences* [Khoa hoc Phap ly] <http://luathoc.cafeluat.com/showthread.php/27457-Mot-so-y-kien-ve-dia-vi-phap-ly-cua-Hoi-dong-canh-tranh-tai-Viet-Nam-trong-dieu-kien-hien-nay>

Son, Nguyen, Ngoc 'Co che Canh tranh va Su Thong dong trong Dau thau theo Luat Canh tranh' [Competition Mechanism and Collusion in Bidding under Competition Law] (2006) (2) (33) *Legal Sciences* [Khoa hoc Phap ly] <http://www.hcmulaw.edu.vn/hcmulaw/index.php?option=com_content&view=article&id=360:ccctvsttttlct&catid=104:ctc20062&Itemid=109>

Son, Pham Thanh,'Tai Co cau Hay Giai cuu Vinashin?'[Vinashin: Restructuring or Saving?] (2010) *Tuan Vietnam* (Online) <http://www.tuanvietnam.net/2010-07-08-tai-co-cau-hay-giai-cuu-vinashin->

Spiliotopoulos, Epaminondas, 'The Nature of the Public Undertaking' (1966) 37 (3) *Annals of Public and Cooperative Economics* <http://www3.interscience.wiley.com/cgi-bin/fulltext/119729100/PDFSTART>

Standing Committee of the National Assembly,'Bao cao Giai trinh Va Tiep thu Chinh ly Du thao Luat Canh tranh Trinh Quoc hoi Thong qua' [Report on Explanations, Acknowledgements and Amendments of the Draft of the *Competition Law* Submitting to the National Assembly for Approval] (2004)

Stewart, John F, Robert S Harris and Willard T Carleton, 'The Role of Market Structure in Merger Behaviour (1984) 32 (3) *Journal of Industrial Economics* 293

Stigler, George J, 'The Theory of Economic Regulation' (1971) 2 *Bell Journal of Economics and Management Sciences* 3

Stiglitz, Joseph E et al, *The Economic Role of the State* (Oxford, 1989)

Suedekum, Jens, *National Champion versus Foreign Takeover* (2007) <http://ftp.iza.org/dp2960.pdf>

Swedish Competition Authority, *The Pros and Cons of Competition in/by the Public Sector* (2009)

<http://www.kkv.se/upload/Filer/Trycksaker/Rapporter/Pros&Cons/Pros_and_Cons_Comp_by_public_sector.pdf>

Szyszcak, Erika, *The Regulation of the State in Competitive Markets in the EU* (Hart Publishing, 2007)

Taylor, Martyn, *International Competition Law: A New Dimension for the WTO* (Cambridge University Press, 2006)

Thai, Le Viet 'Chinh sach Canh tranh Mot Cong cu Can thiet Trong nen Kinh te Thi truong' [Competition Policy: A necessary tools in the Market Economy] (1996) *Nghien cuu Kinh te* [Economics Studies]

Thai, Le Viet, 'Chuyen de ve Hanh vi Tap trung Kinh te' De tai Nghien cuu ve The che Canh tranh trong Dieu kien Phat trien Kinh te Thi truong tai Vietnam' [Study on Economic Concentration Activities – Research on Competition Institution in the Context of Developing a Market Economy in Vietnam] (2005)

Thai, Le Viet, 'Hanh vi Thoa thuan Han che Canh tranh [Agreements in Restraint of Competition] Working Paper on Competition Law (2005)

Thai, Le Viet, Vu Xuan Nguyet Hong, Tran Van Hoa, 'Anti-trust Law and Competition Policy in Vietnam: Macroeconomic Perspective' in Tran Van Hoa (ed) *Competition Policy and Global Competitiveness in Major Asian Economies* (Edward Elgar Publishing, 2003)

Thai, Vo Duy, *Xu huong Thoa thuan Han che Canh tranh o Vietnam* [Trends of Anti-competitive Agreement in Vietnam] (2009) <http://www.vcad.gov.vn/Web/Content.aspx?distid=2243&lang=vi-VN>

The US Commercial Service and ITA Trade Development, *'Aerospace Exports: Market Research Identifies Solid Prospects'* <http://www.ita.doc.gov/exportamerica/NewOpportunities/no_aeroex_1002.html>

The US Department of Justice, *Antitrust Case Filings* <http://www.usdoj.gov/atr/cases/stilwe0.htm>

Tho, Tran Van, *Vietnamese Gradualism in Reforms of the State-Owned Enterprises*

(2000) <http://www.f.waseda.jp/tvttran/en/recentpapers/E02States-owned%20entreprises%20in%20Vietnam.doc>

Thuy, Dao Xuan, *Dieu kien va Giai phap Hinh thanh Cac Tap doan Kinh te Tu Cac Tong Cong ty 91* [Conditions and Solutions for the Establishment of Economic Groups on the Basis of the 91 State General Corporations] (National Political Publishing House, 2009)

Thuy, Trinh Thi Thanh et al, 'Scientific Background for Determining the Degree of Competitive Restrictive Agreements and Exemption Criteria in the Competition Law', (Conference Report of Ministry of Trade Research Project 2003-78-009, 2004)

Tiem, Phan Van and Nguyen Van Thanh, 'Problems and Prospects of State Enterprise Reform, 1996 - 2000' in Ng Chee Yuen, Nick J Freeman and Frank H Huynh, *State-Owned Enterprise Reform in Vietnam: Lessons from Asia* (Institute of Southeast Asian Studies, 1996)

Toninelli, Pier Angelo, 'The Rise and Fall of Public Enterprise – the Framework' in Pier Angelo Toninelli (ed) *The Rise and Fall of State-Owned Enterprise in the Western World* (Cambridge University Press, 2000)

Tran, Le Thuy, *Introduction to Regulation of Competition in South East Asia: A Comparativr Study of Antimonopoly Laws in Vietnam and Indonesia and Their Models* (2007) <http://www.gsid.nagoya-u.ac.jp/bpub/research/public/forum/34/12.pdf >

Trebilcock, Michael and Edward Iacobucci, 'Privatization and Accountability' (2003) 116 (5) *Harvard Law Review* 1422

Trung, Nguyen, 'Mo hinh Tap doan Nha nuoc va Noi lo Vuot Tam Kiem soat' [Model of State Economic Groups and Concerns for Exceeding the State Control] (2008) *Tuan Viet Nam* <http://www.tuanvietnam.net//vn/sukiennonghomnay/4756/index.aspx>

Trung, Nguyen, *Vai Suy nghi ve Tap doan Kinh te Quoc doanh o Nuoc ta* [Some Thoughts about State Economic Groups in Our Country] (2008) <http://www.viet-

studies.info/NguyenTrung/NguyenTrung_VeTapDoanKinhTe.htm>

Truong, Doan Van, *Ban Pha gia va Bien phap, Chinh sach Ban Pha gia* [Dumping and Methods, Policies of Dumping] (Statistics Publishing House, 1998)

Tu, Nguyen Thanh, 'Phap luat Canh tranh trong WTO va Kinh nghiem cho Vietnam' [Competition Law under WTO – Experiences for Vietnam] in (2007) 91 *Legislative Studies* [Nghien cuu Lap phap] <http://www.nclp.org.vn/nha_nuoc_va_phap_luat/phap-luat-canh-tranh-trong-wto-va-kinh-nghiem-cho-viet-nam>

Tu, Tran Anh, 'Nhan dien Doc quyen Hanh chinh o Vietnam' [Identifying Administrative Monopoly in Vietnam] (2008) 24 *Tap chi Khoa hoc Dai hoc Quoc gia Ha Noi* [Hanoi National University Sciences Journal]

Tu, Vu Huy et al, *Co cau Lai Doanh nghiep Nha nuoc Theo Luat Doanh nghiep Nam 2005* [Restructuring State Corporations according to the *Enterprises Law 2005*] (National Political Publishing House, 2007)

Tuan Vietnam (Online), 'Benh Cua Doc quyen' [Troubles of Monopoly] (2008) <http://tuanvietnam.net/vn/sukiennonghomnay/5172/index.aspx >

