DEVELOPMENTS AND IMPLICATIONS OF FUTURE FTAs
FOR THE COMPETITION LAW IN VIETNAM

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INTRODUCTION

Until 1986 Vietnam pursued a central-subsidy economy in which the State planned, and directly intervened in the market through state-owned enterprises (‘SOEs’) and administrative decisions. Few market rules appeared but they were applied to minority of small private enterprises and households only. There is obviously, no room for competition.

The concept of market-based economy just addressed when Vietnam Communist Party decided to carry out its ‘Renovation Course’ (‘Đổi mới’), which determined to pursue the ‘socialist-oriented market economy’.³ The greatest change in terms of economic policy is recognition of variety of ownership types and economic sectors. Apart from this, open-trade policy contributed the significant part to boost foreign direct investment (‘FDI’) and facilitate international trade. These reforms had caused to surprising economic growth of Vietnam, for instance, the average GDP per annum was over 7.5% in the period of 2000-2005 and Vietnam economy ranked at 58th position globally in 2006. A competitive and proactive economy has been built that allowed the entry of non-governmental economic sectors as well as the foreign investing enterprises.⁴

The accession into the world largest trading organization – the World Trade Organization (‘WTO’) – in 2007 was the optimistic sign of integration of Vietnam into the global economy.⁵

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³ Vietnam Communist Party’s Resolution No. 21/NQ-TW dated 30 Jan 2008 defined ‘Vietnam’s socialist-oriented market economy is an economic model, which both conforms to principles of the market economy, and is based on and guided by principles and nature of socialism in terms of the ownership, management organization and distribution. It comprises of many ownership types and economic sectors, in which the State-owned economy plays the vital role’
⁴ CUTS-International (n 1), 11-12
Before such accession, Vietnam became a full member of ASEAN on 28 July 1995,\textsuperscript{6} and afterwards joined in the Asia-Pacific Economic Cooperation in 1998.\textsuperscript{7} With the wide range of trade relations between Vietnam and important economic partners, the quantity of FDI into Vietnam market has increased significantly in both value (from around $2,000 million to over $11,000 million) and quantity of projects (doubled from approximately 800 to nearly 1,600) in last decade, and the wider market for exporting goods has been opened.\textsuperscript{8}

As a result, the adoption of Vietnam Competition Law in 2004 (‘VCL’) stemmed from the requirement of economic transition and international economic integration.\textsuperscript{9} Nearly a decade of implementation, VCL has played an important role in building competitive and efficient market. For example, until 2014 Vietnam Competition Authority – a governmental agency being in charge of competitive issues – has launched 78 initial investigations in terms of restricting competition, with the average number was over 10 cases per year, and it has issued 5 decisions.\textsuperscript{10}

Even though the remarkable contribution of VCL in the economic development, there are still many constraints for foreign investors who seek opportunities to enter into Vietnam’s market. According to ‘Doing Business 2015: Going Beyond Efficiency’ of the World Bank issued by 2014, Vietnam occupied the rank of 78\textsuperscript{th} that was lower than the previous report, and Vietnam also stood behind other ASEAN Member States (‘AMSs’) such as Thailand and Malaysia.\textsuperscript{11} Legal risk and uncertainty is noted as the most challenging reason why Vietnam business environment suffers disadvantages compared to other countries in the same region.\textsuperscript{12} Hence, any regulations adversely affecting to economy should be considered carefully and amended.

\textsuperscript{11} Cuts International (n 1), 14
By 2015, Vietnam becomes an integral part of the ASEAN Economic Community (‘AEC’), which envisages four key characteristics, including a single market and production base; a highly competitive economic region; a region of equitable economic development; and a region fully integrated into the global economy.\(^{13}\) In order to promote regional economic integration, the harmonization of competition law and policy in ASEAN becomes the necessity, as similar to that of most regional trade areas.\(^{14}\)

At the same time, Trans-Pacific Partnership Agreement (‘TPP’) – a trade agreement that will open markets further, set high-standard trade rules, and address 21st-century issues in the global economy – is negotiated by the United States and 11 other Asia-Pacific countries, including 4 AMSs, Brunei Darussalam, Malaysia, Singapore, and Vietnam.\(^{15}\) This agreement certainly requires a reform of competition policy in each member to ensure that private sectors are able to compete on fair terms with SOEs, especially when such SOEs receive significant state aid to engage in commercial activity.\(^{16}\)

Also, the EU and Vietnam have reached an agreement in principle for a free trade agreement (FTA), after two and a half years of intense negotiations.\(^{17}\) Provisions on competition policy definitely are the core content of FTAs which EU is paying the special attention.\(^{18}\) Due to the deficiencies of the country's competition policies may undermine the results of otherwise satisfactory FTA negotiations, EU has the great concern with the dominant of SOEs in Vietnam economy, which represented 39% of both GDP and industrial output, and enjoyed preferential treatment from the authorities, for instance, regarding land allocation.\(^{19}\)

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\(^{16}\) Office of the US Trade Representative (n 14)


Deriving from the development of international economic cooperation, there is a need for reform of Vietnam competition law in order to enhance its effectiveness and to meet Vietnam’s commitments in such FTAs.

The first section of this paper will present the progress of international cooperation on competition policy and law; particularly in ASEAN in its the deeper economic integration form – AEC, in Asia – Pacific with the TPP agreement and in the inter-regional trade agreement, such as Singapore-EU FTA and the next Vietnam-EU one. The second section will provide a critical analysis of Vietnamese competition law

1. THE DEVELOPMENTS AND IMPLICATIONS OF FUTURE FTAs AND THE NEED FOR AN EFFECTIVE COMPETITION POLICY AND LAW IN VIETNAM

First, it is noteworthy to distinguish between competition policy and competition law. Even competition policy and competition law are tools to maximize the economic market efficiency, and their functions can supplement each other, they are different concepts. Competition law comprises rules and regulations that is the framework for competition authorities to prevent anti-competitive behavior such as prohibiting cartels, abuse the power from dominant position in market, controlling mergers and dealing with unfair competitive activities. Competition policy spans a much broader set of measures and instruments that may be pursued by governments to promote and protect competition.\(^{20}\) Competition policy includes a wide range of governmental policies that promote or maintain the level of competition in markets, and contain governmental measures that directly affect the behaviour of enterprises and the structure of industry and markets.\(^{21}\)

This section will focus on the enactment of Vietnam Competition Law 2004 under the pressure of international integration, especially when negotiating to enter into the WTO, and then the rationale to reform this law. It is useful to take a glance at the proliferation of regional trade agreements, including AEC, TPP and FTAs with the EU. The aim of this section is to indicate where VCL began and where it is expected to come in the prospective of deeper economic integration among ASEAN, and with external partners such as the US and the EU.

