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Neutralising the Advantages of State-Owned Enterprises for a Fair Playing Field

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Abstract: *Despite Vietnamese competition authorities' attempts to control state monopolies in domestic markets during the last 10 year of establishment, this appears to be the key challenge of Vietnamese competition regime. In the process of transitioning from a centrally planned economy to a market economy, the State-owned enterprises (SOEs) sector is perceived as a means to ensure the socialist orientation of the economy as well as preserve national economic goals. For these purposes, SOEs have been offered several advantages ranging from tangible incentives to latent conveniences over the privately owned enterprises. In this context, competition laws and policies should be able to neutralise the advantages of SOEs to level the playing field or else it would be used a shield to protect SOEs from their private rivals.*

This paper looks into the issues with the SOE sector in the context of Viet Nam's political economy and identifies the factors inhibiting the country's effort to control State monopolies in the last 10 years of competition law enforcement. It provides commentaries on the implementation of competition laws and policies in Viet Nam from the perspective of economic integration, particularly the on-going negotiation Trans-Pacific Partnership.

Keywords**:** antitrust, competition law, competition policy, competitive neutrality, developing countries, public enterprises, political economy, industrial policy, SOEs, State monopoly, TPP, Viet Nam.

JEL Classification**:** K21, L12, L32, L44, L52, L93, L96

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1. Introduction

Amongst developing countries, one of the biggest challenges in making and implementing a competition law and policy is how to balance the demand for economic growth and the maintenance of a level competitive condition for all market players. In Viet Nam, this dilemma often exists in terms of balancing the market advantages between government businesses—specifically state-owned enterprises (SOEs)—and privately owned enterprises. The SOEs had risen in dominance stemming from a centrally planned economy in the past, wherein the public sector was the only authorised player in the marketplace. Thus, on one hand, SOEs partly contributed to Viet Nam's miraculous economic growth (Fforde, 2004). On the other hand, SOEs also became a roadblock to Viet Nam's transition to a market economy.

Since the late 1990s, the public sector's influence has gradually lessened as economic reforms began to drive the emergence of private sector enterprises, including domestic and foreign invested enterprises. According to an Asian Development Bank survey, Viet Nam's private sector had outpaced the public sector from the years 1995 to 2005. As of November 2005, the sector accounted for more than 50 percent of gross domestic product (GDP), 27 percent of total capital investment and over 90 percent of the workforce (Asian Development Bank, 2005).

Despite the rapid growth of the private sector, the SOE sector has sustained its presence in a wide range of industries as a means to ensure the socialist orientation of the economy as well as preserve national economic goals. According to statistics published by the General Statistics Office and Ministry of Finance in 2012, SOEs accounted for 32.6 percent of GDP and 18.4 percent of industrial production, although both have declined from their 2000 values of 34.9 percent and 41.8 percent, respectively (Vu, 2014).

As such, although the Viet Nam Competition Law (VCL) was first introduced mainly due to pressure from the country's accession to the World Trade Organization (WTO),[1] it was nonetheless looked upon as the cornerstone for a level playing field between SOEs and private sector enterprises. Indeed, the very first important action of

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[1] The law was passed by the National Assembly in 2005 and took effect on 1 July 2005. Viet Nam become an official member of the WTO in 2007.

the Vietnamese competition authorities was their attempt to bust the misuse of state monopolies—anywhere from simple monopolies to complex oligopolies—in domestic markets.[2] However, one lesson learned during the first 10 years of enforcement is that its other key challenge is rooted in a more systemic and institutional problem: the political interference in the form of 'state economic management' and potential conflicts between competition policies and the industrial policies that are usually exercised in the direct control of large SOEs (Vu, 2014).

This paper thus looks into the issues with the SOE sector in the context of Viet Nam's political economy and identifies the factors inhibiting the country's effort to control State monopolies in the last 10 years of competition law enforcement. It provides commentaries on the implementation of competition laws and policies in Viet Nam from the perspective of economic integration, particularly the Trans-Pacific Partnership (TPP).

2. SOE Sector in the Context of Viet Nam's Political Economy

2.1. The SOE sector reform since 1990s

For a long time, Viet Nam maintained a centrally planned economy characterised by high degrees of state control in all aspects of the economy. Only state and collective forms of ownership were given official recognition, and trading between such bodies proceeded in the absence of an effective price mechanism (Bui and Nguyen, 2001; Gillespie, 2005).

The SOE reform started in 1986 when the Viet Nam Communist Party (VCP) decided to pursue the renovation policy that started a transition from a command economy to a market economy with a distinct socialist orientation. This decision placed Viet Nam, its institutions, officials, and its newly born quasi-legal private sector on a path of economic integration, which led to greater economic competition, and hence increased foreign and domestic demand for a competition policy (Asian Development Bank, 2005; Auffret, 2003).