Tuan Vietnam (Online), 'Dieu hanh Tap doan Kinh te o Vietnam' [Regulating Economic Groups in Vietnam] <http://www.tuanvietnam.net/news/InTin.aspx?alias=tulieusuyngam&msgid=4089>

Tuan, Trinh Anh, *Ban chat Phap ly va Cac Yeu cau Co ban Doi voi Co quan Canh tranh – Bai hoc cho Vietnam* [Nature and Fundamental Requirement for a Competition Authority: Lessons for Vietnam] (2009) <vcad.gov.vn/Modules/CMS/Upload/36/2009_6.../dien%20dan%20T5.doc>

Tuan, Trinh Anh, 'Competition Environment and the Urgency of Competition Law in Vietnam' (Paper presented at the 3rd APEC Training Program on Competition Policy 1-3, March 2004, Kuala Lumpur, Malaysia) <http://www.jftc.go.jp/eacpf/01/APEC_Policy_Vietnam.pdf>

Tung, Le Hoang, 'Competition and Monopoly in Vietnam' (Paper presented at

International workshop on Competition Policy in Seoul, July 30 - August 2, 2001)

Tung, Lu Dong *Comparison of EC and Vietnamese Competition Laws: Anti-competitive Agreements* (Master of European Affairs Law Thesis, Lund University, 2005)

Tung, Tran Thanh, 'Vu Kien Mo duong Cho Luat Choi ve Canh Tranh') [The Case Paved the Way for Competition Rules to be Applicable], *Saigon Times* (Online) (2009) <http://www.thesaigontimes.vn/Home/kinhdoanh/thuongmai/17945>

Tuoi Tre (Online), 'Chi Cam Tap trung Kinh te Khi chiem tren 50% Thi phan' [Only Economic Concentration account for over 50 per cent of Market Share is Prohibited] <http://www.tuoitre.com.vn/Tianyon/Index.aspx?ArticleID=44189&ChannelID=11>

Tuoi Tre (Online), 'May bay Pacific Airlines: Chet dung Vi Khong Duoc Bom Xang' (2008) [Pacific Airlines' Aircrafts Could not Fly due to No Fuel Supply] <http://www.tuoitre.com.vn/Tianyon/Index.aspx?ArticleID=250471&ChannelID=3>

Turner, Kaysen and, *Antitrust Policy: An Economic and Legal Analysis* (Harvard University Press, 1959)

Tuyet, Trang Thi et al, *Mot so Giai phap Hoan thien Quan ly Nha nuoc Doi voi Doanh nghiep* [Some Solutions to Enhance State Management for Enterprises] (National Political Publishing House, 2006)

UN International Law Commission, *Conclusions of the work of the Study Group on the Fragmentation of International Law: Difficulties arising from the Diversification and Expansion of International Law* (2006) <http://untreaty.un.org/ilc/texts/instruments/english/draft%20articles/1_9_2006.pdf>

UNCTAD, 'Attracting FDI in Electricity' (2009) *Investment Policy Review of Vietnam* <http://www.unctad.org/en/docs/iteipc200710_en.pdf>

UNCTAD, 'Model Law on Competition Draft Commentaries to Possible Elements for Articles of A Model Law or Laws' (TD/RBP/CONF.5/7, 2000)

<http://www.unctad.org/en/docs/tdrbpconf5d7.en.pdf>

UNCTAD, *Model Law on Competition: Substantive Possible Elements for a competition law, commentaries and alternative approaches in existing legislation* (TD/RBP/CONF.5/7/Rev.3, United Nations, 2007) <http://www.unctad.org/en/docs/tdrbpconf5d7rev3_en.pdf >

UNCTAD, *The Effects of Anti-competitive Business Practices on Developing Countries and their Development Prospects* (United Nations, 2008) <http://www.unctad.org/en/docs/ditcclp20082_en.pdf >

UNCTAD, *The United Nations Set of Principles and Rules on Competition* (TD/RBP/CONF/10Rev2, 2000) <http://www.unctad.org/en/docs/tdrbpconf10r2.en.pdf>

UNDP Vietnam, *The State as Investor: Equitisation, Privatisation and the Transformation of SOEs in Viet Nam* (2006) <http://www.undp.org.vn/undpLive/System/Publications/Publication-Details?contentId=2079&languageId=1&categoryName=&CategoryConditionUse=>

United Nations, Department of Economic and Social Affairs, *Public Enterprises: Unresolved Challenges and New Opportunities* (United Nations, 2008)

UNTACD, 'Abuse of Dominance' (TD/B/COM.2/CLP/66, 2008) <http://www.unctad.org/en/docs/c2clpd66_en.pdf>

UNTACD, 'Model Law: the Relationships between a Competition Authority and Regulatory Bodies, including Sectoral Regulators' (TD/B/COM.2/CLP/23, 2001) <http://www.unctad.org/en/docs/c2clp23&c1.en.pdf>

UNTACD, *Application of Competition Law: Exemptions and Exceptions* (2002) <http://www.unctad.org/EN/docs/ditcclpmisc25_en.pdf>

UNTACD, *Investment Policy Review of Vietnam, Chapter 3: Attracting FDI in Electricity* (2009) <http://www.unctad.org/en/docs/iteipc200710_en.pdf>

US Department of Justice, *Competition and Monopoly: Single Firm Conduct under*

Section 2 of the Sherman Act (2008), <http://www.justice.gov/atr/public/reports/236681.pdf>

USAID, *Competition Review of the Vietnamese Telecom Sector* (2005) <http://pdf.usaid.gov/pdf_docs/Pnade784.pdf>

USVTC, *Catalog Legal Update on Vietnam Trade Regime* (2006) <http://www.usvtc.org/updates/legal/Catalog/CatalogSep06.pdf>

USVTC, *Competition Law Update* (2006) <http://www.usvtc.org/updates/legal/PhillipsFox/CompetitionLawUpdate-July2006.pdf>

VCAD, 'Report on the Research and Survey on Community's Awareness Level about Competition Law' (2009)

VCC and EU-Vietnam Multilateral Trade Assistance Project (MUTRAP), Report of the 'Five Years of the Implementation of Competition Law regarding Anti-competitive Behaviour' in December 2010

Vien Ngon ngu hoc, *Tu dien Tieng Viet* [A Dictionary of Vietnamese] (Social Sciences, 1994)

Viet Bao (Online), 'Can Xoa bo Doc quyen Tren Thi truong Hang khong' [Aviation Monopoly Must be Removed] (2006) <http://vietbao.vn/Kinh-te/Can-xoa-bo-doc-quyen-tren-thi-truong-hang-khong/10955207/87/>

Viet Bao (Online), 'Cuoc Doi dau Viettel – VNPT Chua Co Hoi ket' [Confrontation between Viettel and VNPT: Still No End] (2005) <http://vietbao.vn/Kinh-te/Cuoc-dau-Viettel-VNPT-chua-co-hoi-ket/10916147/87/>

Viet Bao (Online), 'Dam phan EVN Telecom – VNPT: Moi Ngay Chi Sua Mot Chu' [EVN Telecom - VNPT Negotiation: One Word Corrected per Day] (2006) <http://vietbao.vn/Kinh-te/Dam-phan-EVN-Telecom-VNPT-Moi-ngay-chi-sua-1-chu/45201381/87/>

Viet Bao (Online), 'Ket qua Kiem toan Tap doan Dien luc Vietnam EVN (2008) <http://vietbao.vn/Kinh-te/Ket-qua-kiem-toan-Tap-doan-Dien-luc-Viet-Nam-

EVN/80102183/92/>

Viet Bao (Online), 'Mang 098 Nghen Mach: VNPT Can Ly, Dong Y Mo Cua Cho Viettel' [The Network 098 Congested: Running Out of Arguments, VNPT Agrees to Open More Connections] (2005) <http://vietbao.vn/Kinh-te/Mang-098-nghen-mach-VNPT-can-ly-dong-y-mo-cua-cho-Viettel/45160021/87/>