\(^{20}\) Luu Huong Ly (n 13), 293

\(^{21}\) ASEAN Group on Competition, ‘ASEAN Regional Guidelines on Competition Policy’, third para. of Preface
1.1 Enactment of Vietnam Competition Law in 2004

In the 1980s, the leaders of Communist Party of Vietnam and the State recognized the roots of economic stagnation and crises in the rigid, centrally-planned, command-and-control economic system with monopolistic, state-owned enterprises. They had since shown a strong inclination towards liberal economic reforms, which resulted in the ‘Renovation Course’ policy in 1986. This policy affirmed the private sector as potentially efficient suppliers of goods and services, and as the new engine of growth. A variety of solutions have been applied, for instance, the dissolution, restructuring, and privatization of SOEs, the liberalization of both internal and external trade regimes, and encouraging private investment into the economy.\(^{22}\)

Among other things, building the blocks for market development and setting the rules for market performance attracted the special attention of the leaders that was reflected in the Political Report by the Central Committee of the Communist Party of Vietnam at the 8th National Congress in 1996

> Establish cooperation and a healthy competitive environment in production and trade; develop state-owned monopolies in some certain industries and sectors of strategic significance to the country; eliminate monopolies in other commercial activities, and prevent abuses of monopolistic positions aimed at maintaining privileges, individual benefits and distorting competition in the market.\(^{23}\)

Indeed, foreclosure, bid-rigging agreements caused a great deal of harm to enterprise and market development, adversely impact state revenues, and deprive consumer welfare. For instance, in 2000s a new product, Laser beer, was foreclosed from domestic market due to unjust pressure exercised by a coalition of established beer manufacturers in retail shops, distribution agencies and bars. In particular, the competitors, including VBL who owned the brands such as Heineken, Tiger, and Bivina, forced distribution agencies, retail shops and bars to sign exclusive contracts with them which prevented any promotional campaigns of Laser anywhere in Vietnam. A beer shop owner was brought to court by these beer producers for having violated the contract by

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\(^{23}\) The Political Report by the Central Committee of the Communist Party of Vietnam at the 8th National Congress in 1996, Chapter III, section 1, para. 3
selling Laser beer. The court ruled in favor of the beer producers since the Competition Law had yet to be passed.\textsuperscript{24}

Many other examples of anti-competitive behavior could be uncovered in construction projects funded by state budget, such as in the Van Lam Son Hai II Road Construction Project, all companies participating in the bidding for this project belonged to the same business group which Company 98, who was awarded the contract, controlled.\textsuperscript{25}

Supported by the technical assistance of international institution as the UNDP, the World Bank and the IMF, many research papers concluded a level playing field was not properly established in Vietnam since there was severe discrimination between the SOEs and private companies; in other words, abuse of economic and administrative power by SOEs was still prevalent. New challenges also emerged as a result of the increasing investment of foreign companies, most often transnational corporations, as well as domestic and cross-border anti-competitive practices.\textsuperscript{26}

To promote and protect market competition, the need to adopt a law that safeguards competition in market was necessary; therefore, the discussion on introducing a competition law in Vietnam started in the late 1990s within academic circles and state agencies.\textsuperscript{27} As a result, Vietnam Ministry of Trade was assigned the task of drafting a law on competition. After a four-year drafting process, with reference to the statutes of nine foreign jurisdictions and the model laws promoted by UNCTAD and the World Bank, Vietnam Competition Law was finally passed in December 3\textsuperscript{rd}, 2004 by the National Assembly, and entered into effect on 1 July 2005.\textsuperscript{28}

However, at the time of enactment of the 2004 Competition Law, the economic demand was not mature enough to force Vietnam to issue competition law. Indeed, such issuance likely derived from the pressure of integration into the regional markets and the world. Particularly, the 2000 US-Vietnam Bilateral Trade Agreement emphasized that the quality of Vietnam regulations and consistency of legal framework was a prerequisite to promote trade cooperation between US and Vietnam.

\textsuperscript{24} Alice Pham (n 21), 553-54
\textsuperscript{25} Ibid, 554
\textsuperscript{26} Alice Pham (n 21), 550
\textsuperscript{27} Alice Pham (n 21), 551
More importantly, the process of accession to the WTO has played a distinguished role in the way towards the adoption of a competition law in Viet Nam. To acquire WTO membership, Vietnam’s law needed to harmonize with WTO law as ‘a system of rules dedicated to open, fair and undistorted competition’. In particular, the report of Working Party on Accession of Vietnam expresses the concern that 63 negotiating countries have with regard to Vietnamese competition law:

*In response to a specific question, he added that no provisions of the [competition] law addressed whether State-owned or State-controlled firms retained competitive privileges under the law as compared to other enterprises.*

In other effort to enhance the effectiveness of system of laws, the Central Committee of the Communist Party of Vietnam has re-stated competition policy and law are the essential means to establish the solid legal framework for fair competition, equality, and being in accordance with basic principles of the WTO and other international commitments.

It is now widely recognized that an effective competition law is an essential requirement for market-based economy. The aim of such law is to restrict unnecessary interventions or abuse of power in the marketplace either by the State or by private sectors that adversely affect economic efficiency and consumer welfare. An effective competition law also serves as a tool for government to keep a check on the economic concentration and rent-seeking behavior. It also prevents anti-competitive practices and provides market participation opportunities, lowers market’s barriers for individual entrepreneurs, small and medium-sized businesses.

Nevertheless, little progress on building general rules of competition in the multilateral agreement has been achieved to this day. WTO negotiations on competition policy reached a dead end after the decision of the General Council in July 2004 that the interaction between trade and competition policy would no longer form part of the Work Programme set out in the Doha Ministerial Declaration. Harmonization of national competition policy and law therefore is on

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31 Resolution No. 48/NQ-TW dated 24 May 2005 of the Central Committee of the Communist Party, Chapter II, Section 3, para. 2
32 Alice Pham (n 21) 548
the agenda of various regional forums. Amongst other things, ASEAN cooperation on competition and prospective FTAs’ commitments shall impact significantly on Vietnam policy and law in the near future.