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[2] The first decision on competition was handed down against Vietnam Air Petrol Limited, a State monopoly that supplies petrol for airplanes, for abuse of its monopolistic position in 2008. The second decision was to sanction a price-fixing cartel of 19 non-life insurance companies, many of which are SOEs, which was endorsed by the Vietnam Insurance Association in 2010.

Although SOEs are no longer the sole player in the marketplace since then,[3] Viet Nam is still a highly concentrated economy. These SOEs are still the mainstay of public ownership in the marketplace, ensuring the socialist orientation of the national economy. They are established to supply essential products and services, apply advanced technology, create competitive edges and encourage rapid economic development in geographical areas with difficult socio-economic conditions.

Under the laws,[4] SOEs were set up by and put under direct control of the central or local governments or other state agencies. In particular, the Prime Minister, through his decisions, has the capacity to establish state enterprises that are large scale or operating in strategic industries. Heads of government-attached agencies and presidents of the provincial-level people's committees have the capacity to establish state enterprises in other areas.

Since 2005, the Law on Enterprises that aims to abolish discrimination between SOEs and privately owned enterprises has repealed the Law on State-owned Enterprises. This law now governs the establishment, management and operation of all types of enterprises, including SOEs (VCL, Article 169). Despite this change, the Law on State-owned Enterprises still applies in the event of conversion into a form of enterprises stipulated in the Law on Enterprises (VCL, Article 171.2).

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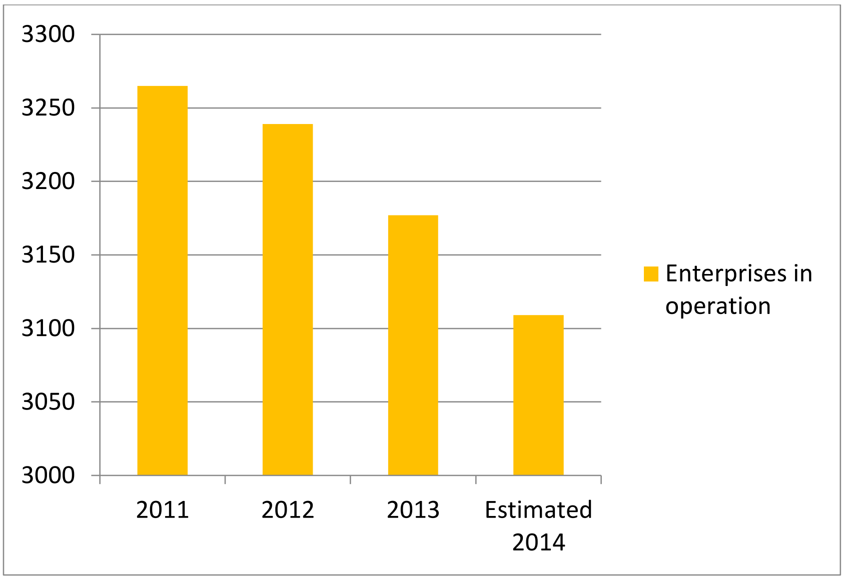
[3] The SOE reform started in 1986. The government issued Decision 217-HDBT dated 14 November 1987, Decision 50-HDBT dated 22 March 1988 and thenafter Decision 195-HDBT dated 02 December 1988 supplementing Decision 217-HDBT to regulate the autonomy in production and trade activities of SOEs. However, in reality the autonomy of SOEs is still limited, and the subsidy mechanism still dominates the operation of SOEs. By the end of 1989, there were over 12,000 SOEs mostly small- and medium-scale with tiny capital, backward technology, and low efficiency.

[4] The Law on State-owned Enterprises (1995), which was replaced by the Law on State-owned Enterprises (2003).

Table 1: SOEs Enterprises over the Years



Source: Vietnam General Statistics Office, 2014.

The SOE reform in Viet Nam is through two simultaneous measures; namely, the formation of state-owned economic groups (SEGs) in strategic sectors and the privatisation of SOEs in less important industries.

Since the early 1990s, in anticipation of the threat of competition after the 'open door policy' for foreign investment was implemented in a number of sectors (Asian Development Bank, 2005; Auffret, 2003), the government started to pilot the national champion policy, which allowed the establishment of SEGs under the Prime Minister's purview.[5] The policy mainly aimed to concentrate investment in and mobilise resources for certain groups of large companies in key industries and economic sectors so as to enhance competitiveness and international economic integration of the SOE sector. It hoped that SEGs would play a role in ensuring the balance in the national economy as well as strengthen effective management and supervision of capital assets invested in the group members (Decree 101, Article 1).