Viet Bao (Online), 'Ong Doc quyen VNPT Bi To cao' [The Monopolist, VNPT Has Been Denounced] (2005) <http://vietbao.vn/Vi-tinh-Vien-thong/Ong-doc-quyen-VNPT-bi-to-cao/40085719/217/>

Viet Bao (Online), 'Viettel – VNPT: Khau chien Nay Lua' [Viettel – VNPT: Intense Dispute] (2005) <http://vietbao.vn/Kinh-te/Viettel-VNPT-Khau-chien-nay-lua/70015728/87/>

Viet Bao (Online), 'Viettel Co Nguy co Pha san Neu VNPT Khong Thao Nut Co chai' [Viettel is on the Erge of Bankcruptcy if VNPT Does not Resolve the bottle-neck Issue] (2005) <http://vietbao.vn/Kinh-te/Viettel-co-nguy-co-pha-san-neu-VNPT-khong-thao-nut-co-chai/45159811/87/>

Viet Bao (Online), Sap nhap Ba Doanh Nghiep Coca-Cola Vietnam' [Merging three Coca-Cola Vietnam companies] <http://vietbao.vn/Kinh-te/Sap-nhap-3-doanh-nghiep-Cocacola-Viet-Nam/10725308/87/>

Vietnam Business Forum, 'Doc quyen Cung cap Xang dau Hang khong: Ung xu Nhu The Nao Cho Dung Luat?' (2008) [Monopoly in Aviation Fuel Supply: How to Behave Legally?] <http://news.vibonline.com.vn/Home/ttkt/2008/04/1842.aspx>

Vietnam Business Forum, 'EVN Submits Power Price Hike Plan to MoIT' (2008) <http://vibforum.vcci.com.vn/news_detail.asp?news_id=14224>

Vietnam Business Forum, 'Unhealthy Competition Hurting Airline Industry' (2006) <http://vibforum.vcci.com.vn/news_detail.asp?news_id=6535>

Vietnam Investment Review (Online), 'Aviation Sector Firms' Complaints Gain Wings' (2008) <http://www.vir.com.vn/Client/VIR/index.asp?url=content.asp&doc=16155>

Vietnam Net, '30 Flights Delayed Because of No Fuel?' (2008) <http://english.vietnamnet.vn/travel/2008/04/776572/>

Vietnam Net, 'Auditor Says EVN Financial Structure Solid' <http://english.vietnamnet.vn/biz/2008/11/815677/>

Vietnam Net, 'Tap Doan Kinh te Phan doi Siet Dac quyen [Economic Groups Object to Tightening Their Exclusive Rights] <http://vietnamnet.vn/chinhtri/2008/08/798487/>

Vietnam Net, 'Building powerful domestic economic groups' <http://english.vietnamnet.vn/biz/2008/05/780953/>

Vietnam Net, 'Cat Dien: Da Den Muc Bao dong' [Power Outage: Alarm Level Reached] (2008) <http://www.vietnamnet.vn/kinhte/2008/04/776685/>

Vietnam Net, 'Cuc Quan ly Canh tranh Yeu cau VINAPCO Giai trinh' [Vietnam Competition Administration Department Asks VINAPCO to Explain] (2008) <http://vietnamnet.vn/kinhte/2008/04/776744/>

Vietnam Net, 'EVN Blows off Local Electric Plants, Ignores Shortage' (2007) <http://english.vietnamnet.vn/biz/2007/12/758921/>

Vietnam Net, 'EVN Dau tu Da Nganh De Lay Ngan Nuoi Dai' (2008) <http://www.vietnamnet.vn/chinhtri/2008/04/779915/>

Vietnam Net, 'EVN Should Consider Lowering Electricity Prices: Experts' (2008) <http://english.vietnamnet.vn/biz/2008/11/815870/>

Vietnam Net, 'Monopoly Allows EVN to cut Power Spontaneously' (2008) <http://english.vietnamnet.vn/biz/2008/10/807894/>

Vietnam Net, 'Monopoly Exists, Airport Service Fees Gallop' (2008) <http://english.vietnamnet.vn/travel/2008/04/779832/>

Vietnam Net, 'Network Jams in 17 Provinces, EVN Telecom Cries' (2006) <http://english.vietnamnet.vn/biz/2006/09/613901/>

Vietnam Net, 'Temasek Dau tu Vao Pacific Airlines' [Temasek to Invest in Pacific

Airlines] (2005) <http://vietnamnet.vn/kinhte/2005/06/452855/>

Vietnam Net, 'Tu Pacific Airlines, Can Mot Cuoc Dai phau Sang tao' [From Pacific Airlines Case: Must Have a Creative Reform] (2004) <http://vietnamnet.vn/kinhte/2004/12/359266/>

Vietnam Net, 'Vietnam Will Lack Electricity until Monopoly Removed' (2008). <http://english.vietnamnet.vn/biz/2008/03/774391/>

Vietnam Net, 'VINAPCO Told to Abide by Rule to Ask Airlines to Pay Fuel-Bills' (2009) <http://english.vietnamnet.vn/biz/2009/04/843697/>

Vietnam Net, 'VINAPCO, Pacific Airlines to Start Talks on Fuel Fee' (2008) <http://english.vietnamnet.vn/biz/2008/04/778019/>

Vietnam Net, 'Want to Invest in Power? Talk to EVN' (2008) <http://english.vietnamnet.vn/reports/2008/08/798976/>

Vietnam Net, 'Where to Buy Electricity? It's the Right of EVN' (2008) <http://english.vietnamnet.vn/biz/2008/05/782818/>

Vietnam Net, EVN's Project on PTC not Backed by MOI <http://english.vietnamnet.vn/biz/2007/06/706767/>

Vietnam News, 'ADB Offers Energy Aid with Plant Loan' (2008) <http://vietnamnews.vnagency.com.vn/showarticle.php?num=03ECO010708>

Vietnam News, 'Airline to Keep Fuel Supplier' (2009) <http://vietnamnews.vnagency.com.vn/showarticle.php?num=04BUS280409>

Vietnam News, 'Domestic Airlines Price War Hurts Industry' (2006) <http://vietnamnews.vnagency.com.vn/showarticle.php?num=03BUS020506>

Vietnam News, 'Electricity Sector Should be Liberalised' (2005) <http://vietnamnews.vnagency.com.vn/showarticle.php?num=01BUS210605>

Vietnam News, 'Home power may jump by 36%' (2008) <http://www.vietnamnews.com.vn/showarticle.php?num=02ECO231008>

Vietnam News, ‘Lower Electricity Rates Await Market Reforms’ (2006) <http://vietnamnews.vnagency.com.vn/showarticle.php?num=01TAS261006>

Vietnam News, ‘Ministry Tells VNPT, Viettel to Make Up’ (2005) <http://vietnamnews.vnagency.com.vn/showarticle.php?num=05ECO050705>

Vietnam News, ‘PetroVietnam Blames EVN for Plant Losses’ (2008) <http://vietnamnews.vnagency.com.vn/showarticle.php?num=02ECO140508>

Vietnam News, ‘Viettel Seeks End to VNPT Connection Dispute’ (2005) <http://vietnamnews.vnagency.com.vn/showarticle.php?num=05ECO290605>

Vietnam News, ‘VNPT Gives More Access to EVN Telecom’ (2006) <http://vietnamnews.vnagency.com.vn/showarticle.php?num=03BUS120706>

Viettel website, ‘Cuoc Cach mang Viettel’(2009) [Viettel Presence Brings about a Revolution] <http://www.viettel.com.vn/TinTuc/tabid/55/key/ViewArticleDetail/Cat/69/Art/8149/language/vi-VN/18/2/2009.viettel>