1.2 Cooperation on Competition Policy and Law among ASEAN Member States

The Association of Southeast Asian Nations (ASEAN) was formed in 1967 by Indonesia, Malaysia, the Philippines, Singapore, and Thailand to promote political, economic cooperation and regional stability.\(^{34}\) This purpose was illustrated in the ASEAN Declaration: ‘Desiring to establish a firm foundation for common action to promote regional cooperation... contribute towards peace, progress and prosperity in the region’.\(^{35}\)

The great progress on regional economic integration happened when ASEAN members adopted the Bali Concord II at the 9\(^{th}\) Summit in 2003, in which the group agreed to establish an ASEAN Economic Community ‘to create a stable, prosperous and highly competitive ASEAN economic region in which there is a free flow of goods, services, investment and a freer flow of capital, equitable economic development and reduced poverty and socio-economic disparities in year [2015]’.\(^{36}\)

At the 13\(^{th}\) Summit in 2007, the ASEAN leaders adopted the Blueprint for the AEC. It defines the four pillars of the AEC, including a single market and production base; a highly competitive economic region; a region of equitable economic development; and a region fully integrated into the global economy.\(^{37}\)

In the Blueprint, competition policy was identified as a key mechanism to achieve ‘a highly competitive economic region’.\(^{38}\) Indeed, ASEAN need the competition policy and law due to following reasons. Firstly, since ASEAN aims to strengthen economic cooperation, it needs competition policy and law not only to reduce market barrier created from both governmental

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\(^{34}\) US. Department of State, ‘Association of Southeast Asian Nations (ASEAN)’ <http://www.state.gov/p/eap/regional/asean/> accessed 10 June 2014

\(^{35}\) The 1967 ASEAN Declaration (Bangkok Declaration), Preamble, para. 2

\(^{36}\) The Declaration of ASEAN Concord II, Section B, para. 1


\(^{38}\) Cassey Lee & Yoshifumi Fukunaga, ‘ASEAN Regional Cooperation on Competition Policy’, ERIA Discussion Paper Series (ERIA-DP-2013-03), 1
regulations restricting market access and private anti-competitive conducts aiming to deter market competition, but also facilitate the pace of regional market integration.\textsuperscript{39}

For example, in the EU’s experience, the competition policy was placed as a significant mechanism for protecting market competition and for speeding up the pace of market integration.\textsuperscript{40} Articles 85 and 86 of the Treaty of Rome establishing the EEC (now Articles 101 and 102 of the Treaty on the Functioning of the European Union) incorporated competition rules as the mechanism for lowering trade barriers and facilitating the EC common market integration.

Secondly, in an emerging ASEAN free market economy, monopolies and restrictive business practices are likely to distort prices and inhibit the efficient allocation of resources. Competition policy and law ensure that both private and state-owned enterprises cannot create any restrictive business practices such as cartels or abuse of dominant position by providing necessary measures and remedies.

In addition, effective competition policy and law enable small and medium-sized enterprises to enter the market and compete equally with other businesses in the regional economy while building third pillar of the AEC – equitable economic development and complying with the principles of liberalization on a non-discriminatory basis.

Furthermore, the implementation of competition law in AMSs would regulate and control mergers and acquisitions as well as abuse of dominant positions by powerful foreign transnational companies in the ASEAN market effectively. Ultimately, the goal of undistorted competition is to benefit consumers, to enable great varieties of product ranges at minimum price.

Given the importance of competition policy and law to ensure that the former statutory obstacles to contestability are not replaced by anti-competitive business practices, thus negating the benefits arising from liberalisation, the rationale behind the harmonization of such policy and


\textsuperscript{40} Joaquin Almunia, ‘Competition enforcement in the EU: Beyond the integration of Markets’ (Speech in the 20\textsuperscript{th} Anniversary of the Academy of European Law (ERA) Trier), available in http://europa.eu/rapid/press-release_SPEECH-12-742_en.htm (accessed 4 August 2015)
law is similar to that of most regional trade areas.\textsuperscript{41} AEC Blueprint thus has laid out several strategic actions as introducing competition policy in all AMSs by 2015; establishing a network of competition authorities and encouraging capacity building programmes; and lastly developing a regional guideline on competition policy.\textsuperscript{42}

In response to recommendations, at the 39\textsuperscript{th} ASEAN Economic Ministers Meeting (‘AEM Meeting’) in 2007, the ASEAN Experts Group on Competition (‘AEGC’) was established. As the regional forum, it focused on strengthening competition-related policy capabilities and best practices among AMSs. Thereafter both ‘ASEAN Regional Guidelines on Competition Policy’ and ‘Handbook on Competition Policy and Law in ASEAN for Business’ were launched in 2010 during the 42\textsuperscript{nd} AEM Meeting as a pioneering attempt to achieve the stated goal of ensuring ASEAN as a highly competitive economic region.\textsuperscript{43}

These Guidelines are based on country experiences and international best practices ‘with the view to creating a fair competition environment in ASEAN’ and ‘seeks to enhance and expedite the development of national competition policy within each AMS’.\textsuperscript{44} The Guidelines are not intended to be a full or binding statement on competition policy.\textsuperscript{45} The non-binding guidelines thus cause a lack of obligation to all AMSs to implement and develop competition policy and law. Each member states would then pursue competition law on their own interest rather than harmonize the common policy and rules.\textsuperscript{46}

In other words, they serve only as a reference or a general framework guide for Members to create a fair competition policy. Indeed, ASEAN has adopted the so-called ‘soft law’ approach when considering the fact that ASEAN region is still constrained by several factors, including the traditional ‘ASEAN Way’, the diversity in Member States’ economic development and competition regimes, and the current level of ASEAN’s economic integration.\textsuperscript{47}

\begin{footnotesize}
\begin{enumerate}
\item \textsuperscript{41} Luu Huong Ly (n 19), 309
\item \textsuperscript{42} ASEAN, ‘About the ASEAN Experts Group on Competition (AEGC)’, available in \url{http://www.aseancompetition.org/aegc/about-asean-experts-group-competition-aegc} (accessed by 4 August 2015)
\item \textsuperscript{43} ASEAN, ‘ASEAN Regional Guidelines on Competition Policy’ (2010), para. 2 of Foreword, available in \url{http://www.asean.org/archive/publications/ASEANRegionalGuidelinesonCompetitionPolicy.pdf} (accessed by 4 August 2015)
\item \textsuperscript{44} ASEAN Regional Guidelines on Competition Policy, para. 3 of Foreword
\item \textsuperscript{45} Ibid, Art. 1.2.2
\item \textsuperscript{46} Pornchai Wisuttisak & Nguyen Ba Binh (n ?), 14
\item \textsuperscript{47} Luu Huong Ly (n 19), 313
\end{enumerate}
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To meet the requirements of AEC Blueprint, at this time, seven AMSs, including Indonesia, Thailand, Singapore, Vietnam, Malaysia and Myanmar, have enacted their general competition laws and remaining countries, such as the Philippines, Brunei Darussalam, Cambodia and Laos have their competition laws in draft form. However, the extent to which the competition laws of ASEAN countries reflect the framework set out in the Guidelines to date vary in terms of the objectives of the law, the legal provisions and the application of per se versus rule-of-reason standards. The form and quantum of the sanctions specified in their laws also varies among countries.48

Given these variations, a criticism has been raised that the Guidelines do not go far enough in promoting the goal of regional integration, as they just specify a required set of laws and procedures. It has been suggested that regional cohesion would be better encouraged by a more prescriptive set of ASEAN competition laws, which would have the effect of making it easier for businesses to operate within the region.49

To sum up, there is a development on ASEAN competition policy and law to facilitating regional integration in which the Regional Guidelines are the good example of such cooperation among AMSs. Nevertheless, it is also noticed that ASEAN still have to face with various challenges, among other things, non-binding competition policy and a weak implementation of competition law in ASEAN countries. These issues raised the question of revision and reform each member’s competition law in order to enhance its enforcement and harmonize the regional competition policy and law.