[5] These economic groups were established under the Prime Minister's Decision No. 91/TTg and Decision No. 90/TTg, both dated 7 March 1994. On 5 November 2009, the government issued Decree No. 101/2009/ND-CP to pilot the establishment, organisation, operation and management of state-owned economic groups (Decree 101) in more detail than Decision No. 91/TTg and in line with regulations governing Vietnamese enterprises.

As such, SEGs were established and had maintained their dominance in a variety of strategic industries deemed essential to Viet Nam's economic development, ranging from heavy industries to labour-intensive industries (Decree 101, Article 3).

Table 2: Market Share of SEGs Established in accordance with Decision 91/TTg (in 1999 and 2003)

Industries	1999 (%)	2003 (%)
Electricity	94	92
Coal	97	98
Paper	50	70
Cigarette	63	N/A
Cement	59	55
Steel	64	52
Chemical Fertilizer	N/A	90
Rubber	N/A	69
Oil	N/A	100
Basic Chemistry	N/A	99
Petroleum	N/A	50
Railway Transportation	N/A	100
Airway Transportation	N/A	90
Commercial Bank Credit	70	N/A
Export Turnover	30	25.1

Source: D.V. Nguyen et al., 2005 (p.63).

Along with the formation of SEGs was a steady rate of privatisation of pure SOEs into joint stock companies. The State's privatisation was first piloted in 1992 to transform SOEs, for which the State does not need to maintain 100 percent ownership, into enterprises with multiple owners and mobile private and foreign capital. As a result, the number of SOEs had plummeted from 12,000 (1990) to around 7,000 in 1995. During the period 1990–2000, there were 548 SOEs privatised. However, the GDP proportion of SOEs increased from 32.5 percent in 1990 to 42.2 percent in 1995, which shows SOEs' growing dominance over enterprises of other economic sectors (Đại Biểu Nhân Dân, 2014).

In the wake of the 1997 Asian financial crisis, the economic decline called for a more critical reform of an inefficient SOE sector. The privatisation programme was officially promulgated through the government's Decree No. 44/1998/ND-CP on 29 June 1998, governing the transformation of SOEs. From 2000 to 2010, nearly 3,300 SOEs were privatised, which was six times more than the number in the 1990–2000 period. Consequently, the share of the State in GDP has dropped sharply over the previous period. In 2010, the public sector only accounted for 33.74 percent of GDP compared to its portion of 42.2 percent in 1990 (Đại Biểu Nhân Dân, 2014).

Determined to restructure the economy in three pillars—i.e., the restructuring of public investment, system of credit institutions, and state enterprises—the government approved a scheme for restructuring SOEs, focusing on SEGs and national corporations in the period 2011–2015. This scheme aims to increase the SOE's financial capacity, renew its technology and renovate its management system. Privatisation is undertaken by either issuing additional stock to increase capital, selling a part of the State's capital holdings, or any combination thereof (Decree 59, Article 4).

However, the progress of privatisation during this period has been extremely slow. According to statistics for the period 2011-2013, the country held 180 business arrangements, of which only 99 enterprises went under privatisation. Based on the SOE restructuring scheme approved by the Prime Minister, 432 enterprises were expected to be completely privatised in 2014 and 2015; however, the actual number as of 25 December 2014 was only 143 (Chung, 2014).

Table 3: Privatisation of SOEs in Sectors, 2014–2016

Sectors	Number
Oil and gas	1
Basic materials	32
Industry	250
Consumer	55
Healthcare	10
Consumer services	73
Telecommunications	6
Public utilities	48
Banking	0
Finance	25
Technology	3
Total	503

Sources: Stoxplus Research, 2014.

Many reasons were given to explain the delay in privatisation, one of which is that SOE managers do not focus on realising their privatisation plan (Đại Biểu Nhân Dân, 2014). The case of MobiFone, one of three largest mobile networks in Viet Nam, is one example. Initially, the initial plan aimed to complete MobiFone's privatisation in 2005; however, it has not been completed until now mainly because its parent company Vietnam Post and Telecommunication Group is not willing to divest of its most profitable subsidiary (Phong, 2014). As discussed below, SOEs have little incentive to implement the privatisation programme for fear that doing so would effectively deprive them of the favourable treatments they currently enjoy. These competitive advantages do not make SOEs more efficient but instead reinforce their anti-competitive stance.

2.2. The competitive advantages of SOEs

Because they are government owned, SOEs have advantages ranging from tangible incentives to latent conveniences (Vu, 2012). Many SOEs dominate several key industries, and therefore often do not encounter tough competition in the market nor are threatened of being excluded from the relevant market. In addition, State authorities, being able to establish policies, will often prioritise SOEs over private enterprises in many government projects.