Vinh, Le Danh, ‘Building Competition Law in Vietnam to Meet the Need of Regulating Market Economy and in the light of Trade Liberalization and International Economic Integration’ (Paper Presented at ASEAN Conference on Fair Competition Law and Policy in the ASEAN Free Trade Area (AFTA) Bali, March 5-7, 2003) <http://www.jftc.go.jp/eacpf/04/vietnam_p.pdf>

Vinh, Le Danh and Hoang Xuan Bac, ‘To chuc Bo may Thuc thi Luat Canh tranh, Dieu tra Xu ly Vu viec canh Tranh [Organisation and Mechanism for the Implementation of Competition Law, Investigation and Handling of Competition Cases] (2005)

Vinh, Le Danh, Hoang Xuan Bac, Nguyen Ngoc Son, *Giao trinh Luat Canh tranh* [Textbook on Competition Law] (Hochiminh City National University, 2010)

VN Chanel.Net, ‘Khon don Voi Dich vu Doc quyen San bay’ [Troubles Caused by Airport Services](2008) <http://www.vnchannel.net/news/kinh-te/200804/khon-don-voi-doc-quyen-dich-vu-san-bay.70647.html>

VN Economy, ‘Bung nhung cot dien va Dung dang Trach nhiem’ [Unsolved conflict regarding electric posts and Responsibility] (2010) <http://vneconomy.vn/201012593636230P0C5/bung-nhung-cot-dien-va-dung-dang-trach-nhiem.htm>

VN Economy, ‘Cuc Hang khong Viet Nam Bi To Lam Kho Jetstar Pacific’ (2008) [Vietnam’s Aviation Administration Bureau was Accused of Causing Difficulties to Jetstar Pacific] <http://vneconomy.vn/20081124020117887P0C19/cuc-hang-khong-viet-nam-bi-to-lam-kho-jetstar-pacific.htm>

VN Economy, ‘Doc quyen Dich vu San bay, Hang khong Keu Cuu’ [Airport Ground Services Monopoly: Airliners Ask for Help] (2008) <http://vneconomy.vn/60536P0C19/doc-quyen-dich-vu-san-bay-hang-khong-keu-cuu.htm>

VN Economy, ‘EVN Tang Gia Thue Cot dien, VNPT ‘Cau cuu’ [EVN Proposed a Increased Rent for Hanging Telecommunication Cable, VNPT Sought for Help] (2010) <http://vneconomy.vn/2009122512054628P0C9920/evn-tang-gia-thue-cot-dien-vnpt-cau-cuu.htm>

VN Economy, ‘Luat Canh tranh Khoanh tay Nhin Doc quyen’ quyen’ [Competition Law Stands Idly Seeing Monopoly] <http://vneconomy.vn/20090306095723894P0C5/luat-canh-tranh-khoanh-tay-nhin-doc-quyen.htm>

VN Economy, ‘Tang Gia Treo Cap, ‘Moi VNPT Khong chiu’ [Increase of Hanging Cable Fee, Everyone Agreed, except VNPT] (2010) <http://vneconomy.vn/20091230082334969P0C16/tang-gia-treo-cap-moi-vnpt-khong-chiu.htm>

VN Express, ‘Cam Tap trung Kinh te chiem tren 50% Thi phan’ [Prohibiting Only Economic Concentration Case account for over 50 per cent of Market Share] <http://vnexpress.net/GL/Kinh-doanh/2004/03/3B9D07DA/>

VN Express, ‘Co Canh tranh Khong Lanh manh Trong Nganh Hang Khong’ [Is There Fair Competition in Aviation Industry’] (2006) <http://vnexpress.net/Vietnam/Kinh-doanh/2006/04/3B9E91DD/>

VN Express, ‘Co quan Quan ly Canh tranh Phai Dung Doc Lap’ [The Competiton Authority Must Stand Independently] (2004) <http://vnexpress.net/gl/kinh-doanh/2004/06/3b9d32d2/>

VN Express, ‘De nghi Doi Luat Canh tranh Thanh Luat Chong Doc quyen’ [Propose to Change Title of the Law from the Competition Law to Anti-monopoly Law] (2004) <http://www.vnexpress.net/gl/kinh-doanh/2004/04/3b9d1671/>

VN Express, ‘EVN Telecom – Nan nhan moi cua VNPT’ [EVN Telecom - New Victim of VNPT] (2006) <http://www.vnexpress.net/GL/Kinh-doanh/2006/07/3B9EBA01/>

VN Express, ‘Mo cua Thi truong, Nganh duong keu kho’ [Opening Market, Sugar Industry Claims Difficulties] <http://vnexpress.net/gl/kinh-doanh/2005/08/3b9e17f6/>

VN Express, ‘Tong Cong ty Dien luc Doc quyen Mua re, Ban dat’ (2001) [Monopoly of EVN: Buy Low but Sell High] <http://vnexpress.net/SG/Kinh-doanh/2001/07/3B9B2DE2/>

VN Media, ‘Vietnam Airlines Quyet Giu VINAPCO’ [Vietnam Airlines to Keep VINAPCO] (2009) <http://www.vnmedia.vn/newsdetail.asp?NewsId=162706&CatId=26>

VTC News, ‘Dich vu Doc quyen San Bay Tang gia 5-10 Lan’ [Airport Ground Services Fees to Increase from 5 up to 10 times] (2008) <http://vtc.vn/kinhdoanh/doanhnghiep/177753/index.htm>

VTC News, ‘Jetstar Len Tieng Ve Phan doi Tach VINAPCO Cua Viet Nam Airlines’ [Jetstar Responses to Vietnam Airlines’ Objection to Break-up VINAPCO] (2009) <http://www.vtc.vn/kinhdoanh/jetstar-len-tieng-ve-phan-doi-tach-vinapco-cua-viet-nam-airlines/213374/index.htm>

VTC News, ‘Pha The Doc quyen Dien’ [Breaking Monopoly in Electricity Sector] (2008) <http://vtc.vn/kinhdoanh/175945/index.htm>

VTV Website, ‘Ra Mat Hang Hang khong Gia Re Jetstar Pacific’ [Low Cost Airline Jetstar Starts to Operate] (2008)

<http://www.vtv.vn/VN/TrangChu/TinTuc/CKX/2008/5/24/159028/>

Wang, Leiming, Lutao Shen and Sheng Zou, Five Comprehensive Government Restructures 1982-2003, XINHUA NEWS AGENCY, Mar. 6, 2003, http://www.people.com.cn/GB/shizheng/252/10434/10435/20030306/937651.html

Webster, Leila and Marcus Taussig, Vietnam's Undersized Engine: A Survey of 95 Large Private Manufacturers' *MPDF Private Sector Discussions No. 8* (1999)

Weiss, Leonard W, 'The Structure-Conduct-Performance Paradigm and Antitrust' (1979) 127 (4) *University of Pennsylvania Law Review* 1104

Wen, Xueguo, 'Market Dominance by China's Public Utility Enterprises' (2008-2009) 75 *Antitrust Law Journal* 153

Wettenhall, Roger, 'The Globalisation of Public Enterprises' (1993) 59 *International Review of Administrative Sciences* 387 <http://ras.sagepub.com/cgi/reprint/59/3/387>

Whish, Richard and Brenda Sufrin, *Competition Law* (Butterworths, 3rd, 1993)

Wils, Wouter P J, 'Self-incrimination in EC Antitrust Enforcement: A Legal and Economic Analysis' (2003) 26 (4) *World Competition*: *Law and Economics Review* 567

Winston, Clifford, *Government Failure versus Market Failure – Microeconomics Policy Research and Government Performance* (2006) <http://reg-markets.org/admin/authorpdfs/redirect-safely.php?fname=../pdffiles/php3v.pdf>

Wood, Diane P, 'State Trading in the United States' in Thomas Cottier and Petros Mavroidis (eds), *State Trading in the Twenty-First Century* (The University of Michigan Press, 1999)

World Bank, *'Held by the Visible Hand: The Challenge of SOE Corporate Governance for Emerging Markets'* (World Bank, 2006) <http://rru.worldbank.org/Documents/Other/CorpGovSOEs.pdf>