1.3 **The draft provisions on competition in future FTAs with outside-ASEAN partners**

Apart from the cooperation within the ASEAN, all members have developed external relations with their major economic partners, such as China, Japan, US and EU. This concern is truly reflected by the fourth pillar of AEC that is ‘integration into the global economy’. Indeed, ASEAN’s biggest achievement have been in this pillar, with obtaining over 86 percent of goals,

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49 Carol Osborne (n 52), 2
according to the AEC Scorecard published in 2012, due to ASEAN economies trade mostly with the rest of the world.\textsuperscript{50}

This is corroborated by the fact that ASEAN as a whole is the EU's third largest trading partner, after the US and China. As a result, the EU-ASEAN Dialogue was launched at a multi-level that plays an important part in co-operation between two regions. However, after ‘region-to-region’ negotiations on a free trade agreement (‘FTA’) proved difficult, the EU regarded FTAs with individual ASEAN countries as stepping stones towards an agreement in the regional framework, which remains the ultimate goal.\textsuperscript{51}

Negotiations for an ambitious and comprehensive EU-Vietnam FTA began in June 2012 with a view to ensuring an effective environment for trade and investment relations. After two and a half years of intense negotiations, on 4 August 2015, the EU and Vietnam reached an agreement in principle for a free trade deal.\textsuperscript{52} The Agreement includes the elimination of nearly all tariffs (over 99%) within a 10-year liberalisation period for Vietnam. The agreement also covers non-tariff barriers to trade and other trade related aspects such as public procurement, competition, intellectual property rights, and sustainable development.\textsuperscript{53}

After this breakthrough, technical discussions will have to be completed so as to finalise the legal text of the agreement.\textsuperscript{54} Even though FTA’s provisions on competition are still being in draft, these rules can be foreseen by referring to EU’s concern with Vietnam competition policy and reviewing the FTA between the EU and other ASEAN country, Singapore, signed recently.

In the perspective of the EU, Vietnam has not yet completed the transition from a state-controlled economy to a market economy. State-owned enterprises (‘SOEs’) represent 39% of both GDP and industrial output which easily enjoy preferential treatment from the authorities, for instance, regarding land allocation. Moreover, the state sector, even accounting for the

\textsuperscript{50} Asian Development Bank (ADB) & the Institute of Southeast Asian Studies (ISEAS), Toward an ASEAN Economic Community – and Beyond, ed in The ASEAN Economic Community: A Work in Progress (2013), 35 \texttt{http://aric.adb.org/pdf/aeim/AEIM_2013October_ThemeChapter1.pdf} accessed 10 June 2014


\textsuperscript{53} Ibid

\textsuperscript{54} Vietnam Chamber of Commerce and Industry (VCCI), ‘EU and Vietnam reach agreement on free trade deal’, available in \texttt{http://wtocenter.vn/content/eu-and-vietnam-reach-agreement-free-trade-deal} (accessed 8 August 2015)
significant share of Vietnam’s non-performing loans – around 8% GDP, performs worse than the non-state sector, not least as the result of ineffective corporate governance. As a result, these enterprises deprive the non-state sector of growth opportunities, discourage investors and weaken Vietnam's overall macroeconomic outlook. The EU therefore is providing training and capacity-building programmes on competition and stresses that anti-competitive practices could be addressed in a comprehensive manner within the FTA framework.

Referring to EU-Singapore FTA, both parties confirmed this agreement would not prevent any party from designating or maintaining state monopolies, but they are obliged to ensure that no discrimination is exercised regarding the conditions under which goods and services are procured from and marketed to natural or legal persons of the other Party. The same measure would be foreseen in forthcoming agreement between EU and Vietnam which means the role of SOEs in Vietnam economy would be unchanged; however, the government would adjust the treatment to such enterprises as commercial entities and to avoid creating discriminating platform among different sectors in market.

Another FTA which Vietnam is joining in negotiation rounds is the Trans-Pacific Partnership Agreement (‘TPP’) between the US and other 11 Asia-Pacific countries. The TPP not only seeks to provide new and meaningful market access for goods and services, but also set high-standard rules for trade, and address vital 21st-century issues within the global economy such as IP rights protection, fair competition, fundamental labour rights and environmental protection, etc.

With the positive signs that the US Congress has given the ‘fast-track’ authority enabling President B. Obama to present the Congress with a complex final package, and the collective efforts of parties’ ministers at Hawaii Round resolving a limited number of remaining issues, paving the way for the conclusion of the TPP negotiations, many observers forecast the TPP would reach the final consensus of both parties due to in the case of delaying, this agreement

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55 EU-Singapore FTA, Art. 12.4
58 Joint Statement by TPP Ministers at 31 July 2015, the 1st para.
would face the significant challenges and cannot re-launch until the completion of the US Presidential Election in 2016.\textsuperscript{59}

Among other things, the chapter on competition policy is one of crucial issues discussed in such rounds. From the perspective of the US, competition policy and SOEs are grounded in long-standing principles of fair competition, consumer protection, and transparency. The US goals is to seek rules to prohibit anti-competitive business conduct, as well as fraudulent and deceptive commercial activities that harm consumers.\textsuperscript{60} As a result, recent US FTAs have included provisions to limit the trade-distorting effects of unjust governmental activities as well as the anti-competitive behavior of private sector.\textsuperscript{61}

To ‘promote a competitive business environment, protect consumers and ensure a level playing field for TPP companies’, these parties have been discussing the language for a chapter on competition policy since November 2011. Such language would include ‘the establishment and maintenance of competition laws and authorities, procedural fairness in competition law enforcement, transparency, consumer protection, private rights of action, and technical cooperation’.\textsuperscript{62} Furthermore, the US have indicated the concern that competition provisions should be critical in dealing with SOEs, particularly in addressing issues regarding the financing, regulation, and transparency, to ensure that such enterprises are not provided an unfair competitive advantage.\textsuperscript{63}

Specifically, the TPP is to seek, firstly, the basic rules for fair procedures on competition law enforcement; then, commitments ensuring SOEs act in accordance with commercial considerations and compete fairly, without undue advantages from state's aid, while allowing governments to provide support to SOEs that provide public services domestically; and rules