World Bank, 'Vietnam: Country Procurement Assessment Report: Transforming Public

Procurement', Report No. 25144-VN (2002)

World Bank, 'Vietnam: Economic Report on Industrialization and Industrial Policy' (Report No. 14645-VN, 1995)

World Trade Organisation, *The Fundamental Principles of Competition Policy*, WTO Doc WT/WGTCP/W/127 (1999) <http://docsonline.wto.org/imrd/directdoc.asp?DDFDocuments/t/WT/WGTCP/W127.doc>

Xiaoye, Wang, 'Issues Surrounding the Drafting of China's Anti-Monopoly Law' *Washington University Global Studies Law Review* (3) 285

Yarrow, George, 'The Economics of Regulation' in Venkata Vemuri Ramanadham (ed.) *Privatization and After:Monitoring and Regulation* (Routledge, 1994)

Zhang ,Yahua and David K Round, 'China's Airline Deregulation since 1997 and the Driving Forces behind the 2002 Airline Consolidations'(2008) 14 (3) *Air Transport Management* 130

Zwisler, Magaret M, '*Volvo Trucks v Reeder Simco*: Judicial Activism at the Supreme Court?' (2006) 20 (3) *Antitrust* <http://apps.americanbar.org/antitrust/at-committees/at-pdiscr/special-resources/pdf/Sum06-ZwislerC.pdf>

B. CASES

I. European Union

AAMS [1998] OJ L 252/47

ACF Chiemiefarma NV v Commission (C-41/69) ECR 661

AEG-Telefunken AG v Commission (107/82 R) [1983] ECR 3151

Aéroports de Paris v Commission (C-82/01) [2002] ECR I-9279

Aéroports de Paris v Commission (T-128/98) [2000] ECR II-3929

Ahmed Saeed Flugreisen and Silver Line Reiseburo GmbH v Zentrale zur Bekampfung Unlauteren Wettwerbs eV (C- 66/88) [1989] ECR 803

Air France v Commission (T-2/93) [1994] ECR II-323.

Airport de Paris v Commission (T-128/98) [2000] ECR II-3929

Airport of Milano [2001] ECR I-185

AKZO Chemie B.V v Commission (C-62/86) [1991] ECR I-3359

Almelo (C-393/92) [1994] ECR 1477

Alpha Flight/Áeroports de Paris [1998] OJ L 230/10

Ameyde v UCI [1977] ECR 1091

Amministrazione Autonoma dei Monopoli di Stato (AAMS) *v Commission* (T-139/98) [2001] ECR II-3413

Anseau – Navewa [1983] ECR 3369

AROW/BNIC [1982] OJ L379/1

AstraZeneca/Novartis (COMP/M.1806) [2004] OJ L 110/1

Baustahlgewebe v Commission [1994] CFI T-145/89 ECR II-987

Bayer AG v Commission of the European Communities (T- 41/96) [2000] ECR II-3383, *aff'd* on appeal cases (C-2-3/01 P) [2004] ECR I-23

Belgian Post [2001] D.Comm OJ L 61/32

Blokker/ Toys 'R' Us (IV/M.890) [1998] OJ L 316/1

BMW Belgium SA et al v Commission (C-32/78 and C-36-82/78) [1979] ECR 2435

BNIC v Clair (C-123/83) [1985] ECR 391

Boosey and Hawkes [1987] OJ L 286/36

British Leyland [1986] ECR 3263

British Plasterboard (C-310/93) [1993] ECR II-389

British Sugar [1998] OJ L 284/41

British Telecommunications (C-41/83) [1985] ECR 873

BRT/SABAM II (C-127/73) [1974] ECR 313

Carnival Corporation/P&O Princess II (COMP/M.3071) [2003] OJ C 42/7

Cement [1994] OJ L343/1

Cementhandelaren v Commission (C-8/72) [1972] ECR 977

CEWAL Joined Cases (C-395-6/96 P) [2000] ECR I-1365

Chevron/Texaco (COMP/M.2208)

CICCE v Commission (C-298/83) [1985] ECR 1105

Cimenteries CBR SA et al. v Commission Joined cases (T-25 etc./95) [2000] ECR II-491

Cimenteries CBR v Commission (T-25/95) [2000] ECR II-491

CMA – FETTCSA (T-213/00) [2003] CFI 39-48

Coca-Cola/Amalgamated Beverages GB (IV/M.794) [1997] OJ L 218/15

Commercial Solvents v Commission (C-7/73) [1973] ECR 223

Commission v Italy (Transparency Directive II) C-118/85 (1987) ECR 2599

Compagnie Maritime Belge Transports SA, Compagnie Maritime Belge SA and Dafra-Lines A/S v Commission, Joined Cases (C-395-6/96 P) [2000] ECR I-1365

Conagra/Idea (IV/M.0010) [1991] OJ C 175

Consten and Grundig v Commission (C-56-8/64) [1966] ECR 342

Continental Can (C-6/72) [1973] ECR 215

Continental Can v Commission (C-6/72) [1973] ECR 215

Convenzionali Porto di Genova SpA v Siderurgica Gabrielli SpA [1991] C-1 79/90 ECR I-5889

Cooperatiëve Vereniging Suiker Unie UA v Commission (European Sugar Cartel) Joined cases (C-40-48/73, C-50/73, C-54-56/73, C-111/73, C-113-114/73) [1975] ECR-1663

Corbeau (C-320/91) [1993] ECR I-2533

Corsica Ferries Italia Sri v Corpo dei Piloti del Porto di Genova (C-18/93) [1994] ECR I-1783

Deutsche Post AG v Gesellschaft für Zahlungssysteme mbH and Citicorp Kartenservice GmbH (C-147/97) [2000] ECR I-825

Deutsche Bahn v Commission (T-229/94) [1997] ECR II-1689

Deutsche Post AG (C-COMP/35.141) OJ L 125

Deutsche Post AG [2001] OJ L 331/40 155-167

Deutsche Telekom AG (C-COMP/C-1/37.451) [2003] OJ L 263

Dunlop – Slazenger (T-43/92) [1994] ECR II-441

Elliniki Radiophonia Tilcorasi (ERT) v DEP C-260/89 [1991] ECR I-2925

Entreprenørføreningens Affalds/Miljøsektion v Københavns Kommune [2000] (C-209/98) ECR I-3743

European Night Services v Commission (T-374, 375 and 388/94) [1998] ECRII-3141

Europemballage and Continental Can v Commission (C-6/72) [1973] ECR 215

Eurovision II (*Eurovision II* [2000] D.Comm. CFI OJ L151/68 68, *rev'd* CFI [2002] ECR 11-3805); *Woodpulp I* [1988] ECR 5193, 24-27)

Exxon/Mobil (IV/M.1383) [2004] OJ L 103/1

Federation Francaise des Societes d'Assurances and others v Ministry of Agriculture and Fisherie (C-244/94) [1995] ECR I-4013, 17

FENIN v Commission (T-319/99) [2003] ECR II-357

Ford/Hertz (IV/M.397) [1994] OJ C 121

Ford-Werke AG and Ford of Europe Inc. v Commission [1985]ECR 2725

France v Commission (Terminal Equipment) (C-327/91) [1991] ECR I-1223

France, Italy and UK v Commission Cases (C-188/190) [1982] ECR 2545

French Federations in the beef sector [2003] C.Comm IP/03/479

Funeral Services (C-30/87) [1988] ECR 2479

GEMA [1971] OJ L 134/15

General Motors (C-26/75) [1975] ECR 1367

Gottrup – Klim (C-250/92) [1994] ECR I-5641

Greek Television (C-290/89) [1991] ECR I-2925, 22-23

Grundig and Consten v Commission [1966] ECR 299

GT- Link (C-242/95) [1997] ECR I-4449

Hasseblad v Commission (C-86/82) [1984] ECR 883

Hercules Chemicals v Commission (T-7/89) [1991] ECR II-171

Hilti [1987] OJ L 65/14 36; aff'd CFI 1991 ECR II-1439 99-101

Hoffmann-La Roche and Co AG v Commission (C-85/76) [1979] ECR 461

Höfner v Macrotron GmbH (C-41/90) [1991] ECR I-1979

HOV-SVZ v Deutsche Bahn [1994] OJ L 104/34 191-248; aff'd CFI [1997] ECR II-1689

Hudson's Bay I [1988] OJ L 316/43, *aff'd* CFI July 2, 1992, ECR 11-1931

IBM v Commission (C-60/81) [1981] ECR 2639

ICI v Commission (C-48-69) [1972] ECR 619

ICI/TIOXIDE (IV/M.0023) [1990] OJ C 304

Ilmailulaitos/Luftfartverket (Finish Airports) [1999] OJ L 69/24

Imperial Chemical Industries Ltd v Commission [1972] C-28, 49 and 51-7/69 ECR 619

Irish Sugar [1997] OJ L 258/1

Italy v Commission (C-41/83) [1985] ECR 873

J.C.J. Wouters, J.W. Savelbergh, Price Waterhouse Belastingadviseurs BV v Algemene Raad van de Nederlandse Orde van Advocaten (Price Waterhouse) (C-309/99) [2002] ECR I-1577

Jackson, Tennessee Hosp. Co. LLC v West Tennessee Healthcare, Inc., 414 F.3d 608 (6th Cir, 2005)

Job Center II (C-55/96) [1997] ECR I-7119

Kali and Salz v Commission (C-68/94 and C-30/95) [1998] ECR I-1453

KLM/Air UK (IV/M.967) [1997] OJ C 372/20

Krupp Thyssen [2001] ECR II-3757 151-154

Leclecr – French Gasoline Prices [1985] ECR 306

Lehman Brothers/SCG/Starwood/Le Meridien (COMP/M.3858)

London European v Sabena [1988] OJ L 317/47

LTU v Eurocontrol [1976] ECR 1541

Luttikhuis v Corbeco (C-399/93) [1995] ECR I-4515

Maxicar v Renault (C-53/87) [1988] ECR 6039

Merci Convenzionali Porto di Genova SpA v Siderurgica Gabrielli SpA (C-1 79/90) [1991] ECR I-5889

Metro SB-Großmärkte v Commission (C-26/76) [1977] ECR 1875

Métropole Télévision SA (M6) and others (T-354/00) [2001] ECR II-2459

Microsoft v Commission (T-201/04 R1) [2004] ECR II-2977

Miller v Commission (C-19/77) [1978] ECR 131

Ministère Public du Luxemburg v Muller (C-10/71) [1971] ECR 723

Ministère Public v Decoster (C-69/91) [1993] ECR I-5335

Muller-Hein [1971] ECR 723

N V Netherlands Banden Industrie Michelin v Commission (C-322/81) [1983] ECR 3451

Nabisco/United Biscuits (COMP/M.1920) [2002] OJ C 43/ 23

National farmers' Union (C-241/01) [2002] ECR I-9079

Nungesser v Commission (Maize Seed) (C-258/78) [1982] ECR 2015

Nuovo Cegam [1984] OJ L99/29

NV IAZ International Belgium v Commission (C-96/82) [1983] ECR 3369

Orkem v *Commission* (C-374/87) [1989] ECR 3343

Papiers Peints de Belgique and Others v Commission [1975] ECR II-1491

Phillip Morris/Rothmans [1987] ECR 4487

Polypropylene – Atochem (T-3/89) [1991] ECR II-1177 43-44 and 52-57

Polypropylene – Montecatini C-235/92P [1999] ECR I-4539, 133 – 148

Polypropylene [1986] D.Comm OJ L 230/1 ECR II-867 120 – 127

Poucet (C-159-60/91) [1993] ECR 637

Price Waterhouse/Coopers & Lybrand (M.1016) [1999] OJ L 50

Pronuptia de Paris GmbH v Pronuptia de Paris Irmgard Schillgalis (C-161/84) [1986] ECR 353

PVC II [1994] OJ L239/14 35-38 *aff'd* in CFI [1999] ECR II-931 and ECJ [2002] ECR I-8375

PVC II [1999] ECR 931

Pyneboard Pty Ltd v TPC (1983) 152 CLR 343

Racal Decca [1988] OJ L 43/27

Re Film Purchases by German Television Stations [1989] OJ 1989 L 284/36

Re Roofting Felf cartel: BELASCO v Commission (C-246/86) [1989] ECR 2117

Régie des Télegraphes et des Téléphones v GB-Inno-BM SA (C-18/88) [1991] ECR 5941

Remia BV and Verenigde Bedrijven Nutricia BV v Commission (C-42/84) [1985] ECR 2545

Rennet [1981] ECR 851

RTT v GB-INNO (C-18/88) [1991] ECR I-5941

RTZ/CRA (IV/M.660) [1996] OJ C 22/10

SA Hercules NV v Commission (T-7/89) [1991] ECR II-1711

Sacchi v Tele Biell (C-155/73) [1974] ECR 409

SACEM III Joined cases (C-110, C-241-2/88) [1989] ECR 251

Sandoz Prodotti Farmaceutici Spa v Commission (C-277/87) [1990] ECR I-45

Sandoz v Commission (C53/69) [1972] ECR I-45

Sarrio v Commission [1998] CFI T-334/94 ECR II-1439

SAT/Eurocontrol (C-364/92) [1994] ECR I-43

Scottish & Newcastle/Groupe Danone (COMP/M.1925)

Shell/DEA (COMP/M.2389) [2003] OJ L 15/35

SNFR v Inter-Huile [1983] ECR 555

SNUPUT v High Authority (C-19/61, C-42/50 and C-49/50 [1962] ECR 655

Société Générale v *Commission* (T-34/93) [1995] ECR II-547

Société La Technique Minière v Maschinenbau Ulm GmbH (C-56/65) [1966] ECR 235

Spain, Belgium and Italy v Commission joined cases (C-271/90) (C-281/90) and (C-289/90) [1992] ECR I-5833

SSI v Commission joined cases (C-240-2 and C-262/82) [1985] ECR 3831

Steel Beams – Eurofer (*Steel Beams v Eurofer* (T-T-134-57/94) [1999] ECR II-263

Stichting Certificatie Kraanverhuurberiif and the Federatie van Nederlandse Krannverhuurbedriijven [1995] OJ L312/79; on appeal cases *Stichting Certificatie Kraanverhuurberiif and the Federatie van Nederlandse Krannverhuurbedriijven* (T-213/95 and T-18/96) [1997] ECR II-1739

Strintzis Lines (T-65/99) [2003] ECR II-5433

Sugar (C-40/730 [1975] ECR 1663

Surgical Care Center of Hammond, L.C. v Hospital Service District No. 1 of Tangipahoa Parish, 171 F.3d 231 (5th Cir, 1999)

Telecommunications Directive Services (1992) ECR I-5833

Telecommunications Directive Terminal Equipment (1991) ECR I-1223

Telemarketing (C-311/84) [1985] ECR 3261

Tepea BV v Commission (C-28/77) [1978] ECR 1391

Terminal Equipment (C-202/88) [1991] ECR I-1223

Tetra Pak II (T-83/91) [1994] ECR II-755, 160; aff'd ECJ [1996] ECR I-5951

Tetra Pak Rausing SA v Commission (Tetra Pak II) (T-51-89) [1990] ECR II-309

Thyssen Stahl v Commission [1999] CFI T-141/94 ECR II-347

United Brands Co v Commission (C- 27/76) [1978] ECR 207

United Brands Co v Commission (C- 27/76) [1978] ECR 207

Van den Bergh Foods Ltd v Commission (T-65/98) [2003] ECR II-4653

Van Landewyck SARL and Others v Commission (C-218/78) [1980] ECR 3125

VBVB and VBBB v Commission (C-43 & 63/82) [1984] ECR 19

VBVB and VBBB v Commission (C-43-63/88) [1984] ECR 19' *Aluminium Imports from Eastern Europe* [1985] OJ L92/1;

Veba/VIAG (COMP/M. 1673) [2001] OJ L 188/1

Verband der. Sachversicherer v Commission (C-45/85) [1987] ECR 405

Vereeniging van Cementhandelaren v Commission (C-8/72) [1972] ECR 977

Volk v Vervaecke (C-5/69) [1969] ECR 295

Volkswagen AG v Commission (T-62/98) [2000] ECR II 2707 231.