\textsuperscript{61} Ian F. Fergusson, Mark A. McMinimy, Brock R. Williams, ‘The Trans-Pacific Partnership (TPP): Negotiations and Issues for Congress’, Congressional Research Service No.7-5700 (March 20, 2015), 37

\textsuperscript{62} TPP agreement as agreed to by the TPP members in Honolulu, Hawaii on 12 November 2011, section ‘Legal Texts’, para. ‘Competition’

\textsuperscript{63} Ian F. Fergusson, Mark A. McMinimy, Brock R. Williams (n 66), 37
providing transparency with respect to the nature of government control over and support for SOEs.\(^{64}\)

Sub-conclusion: Section 1 has provided the overview of competition policy and the enactment of Competition Law 2004 in Vietnam to meet the requirements of further economic integration into the regional as well as global market. It has also indicated the impacts on the current law on competition of Vietnam due to the significant changes of economic cooperation, not only in ASEAN, but also in cross-regional level, particularly EU-Vietnam as a single country, EU-ASEAN as the whole group; and in Asia-Pacific economies with the ambitious TPP Agreement. Such changes would lead to the reform regarding Vietnam competition policy and law in order to harmonize with the common policy in AEC, to comply with commitments of Vietnam when signing up-coming FTAs.

2. VIETNAM COMPETITION LAW – CRITICAL ANALYSIS

The Competition Law of Vietnam was passed in December 2004 by the National Assembly of Vietnam is the result of a four-year process. It referred to the model laws of international institutions such as the UNCTAD, and some countries having the same condition in terms of economic and social factors as Thailand, Croatia, Bulgari, Turkey, South Korea, Japan, etc. It became effective on 1 July 2005.\(^{65}\)

According to the 2014 Annual Report published by VCA, after nearly 10 years of competition law enforcement, the number of competition cases, with 78 cases and 5 issued decisions, is very limited compared to Singapore, a country in ASEAN. During the same period 850 complaints were made since CCS started, its total workload excluding complaints amounting to 242 cases.\(^{66}\) These figures point to the ineffectiveness of VCL and the urgent need to reform in the perspective of significant changes in both regional and global situation.

This section focuses on the analysis of the limited role played by VCL in the last 10 years, and of the factors which negatively impacted on the enforcement of VCL such as the lack of clear and

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comprehensive objectives due to the dilemma of economic liberalization and communist political ideology, the differences between VCL’s provisions and those of competition law in other countries, ASEAN and the EU. A comparative approach will be used in combination with a socio-legal perspective, given that the differences in terms of level of economic development, political, socio-cultural factors of each State.

2.1 Ineffectiveness of Vietnam Competition Law

a. The dilemma of VCL’s objectives

Even though it reaffirms that economic liberalisation is the key issue for the development of Vietnam, the communist political ideology is still maintenance of State control over key sectors of the economy as is stated expressly in Article 51.1 of Vietnam Constitution. VCL is therefore torn between control of abuses of dominance and monopolies and the keeping the dominant role of state economy. For example, the large-scale network industries manufacturing public utility products or services are the state-monopolized sectors, such as telecommunications, electricity, water and transportation. The de facto position of dominant or monopolistic SOEs may put them outside the reach of Competition Law, annulling the power of the enforcement agencies.

The telecommunications market notably presents a challenge for the competition authority due to its complexities and conflicts between state interests and competition from the private sector. Before 1995, the state-owned Vietnam Post and Telecommunications Corporation (‘VNPT’) was the only network and fixed-line telephone operator in Vietnam, which also ran the mobile network giants, Mobifone and Vinaphone. Its competitors, SPT and Viettel, an army-run company, repeatedly complained about VNPT for abusing its market power. In fact, VNPT did not provide sufficient interconnection to its network and refrained from providing interconnection in a timely manner, blaming technological constraints. Resolving such case would certainly be difficult for the competition authority due to the inherent conflicting purposes in competition law. To reform the structure of telecommunications market and enhance

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67 Alice Pham (n 21), 555
68 Vietnam Constitution, Art. 51.1: “The Vietnamese economy is a socialist-oriented market economy with varied forms of ownership and economic sectors; the state economy plays the leading role.”
69 Alice Pham (n 21) 555
70 Ibid, 555-56
competition, Decision No. 888/QD-TTg dated 10 June 2014 was adopted to split Mobifone and VNPT, but this decision did not solve all problems of the kind in this field.

Referring to the 2011 Monopoly Regulation and Fair Trade Act (Korea), each country would have diversified objectives when enacting competition law, but in general, the primary objectives at least would be, first to protect market structure and maintain competition by preventing anti-competitive behavior, ensuring the market entry of small and medium enterprises; and secondly to protect consumer welfare. It has become more than necessary to persuade the Vietnamese State’s leaders that ensuring competition and protecting consumers’ benefits should be the priority rather than maintaining bureaucratic intervention in the market economy.

b. The lack of extra-territorial theory in VCL

In general, domestic laws apply only to conduct occurring in the country where they are enacted. that is referred to as the ‘territorial principle’. The principle is also applied in competition law in almost all countries. According to Article 2 of VCL, the applicable entities comprise enterprises, both organizations and individuals, including enterprises engaging in public utility goods or services, and industry associations operating in Vietnam. In other words, the activities of foreign enterprises who do not exist in the form of foreign direct investment (‘FDI’), or establishing a branch or a representative office in Vietnam that damage the lawful interests of Vietnamese companies, such as passing off or breaching IP rights protected within Vietnam, would fall out of the scope of application of VCL.

In the era of deeper economic integration where business transactions between Vietnamese enterprises, consumers and international partners are increasing rapidly in both quantity and complexity, VCL thus is unable to protect competitiveness within the Vietnamese market since it lacks sufficient provisions to prevent anti-competitive behavior generated from abroad. VCL is also silent in the case of anti-competitive behavior of Vietnamese entities conducted in

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71 The 2011 Monopoly Regulation and Fair Trade Act, Art. 1: “This Act is to stimulate the creative initiative of enterprises, to protect consumers, and to strive for the balanced development of the national economy by promoting fair and free competition through the prevention of the abuse of market dominance and excessive concentration of economic power by enterprises and through regulation of improper concerted practices and unfair trade practices.”