Volkswagen AG v Commission (T-62/98) [2000] ECR II-2707, *aff'd* Case *Volkswagen AG v Commission* (C-388/00P) [2003] ECR I-9189

Volvo v Veng (C-238/87) [1988] ECR 6211

Windsurfing International Inc. v Commission (C-193/83) [1986] ECR 611

Wirtschaftsvereinigung Stahl [2001] ECR II-1217); *CEWAL* [2000] ECR I-1365, 144)

Woodpulp II [1993] ECR I-1307

II. United States

American Professional v Harcourt, 108 F.3d 1147 (9th Cir, 1997)

Arizona v Maricopa County Med. Society 457 US 332 (1982)

Broadcast Music Inc. v Columbia Broadcasting Sys. Inc. 441 US 1 (1971)

California Retail Liquor Dealers Ass'n v Midcal Aluminum, Inc., 445 US 97 (1980)

Chicago Board of Trade v United States 246 US 231 (1918)

City of Columbia v Omni Outdoor Adver 499 US 365 (1991)

City of Lafayette v Louisiana Power & Light Co 435 US 389 (1978)

Continental TV Inc v GTE Sylvania Inc 433 US 36 (1976)

Eastman Kodak Co. v Image Technical Services Inc 504 US 451 (1992)

Green Country Food Market, Inc v Bottling Group LLC and Bottling Group Holdings Inc., 371 F.3d 1275 (10th Cir, 2004)

Jefferson Parish Hospital Distt No. 2 v Hyde 466 US 2 (1984) citing *inter alia United States Steel Corp v Fortner Enterprises* 429 US 610 (1977)

Northern Pacific Railway Co. v United States) 356 US 1 (1958)

Pepsico Inc. v The Coca Cola Co, 315 F.3d 101 (2nd Cir, 2002)

Reeves v Stake, 447 US 429 (1980)

Rothery Storage & Van Co. v Atlas Van Lines 792 F.2d 210 (1986)

Standard Oil Co of New Jersey v United States 221US 1 (1911)

United States Postal Service v Flamingo Indus. , 540 US 736 (2004)

United States v Addyston Pipe & Steel Co 85 F. 271 (6th Cir. 1898), *modified and affirmed* 175 US 211 (1899)

United States v American Tobacco Co, 328 US 781 (1946)

United States v City of Stilwell, Oklahoma and Stilwell Area Development Authority (No. CIV 96-196-B (Okla., 1996)

United States v E L du Pont de Neumours and Co 351 US 377 (1956)

United States v Grinnell Corp 384 US 563 (1966)

United States v Philadelphia National Bank 374 US 321(1963)

Verizon Communications Inc v Law Offices of Curtis V Trinko, 540 US 398 (2004)

III. Australia

ACCC v Leahy Petroleum Pty Ltd (2004) 141 FCR 183

Boral Besser Masonry Ltd (now Boral Masonry Ltd) v ACCC [2003] HCA 5

Commonwealth v Mewett (1997) 146 ALR 299

Federal Commissioner of Taxation v Lutovi Investment Pty Ltd (1978) 140 CLR 434

Melway Publishing Pty Ltd v Robert Hicks Pty Ltd [2001] HCA 13

Queensland Wire Industries Pty Ltd v Broken Hill Pty Co Ltd [1989] 167 CLR 177

Re 7-Eleven Stores Pty Ltd ATPR 41-357

Re ACI Operations Pty Ltd (1991) ATPR (Com) 50-108

Re: Eastern Express Pty Ltd (1992) 106 ALR 297

Re: Residential Tenancies Tribunal of New South Wales and Henderson and Another; Ex Parte The Defence Housing Authority (1997) 190 CLR 410

Rural Press Ltd v ACCC (2003) 216 CLR 53

State Authorities Superannuation Board v Commissioner of State Taxation for the State of Western Australia (1996) ALR 129

Universal Music Australia Pty Ltd v ACCC (2003) 121 FCR 529

Universal Music Australia Pty Ltd v ACCC [2001] FCA 1800

Victorian Newsagency (1994) ATPR 41–357

Visy Paper Pty Ltd v ACCC (2003) 216 CLR 119

C. LEGISLATION

I. Vietnamese Legislation and Communist Party Documents

- **Vietnam's Communist Party**

Central Party Committee of Communist Party of Vietnam, *Resolution of the Third Plenum of the Ninth Central Party Committee (Resolution No. 05-NQ-TW (24/9/01) on Continuing to Restructure, Reform, Develop and Improve the Efficiency of State Enterprises*

Communist Party of Vietnam, *Resolution of the Fourth Plenum of the Eighth CPV Party Congress* (December 1997)

Communist Party of Vietnam, *Strategy for Socio-economic Development 2001 – 2010* (presented by the Central Committee, 8th Tenure, to the IX National Congress, 4/2001)

Communist Party of Vietnam, *Strategy for the Socio-economic Stabilisation and Development to the year 2000 of the CPV*

Vietnamese Communist Party, *Documents of the 8th Party Congress* (National Political Publishing House, 1996)

- **Legislation**

Commercial Law 1997

Company Law 1990

Competition Law 2004

Constitution 1992

Cooperatives Law 2003

Decision No. 11/QĐ-HĐXL date 14 April 2009

Decision No. 155/2004/QĐ-TTg dated 24 August 2004

Decision No. 345/2005/TTg	dated 26 December 2/2005
Decision No. 38/2007/QĐ-TTg	dated 2 March 2007
Decision No. 58/2002/QD-TTg	dated 26 April 2002
Decision No. 58/2005/TTg	dated 23 March 2005
Decision No.143/HDBT	dated 10 May 1990
Decision No.217/HDBT	dated 14 November 1987
Decision No.91/TTg	dated 07 March 1994
Decisions No. 90/TTg	dated 07 March 1994
Decree No. 103/199/ND-CP	dated 10 September 1999
Decree No. 116/2005/ND-CP	dated 15 September 2005
Decree No. 120/2005/ ND-CP	dated 20 September 2005
Decree No. 180/2004/ND-CP	dated on 28 October 2004
Decree No. 26/2006/QD-TTG	dated 26 January 2006
Decree No. 45/1998/ND-CP	dated 01 July 1998
Decree No. 49/2002/ND-CP	dated 24 April 2002
Decree No. 50/HDBT	dated 22 March 1988
Decree No. 58/2005/QD-BNN	dated 03 October 2005
Decree No. 88/1999/ND-CP	dated 01 September 1999
Decree No. 90/2001/NĐ-CP	dated 23 November 2001
Decree No.05-2006-ND-CP	dated 09 January 2006
Decree No.06-2006-ND-CP	dated 9 January 2006
Decree No.153/2004/ND-CP	dated 09 August 2004

Decree No.39/CP dated 27 June 1995

Decree No.98/HDBT dated 02 June 1988

Enterprises Law 2005

Law on Cooperatives 1997

Law on Credit Institution 2004

Law on Foreign Investment in Vietnam 1987 (as amended)

Law on Foreign Investment in Vietnam 1996 (as amended)

Law on Investment 2005

Law on Natural Resources and Minerals 2005 (as amended)