73 Hanoi Law University (n 70), 64
Vietnam that affects to foreign markets, for instance, fixing the price of exported goods or services, or sharing consumer markets.\(^74\)

Regarding this issue, other countries, such as the US, Germany, Singapore have broaden their jurisdiction beyond the strict boundaries of their territories. The debate over the scope of extraterritorial jurisdiction in US antitrust law arose from Section 1 and 2 of the Sherman Act.\(^75\) However, the Sherman Act does not give any clear direction concerning jurisdiction over a US corporation’s actions abroad or a foreign national’s activity within its territory. The reference was only to trade ‘\textit{with foreign nations}’ that suggests the Act was intended to regulate certain foreign conduct that restrains or monopolizes trade within the United States.\(^76\) In 1993, the US Supreme Court examined the issue of extending the jurisdiction of the Sherman Act over international parties in \textit{Hartford Fire Insurance Co. v. California} (‘Hartford Fire’).\(^77\) The majority held that ‘\textit{it is well established by now that the Sherman Act applies to foreign conduct that was meant to produce and did in fact produce some substantial effect in the United States}’.\(^78\)

Since Vietnam became a part of the global market, its market easily suffered losses from international cartels whose agreements are made outside VCL’s jurisdiction. Vietnam thus can learn from the experience of Korea in the fight against international cartels. Particularly, on 20 March 2002, the Korean Fair Trade Commission made its first decision regarding the extraterritorial application to six non-Korean graphite electrode manufacturers. Those companies from the US, Germany and Japan who held about 80% of the worldwide graphite electrode market reached agreements on price-fixing and market allocation targeting the world market, including the Korean market. The Commission imposed a surcharge of USD 8,532,000 due to Korean steel manufacturers who were completely dependent on imports had incurred significant financial losses by this international cartel.\(^79\)

c. Determination of the relevant market

\(^74\) Ibid
\(^75\) Section 1 declares illegal ‘\textit{every contract, combination . . . or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations}’. Section 2 deems guilty of a felony ‘\textit{every person who shall monopolize, or attempt to monopolize, or combine or conspire . . . [t]o monopolize any part of the trade or commerce among the several States, or with foreign nations}’.
\(^77\) 113 S. Ct. 2891 (1993)
\(^78\) Ibid, 2909
\(^79\) Won-Ki Kim (n 82) 408-09
Usually any agreements or practices have anti-competitive effect when firm or firms have market power. The first step in measuring market power involves looking at what market share an undertaking owns; in other words, determination of relevant market is necessary to assess the market power.\textsuperscript{80} The role of determination of relevant market has been demonstrated in, among others, case\textit{Vereniging van Samenwerkende Prijsregelende Organisaties in de Bouwnijverheid & Ors v. Commission}.\textsuperscript{81}

\textit{For the purposes of Article [102 TFEU], the proper definition of the relevant market is a necessary precondition for any judgment as to allegedly anti-competitive behaviour ... since, before an abuse of a dominant position is ascertained, it is necessary to establish the existence of a dominant position in a given market, which presupposes that such a market has already been defined. For the purposes of applying Article [101 TFEU], the reason for defining the relevant market is to determine whether the agreement ... is liable to affect trade between Member States and has as its object or effect the prevention, restriction, or distortion of competition within the [Internal] Market.}\textsuperscript{82}

The relevant market combines the product market and the geographic market. The product market is defined by investigating whether product A and product B belong to the same market. The geographic market comprises the area in which the conditions of competition are sufficiently homogeneous. Once the product market and the geographic market have been defined, the EU Commission carries out a detailed analysis based on the concept of substitutability, so-called the ‘Small but Significant and Non-transitory Increase in Price’ (‘SSNIP’) test.\textsuperscript{83}

In the SSNIP test, the Commission carries out an assessment of demand-side substitutability i.e. of customers and supply-side substitutability i.e. of suppliers. In the first case, the question is whether customers can switch readily to a similar product in response to a small but permanent price increase (between 5\% and 10\%). In the second case, the question is whether other suppliers can readily switch production to the relevant products and sell them on the relevant market.\textsuperscript{84}

The concept of relevant market is central to the VCL. The VCL not only defines relevant markets in Article 3.1, but also proceeds to showcase its relevance while conducting inquiry of anticompetitive agreements and dominant position of enterprises as well as while conducting

\begin{itemize}
\item \textsuperscript{80} Goyder, \textit{EC Competition Law}, (5\textsuperscript{th} ed., 2009, Clarendon), 13
\item \textsuperscript{81} Case T-29/92, [1995] E.C.R. 11-289.
\item \textsuperscript{82} Ibid, 11-317, para. 74
\item \textsuperscript{83} The EU Commission notice on the definition of relevant market for the purposes of Community competition law [Official Journal C 372 of 9.12.1997]
\item \textsuperscript{84} Ibid. For a fuller presentation of the concept of relevant market, see also Dadomo & Quénivet, \textit{European Union Law} (2015 Hall & Stott) ch. 16
\end{itemize}
inquiry into an economic concentration case. Decree No. 116/2005/ND-CP, the supplementing document of VCL, then further prescribes the methodology to be utilized by the competition authorities of Vietnam while defining the relevant markets.\(^{85}\) It seems to use both criteria of ‘reasonable interchangeability’ as well as an appraisal of the cross-price elasticity of demand between the product in question and possible substitutes.\(^{86}\)

However, such test stipulated by VCL is considerably different from typical application in other countries when relevant geographical market would be determined before defining the relevant product market. Apart from this, in case Vinapco\(^ {87}\), Vietnam competition authorities based their decision on the characteristics and utility purposes of goods or services to determine the relevant market rather than applying SSNIP test. In particular, the ad-hoc Council defined service in terms of supplying gasoline for civil aviation which is different the service for the military purposes and for consuming purposes; the Council thus concluded that the relevant market was market in which service to supply gasoline for civil aviation. Similarly, such method was also applied by Vietnam agency in case of competition restriction agreements among insurance companies.\(^ {88}\)

Another defect of VCL is that barriers to market entry are applied as the base for determination of relevant geographic market instead of relying on an analysis of supply and demand substitution. Indeed other countries consider such those barriers to define enterprises’ market power rather than to determine relevant market.\(^ {89}\)

In summary, there are different points between VCL and those of other countries regarding determination of relevant market. The unreasonable rules of VCL and supplementing documents could lead to the non-application of SSNIP test that has been evidenced in cases settled by VCA.

\(^{85}\) Decree No. 116/2005/ND-CP, Art. 4, Clause 5.c: ‘Goods or services shall be deemed capable of being substituted for each other in terms of price if above fifty percent of a random sample quantity taken from one thousand consumers living in the relevant geographical area change to purchasing or intend to purchase other goods or services with the same characteristics and use purpose as the goods they are currently using or intend to use where the price of such goods or services increases by more than ten percent and remain stable for consecutive months.’