Law on Prices 2002

Law on Promotion of Domestic Investment 1994

Law on Promotion of Domestic Investment of 1998

Law on Tendering 2005

Law on the Protection of Environment 2005

Law on the Right to Form Associations 1957

Laws on Foreign Investment in Vietnam 1987

Ordinance No. 38/2001/PL-UBTVQH dated 28 August 2001

Ordinance No.40-2002-PL-UBTVQH 10 dated 26 April 2002

Ordinance No.43/2002/PL-UBTVQH10 dated 25 May 2002

Securities Law 2006

State Enterprises Law 1995

State Enterprises Law 2003

II. Legislation and Regulation of other Jurisdictions

- **European Union**

Commission Consolidated Jurisdictional Notice under Council Regulation (EC) No 139/2004 on the Control of Concentrations between Undertakings [2008] OJ C 95/01

Commission Directive (EEC) 90/388 *on Competition in the markets for telecommunication services* [1990] OJ L192/10

Commission Directive 2000/52/EC amending Directive 80/723/EEC on the transparency of financial relations between Member States and public undertakings [2000] OJ L 193/75

Commission Guidelines on the Applicability of Article 81 of the EC Treaty to Horizontal Cooperation Agreements [2001] OJ C 3/02

Commission Guidelines on the Application of Article 81(3) of the Treaty of 22 April 2004 [2004] OJ C 101/97

Commission Memorandum on the Concentration of Enterprises in the Common Market 1970 [1970] COM (70) 100

Commission Notice Guidelines on the effect on trade concept contained in Articles 81 and 82 of the Treaty [2004] OJ C 101/81

Commission Notice on Agreements of Minor Importance which Do not Appreciably Restrict competition under Article 81(1) of the Treaty establishing the European Community [2001] OJ C 386/07

Commission Notice on Calculation of Turnover [1998] OJ C 66

Commission Notice on Guidelines on Vertical Restraints of 13 October 2000 [2000] OJ C 291

Commission Notice on Portal Services [1998] OJ C 39/2 interpreting *Directive 97/67/EC on Portal Services* [1998] OJ L 15/14

Commission Notice on the Application of the Competition Rules in the Postal Sector [1998] OJ C 39/2

Commission Notice on the concept of concentration under Council Regulation (EEC) No 4064/89 on the control of concentrations between undertakings [1998] OJ C 66

Commission Notice on the Concept of Full function Joint Ventures [1998] OJ C 66

Commission Notice on the Definition of Relevant Market for the Purposes of Community Competition Law [1997] OJ C 372

Commission Regulation (EC) No 2790/1999 of 22 December 1999 on the Application of Article 81(3) of the Treaty to Categories of Vertical Agreements and Concerted Practices [1999] OJ L 336

Commission Regulation No. 447/98 on the Notifications, Time Limits and Hearings [1998] OJ L61/1

Commission Telecommunications Guidelines [1991] OJ C 233/2

Commission's Notice on Agreements of Minor Importance in 1970 OJ C 64

Communication on Services of General Interests regarding non-application of Article 90 (Article 86 new) COM (96) 443

Directive 93/38/EEC of 14 June 1993 coordinating the procurement procedures of entities operating in the water, energy, transport and telecommunications sectors [1993] L1999/84

EEC Council Regulation No. 17 of 6 February 1962: First Regulation implementing Articles 81 and 82 of the Treaty [1962] OJ L 35

European Coal and Steel Community Treaty (ECSC)1951

European Convention on Human Rights (ECHR) 1950

Regulation 139/2004/EC on the Control of Concentrations between Undertakings (the EC Merger Regulation) [2004] OJ L24/1

Regulation No. 1/2003/EC of 16th December 2002 on the implementation of the rules on

competition laid down in Articles 81 and 82 of the EC Treaty, OJ 2003 L1/1 (2004)

Treaty on the Functioning of the European Union 2009

- **United States**

Clayton Antitrust Act 1914

Robinson-Patman Act 1936

Federal Trade Commission and the U.S. Department of Justice, *The Antitrust Guidelines for Collaborations among Competitors 2000*

Sherman Antitrust Act 1890

The US Antitrust Criminal Penalty Enhancement and Reform Act 2004

Antitrust Procedures and Penalties Act 1974

US Code - Title 39: *Postal Service*

US Department of Justice and Federal Trade Commission, *Horizontal Merger Guidelines 1997*

US Department of Justice, *Merger Guidelines 1968*

- **Australia**

ACCC, *Guide to Authorisation* (2007)

ACCC, *Guide to Authorisations and Notifications* (1995)

ACCC, *Merger Guidelines* (1999)

Competition and Consumer Act 2010 (Cth)

Competition Policy Reform Act 1995 (Cth)

Competition Policy Reform Act 1995 (VIC)

Competition Policy Reform Act 1995(NSW)

Competition Policy Reform Act 1996 (NT)

Competition Policy Reform Act 1996 (QLD)

Competition Policy Reform Act 1996 (SA)

Competition Policy Reform Act 1996 (TAS)

Competition Policy Reform Act 1996 (WA)

Competition Principles Agreement (CPA)

Consumer Affairs and Fair Trading Acts 2011 (NT)

Fair Trading Act 1999 (VIC)

Fair Trading Acts 1987 (NSW)

Fair Trading Acts 1987 (SA)

Fair Trading Acts 1987 (WA)

Fair Trading Acts 1989 (Qld)

Fair Trading Acts 1990 (TAS)

Fair Trading Acts 1992 (ACT)

Trade Practices Act 1974 (*Cth*)

Trade Practices Amendment (Cartel Conduct and Other Measures) Act 2009

- **Other countries**

Canada

Competition Acts 1986

Charter of Rights and Freedoms 1982

China

Anti-monopoly Law of the People's Republic of China 2007

Czech Republic

Competition Act 1991

Germany

Law against Restraints of Competition (ARC) 1958

Hungary

Competition Act 1996

Italia

Competition and Fair Trading Act 1990

Korea

Monopoly Regulation and Fair Trade Act (MRFTA) 1980

Mexico

Federal Law on Economic Competition of 1992

New Zealand

Commerce Amendment Bill to the Commercial Act Corporations 1986

Pakistan

Ordinance on Monopolies and Restrictive Trade Practices (Control and Prevention) 1970

South Africa

Competition Act 1998

Sweden

Competition Acts of 1993

United Kingdom

Enterprise Act 2002

Competition Act 1998

D. Websites

Central Institute for Economic Management (CIEM) www.ciem.org.vn

Collection of EU Case law eur-lex.europa.eu/en/index.htm

Australia's Competition Tribunal http://www.competitiontribunal.gov.au/about.html

European Commission, Competition section http://ec.europa.eu/competition/index_en.html

EU-Vietnam Multilateral Trade Assistance Project (MUTRAP) www.mutrap.org.vn

Global Competition Forum www.globalcompetitionforum.org/index.htm

International Competition Network (ICN) www.internationalcompetitionnetwork.org

International Monetary Fund (IMF) www.imf.org

Ministry of Finance of Vietnam (MOF) www.mof.gov.vn

Ministry of Industry and Trade of Vietnam (MOIT) www.moit.gov.vn

Ministry of Information and Communications of Vietnam (MIC) www.mic.gov.vn

Ministry of Planning and Investment of Vietnam (MPI) www.mpi.gov.vn

Ministry of Transportation of Vietnam (MT) www.mt.gov.vn

Organisation for Economic Cooperation and Development (OECD) www.oecd.org

Social Sciences Research Network (SSRN) www.ssrn.com

UNDP Vietnam www.undp.org.vn

United Nations Conference on Trade and Development (UNCTAD) www.unctad.org

United Nations Development Programme (UNDP) www.undp.org

Vietnam Air Petrol Company (VINAPCO) www.vinapco.com.vn

Vietnam Business Forum vccinews.com

Vietnam Chamber of Commerce and Industry	www.vcci.com.vn
Vietnam Competition Administration Department (VCAD)	www.vcad.gov.vn
Vietnam Competition Council (VCC)	www.hoidongcanhtranh.vn
Vietnam Electricity Group (EVN)	www.evn.com.vn
Vietnam Posts and Telecommunications (VNPT)	www.vnpt.com.vn
Vietnamese Government	www.vietnam.gov.vn
Viettel Corporation	www.viettel.com.vn
World Bank	www.worldbank.org