\(^{87}\) Decision of Vietnam Competition Council No. 11/QD-HDXL dated 14 April 2009 regarding Vietnam Air Petrol One Member Co., Ltd. stopped supplying gasoline for Jetstar Pacific Airlines

\(^{88}\) Hanoi Law University (n 70), 94-97

\(^{89}\) Ibid, 97
until now. A review of such test is thus more than needed to enhance the reasonableness and accuracy of VCL.

d. Regulation of Competition Restriction Agreements (Cartels)

On 10 October 2013, Vietnam Competition Council issued the final decision on dealing with price-fixing cartels of 12 insurance companies. The behavior of such those companies to fix the insurance price is prohibited in Clause 1 of Article 8 as the agreement either directly or indirectly fixing the price of goods or services. Given that in the period of investigation, the collective market share of those companies was 99.81% of relevant market, which exceeded the threshold of 30% in accordance with Clause 2 of Article 9. The Council therefore concluded that 12 companies related to this cartel had breached the regulation of VCL and monetary fines and remedial measures were imposed. It is noted that since the VCL came into effect, only two cartel cases were settled by Vietnam competition authorities.

Regarding regulation of competition restriction behavior, VCL does not provide any definition of competition restriction, but applies the descriptive approach of the eight activities listed in Article 8. Article 9 prohibits per se illegal bid-rigging agreements, agreements that prevent or restrain other enterprises from entering the market, and agreements that banish other enterprises from the market.

Article 9 also prohibits agreements on price-fixing, sharing consumer markets, control the quantity of products, and imposing restrictive conditions or forcing other enterprises to accept obligations which are not directly related to the subject-matter of the agreement when parties have 30% or more market share of the relevant market. This is similar to the ‘de minimis’ principle of EU Competition law. Article 101 of the Treaty on the Functioning of the European Union (‘TFEU’) prohibits agreements that are aimed at or result in appreciable restrictions of competition, and the Commission refers to market share thresholds in order to consider whether the agreement can lead to an appreciable restriction of competition or not. It creates a ‘safe

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91 VCL 2004, Art. 9, Clause 6,7 and 8
"safe harbour" for companies whose market shares do not exceed 10% for agreements between competitors or 15% for agreements between non-competitors.\textsuperscript{92}

However, as under EU competition law, enterprises may rely on the block exemption provided in Article 10, among other things, for promoting technical progress, increasing the competitiveness of SMEs, etc. The block exemption can be seen as a form of ‘\textit{rule of reason}’ principle as being widely accepted, such as in the US antitrust law.\textsuperscript{93}

Notwithstanding the block exemption provided in VCL, this law has been the target of criticism for lacking two important conditions to enjoy exemption. Firstly, the competition restriction agreement must be necessary to achieve its targets. For example, collective research and development plan usually leads to the consent on mutual assistance and collective exploitation of its results. Secondly, such agreement leading to economic efficiency would not enjoy exemption when it excludes from the market other enterprises who are not parties to agreement. To benefit from an exemption, enterprises must prove the benefits of agreement to consumers, as reducing price of improving the quality of products, not just benefit to parties; and exemption always has the determined duration.\textsuperscript{94}

e. Merger control

The recent M&A wave in Vietnam has been the legal response to the increase in terms of the value as well as the number of M&A cases. In the period of 2009-11, there were about 750 M&A cases worth of USD6.89 billion. Between 2012 and 2014, the total value of M&A transactions significantly rose that reached around USD11.13 billion, and in 2014 there were 285 deals valued USD2.5 billion.\textsuperscript{95} These figures are an indication of the steady growth of economic concentration operations in Vietnam and reflect the fact that Vietnam is an opening economy with participation of diverse economic sectors. For example, economic concentration involved enterprises that are not only SOEs, or private companies, but also multinational companies doing


\textsuperscript{93} In Leegin Creative Leather Products v. PSKS, Inc., to balance the trade-off between efficient and predictable per se rules and the reduced error potential of more thorough rule of reason analysis, the federal courts have shifted to favor the latter. See also Jesse W. Markham Jr. (2012) ‘\textit{Sailing a sea of doubt: A critique of the rule of reason in US Antitrust law}’, Fordham Journal of Corporate & Financial Law, Vol 17(3) 591, 612

\textsuperscript{94} Hanoi Law University (n 70), 149-50

\textsuperscript{95} VCA, ‘\textit{Report on Economic Concentration in Vietnam 2014}’ (Hanoi, 2014), 13
business in Vietnam in the forms of FDI or joint ventures. This phenomenon raised the question of the potential risks of creating dominant enterprises that could adversely affect competition.

The VCA thus has been active in fulfilling its functions of monitoring, following up and controlling economic concentration to prevent and lessen the negative effects of those activities onto market. Firstly, advocacy and dissemination have been enhanced by the VCA to improve enterprises’ awareness and to ensure their compliance with competition regulations. Secondly, the VCA has coordinated with other competent regulators, such as State Securities Commission, Industry Associations and Provincial Departments of Industry and Trade, to tighten the control of economic concentration activities. Then, VCA has been reinforced by foreign investment and securities exchange regulations when controlling the cap of foreign ownership in enterprises’ capital.\textsuperscript{96} In fact, the VCA has approved all the notified and there was only one case falling in the prohibition but fulfilling the conditions for exemptions in accordance with VCL.\textsuperscript{97}

There is an increasing number of economic concentration operations occurring overseas that affect the Vietnamese market, for instance PepsiCo – Suntory; A.P. Moller – Maersk – A/S CMA CGM – S.A MSC Mediterranean Shipping Company SA, etc. In PepsiCo case, Suntory, via its subsidiary (Suntory Beverage) and its affiliate (Food Asia Pte. Ltd), acquired 51% shares of the PepsiCo Global Investment II B.V (‘PGI II’) – an affiliate of PepsiCo. PGI II invested in beverage industry in Vietnam while PepsiCo also owned its affiliate doing business in Vietnam with the same field of activities. The combined market shares of both PepsiCo and Suntory was 45.8% and 47.4% in two consecutive years prior the acquisition that fell within the threshold 30%-50%, those were obliged to notify their transaction to competent agency. After considering the market structure with a large number of beverage companies, over 130, and other factors such as the compliance with the competition rules, the VCA thus concluded that such acquisition was not harmful the competition.\textsuperscript{98} Apart from this case, a remarkable number of M&A transactions relating to foreign elements were conducted in 2014. This number was expected to increase in this year, in particular in view of the privatization of SOEs.

According to a research on M&A market in the ASEAN in 2014, the scale of economic concentration in Vietnam was insignificant, especially when compared with Singapore, the

\textsuperscript{96} Ibid, 45
\textsuperscript{97} Ibid, 44
\textsuperscript{98} Ibid, 50-52
leading country with 880 M&A transactions totaling more than USD82 billion.\(^9\) The Vietnamese competition authority could learn from the experience of Singapore Commission on Competition (‘CCS’) in the case of control over M&A transactions occurring overseas because this agency has issued over 30 merger clearance decisions over the last 10 years; moreover, each decision is based on a sound legal and socio-economic analysis.

On April 2015, the CCS announced the clearance of the joint venture between Boeing Singapore Pte Ltd (‘Boeing Singapore’), a wholly owned subsidiary of Boeing, and SIA Engineering Co Ltd (‘SIAEC’) for a broad range of aircraft maintenance, repair and overhaul (‘MRO’) services together with other related services for specific Boeing aircraft.\(^10\)

In its merger assessment, CCS found that there are strong and viable alternative suppliers of local services to Singapore customers, to act as competitive constraints to post-merger. There is also considerable countervailing buyer power by the airlines, which have the ability to switch to other suppliers of those services, and there is no intention or ability for such proposal to be used by either party to prevent or limit competition in any other related markets. The CCS thus issued the clearance decision on 3 February 2015.\(^11\)

The lack of independence of Vietnam Competition Authority

The enforcement authorities provided by VCL are Administrative Body for Competition (or Vietnam Competition Authority, ‘VCA’) and Competition Council.\(^12\) The VCA was established under the purview of the Ministry of Trade (‘MOT’)\(^13\) and has implemented the competition regulations to competition cases, economic concentration and cases involving unfair competition acts.\(^14\) The head of VCA is appointed by the Prime Minister on the proposal of the Minister of MOT.\(^15\) The Competition Council consists of eleven to fifteen members serving a five-year term and appointed (or re-appointed) by the Prime Minister on the proposal of Minister of MOT.\(^16\)

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\(^11\) Ibid
\(^12\) VCL, Chapter IV
\(^13\) Ministry of Trade and Ministry of Industry were merged under Resolution No. 01/2007/NQ-QH12 dated 31 July 2007 to Ministry of Trade and Industry (‘MOIT’)
\(^14\) VCL, Art. 49.2
\(^15\) Ibid, Art. 50.1
\(^16\) Ibid, Art. 53.1
The current competition regime of Vietnam dates back to earlier than the birth of the VCL in 2004. Prior to enactment of VCL, the Competition Administration Department had already been created within the MOT who was expected to be built into the Competition Authority after the law was passed. The Department was in charge of all issues related to competition and drafted all the implementation guidelines for the competition law. There is a unique characteristic of competition regime of Vietnam since in other countries the competition authority is usually set up after the competition law has been adopted.\textsuperscript{107}

When putting forward the draft of VCL for consultation and comments, the idea that competition administrative body would be within the MOT faced the great opposition from other governmental agencies, scholars and public. The placement within the MOT was perceived to non-independence of future agency, thus affecting this agency’s specialization, fairness, transparency and accountability which had been considered as the main cause leading to the ineffectiveness of competition law enforcement in several countries. Moreover, at that time MOT held the ownership and control of SOEs that led to public skepticism that MOT would distort competition agency’s power in disciplining the conducts of SOEs. However, the triumph of MOT over the placement of competition authority reflects the dilemma of the reform process to balance the development of a market economy with the Communist Party and the State who still wants to retain control over the economy.\textsuperscript{108}

Given the low public awareness of competition and when enforcement agencies are not completely free from political will, and are not equipped with sufficient knowledge, skills and resources, the gradual approach can be gained from the lessons of the Fair Trade Commission of Japan (‘JFTC’) – antitrust law enforcement authority. The JFTC was established at the same time of enactment of 1947 Antimonopoly Act\textsuperscript{109} and developed in parallel with the reform of Japanese antimonopoly law. When enacting such law, the belief of harmonization in business environment still played the vital role of entrepreneurs that existed until 1990s. This constraint of JFTC was escalated by governmental policies that fostered domestic production and export

\textsuperscript{107} Alice Pham (n 21), 559
\textsuperscript{108} Ibid, 599-61
\textsuperscript{109} The Act on Prohibition of Private Monopolization and Maintenance of Fair Trade, Act No. 54 of April 14, 1947
orientation. Japanese government had issued several regulations that excluded a number of industries out of the governing scope of Anti Monopoly Act.\textsuperscript{110}

In 1970s, the Yawata-Fuji case in which JFTC approved the merger between two companies whose over 30\% of market share of 20 different types of products, but required several remedies, had raised the question on the role of competition in market and functions of Anti Monopoly Act and JFTC. Subsequently, at the end of the 1990s, under increasing pressure from global competition, merger enforcement in Japan had grown more serious and JFTC had to issue various guidelines to clarify its procedures and substantive issues.\textsuperscript{111}

With the political will, particularly from Prime Minister Koizumi, the consent of trade associations and strong support from consumers, Japanese antitrust law has undergone the reform to become an effective tool to maintain the competition in market, to protect consumers’ welfare. From being an agency of Ministry of Internal Affairs and Post-Communication, the JFTC not only becomes the administrative body under the purview of Prime Minister that is equivalent to a Ministry, but also is granted the authority to issue competition policy, including Anti Monopoly Act.\textsuperscript{112}

Given the low awareness and the remaining skepticism of the society towards competition law, combined with the limited resources, VCA should initially play the role of awareness-raiser, in particular familiarize the public with the law, focus on the actions that benefit the market and advise the private sector. The same method has proved successful in many countries, such as the United Kingdom, India and Taiwan.\textsuperscript{113}

CONCLUSIONS

The transition of the Vietnamese economy from a State-controlled economy to a socialist oriented market one and the accession of Vietnam to the WTO have been the first steps of Vietnam’s integration into the global economy. This process necessary led to the adoption of the

\textsuperscript{110} VCA, ‘Japan Anti Monopoly Act and Enforcement Experiences’ (Hanoi, 2007), The National Political Publishing House, 35
\textsuperscript{111} Etsuko Kameoka, ‘Competition Law and Policy in Japan and the EU’ (Edward Elgar Publishing Ltd, 2014), 97-98
\textsuperscript{112} VCA (n 117), 116
\textsuperscript{113} Alice Pham (n 21), 562
2004 Vietnam Competition Law with the view to making the Vietnamese market a more attractive and efficient market for the Vietnamese private sector and foreign investors. Although the first generation of Vietnamese competition law and policy has undoubtedly contributed to turning the Vietnamese economy into a more competitive one, it has failed to limit the still over-dominant control of the State over key sectors of the Vietnamese economy. As demonstrated above, the public enforcement of competition regulations still has many salient shortcomings. In order to improve the attractiveness, reliability and dependability of the Vietnamese economy, those shortcomings will have to be addressed in a second generation of competition legislation and policy which will inevitably stem from the process of further economic integration in which Vietnam is taking part and which is taking shape through the creation of the AEC, the TTP and other FTAs to which Vietnam is party, such as the recent EU-Vietnam FTA. This second generation of competition law could be the catalyst for the modernization of Vietnam competition law, notably by ensuring the full independence of the VCA with greater and effective investigation powers, adopting a more economic, effect-based and consumer welfare approach, and adopting specific guidelines providing an analytical framework for the application of competition rules and guidance to enterprises on their interpretation by the competition authority.