Aside from the connection to business opportunities, SOEs can easily access state funds, real estate and other resources at its disposal. In the past, they were assigned land for free or for lease at lower rates. Currently, although specific land incentives for SOEs are not provided under national regulations, these enterprises still enjoy preferential treatments. In practice, they still enjoy such advantages through particular approvals from the central government or local governments on a case-by-case basis. These advantages, which may vary from company to company, are recorded on the SOE's business registration certificate. In some industries such as transportation, aviation and telecommunications, SOEs are given the priority to use existing infrastructure that has been directly invested in by the State.

In terms of project finance, profits (if any) are often retained to increase the SOEs' capital or to make investments, instead of paying dividends to the State Budget. The State also provides support for restructuring inefficient SOEs via financial instruments. These SOEs are able to enjoy loans from commercial banks without being subjected to strict corporate disclosure requirements and government supervision. Likewise, they are able to raise capital through loans at low interest rates (sometimes even interest-free loans) with high credit lines, particularly loans from Development Supporting Funds (Thông Tấn Xã Việt Nam, 2005). Other forms of financial support include supplementary capital, debt rescheduling, debt waiving, and even payment by the government of the SOE's loan obligations.

According to a report of the Organisation for Economic Coordination and Development (OECD), SOEs primarily obtain financing through the State Capital Investment Corporation (SCIC), the Viet Nam Development Bank (VDB), and other commercial banks (OECD, 2013). In 2009, the government reportedly guaranteed about 20 percent to 25 percent of SOEs' debts, directly and indirectly (OECD, 2013). The burden of loans taken out by SOEs on the State Budget is reflected in the amount of foreign loans to SOEs and credit institutions guaranteed by the government in 2011. Such constitutes 12.8 percent of Viet Nam's foreign medium- and long-term loans.

This number increased by 12.5 percent compared to that in 2010 (OECD, 2013).

The risk of bankruptcy is hedged as the State has the capacity to protect its companies through capital injections or, where necessary, through debt purchase. State Capital Investment Corporation and Debt and Asset Trading Corporation are enterprises established by the government for this purpose. Whilst SCIC plays the role of the State Capital's representative in enterprises, the Debt and Asset Trading Corporation's purpose is to handle SOEs' outstanding debts. These two initiatives were established with the bona fide intention of saving SOEs from insolvency and improving the efficiency in managing the State Budget. However, on the extreme end of the spectrum, these entities have spontaneously become the saviours or an exit route for SOEs buried in bad debt.

Although SOEs dominate domestic markets, they are often less efficient than privately owned enterprises and, without appropriate control, may hinder the creation and maintenance of a competitive environment; that is, SOEs were not primarily established for competitive purpose but often with certain social duties. Therefore, most of these are inefficient and cannot utilise their economies of scale (Fforde, 2004). On the other hand, pressuring them to make profit so as to contribute to the State budget would drive them to remedy their inefficiency through the manipulation of their natural monopolistic status such as by imposing high prices and preventing new entries (A. Pham, 2006).

In addition, SOEs are placed under direct or indirect control of State agencies as well as local governments through administrative decisions.[6] This allows the State to intervene in the operation of SOEs, thereby eliminating actual competition amongst them and creating the propitious condition for the formation of State cartels. The formation of SEGs is an example. Those SEGs were formed by shifting SOEs with vertical or horizontal integration into one large holding company for the purpose of creating state conglomerates with high competitive ability to compete with foreign

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[6] The unique character of SOEs was that they were established by and put under direct control of the central or local governments or other state agencies. Those agencies controlled every important aspects of SOEs' operation such as daily management, personnel, price and output allocation, etc. The SOEs' profits (if any) should be remitted to the State budget, which can then be used to subsidise other's losses. As a result, there was no incentive for SOEs to make profit. Most, in fact, were incurring losses. Recently, there have been calls to reorganise the SOEs so as to make them autonomous enterprises and to remove their State subsidy. However, the SOEs are still directed by State agencies through their representatives in the management board.

enterprises in both domestic and international markets. Without an adequate state control in place, this is apparently an ideal environment for cartels to flourish since they can legally fix prices and divide markets or customers (Fforde, 2004).

Corporate governance in SOEs is not effective as there is a thin line between the management function and administration function of the government and ministries (Tuyen, 2012). There is a distinct lack of legal framework for the establishment, management and operation of SOEs. Most regulations governing SOEs exist ‘under the radar’ and are often ultimately subject to the decisions of the State authorities, particularly the Prime Minister. Therefore, SOEs often lack adequate control mechanisms, and the responsibilities of managers are not often closely regulated.

There are also concerns over the lack of transparency in the operation of SOEs resulting from superficial inspections and auditing procedures. In general, the management board or the representative of the State owner has less pressure to attain efficiency and apply risk management in the company’s business activities. Under Decree No. 101/2009/ND-CP, economic groups are established by the government and only have to report to the government and the Prime Minister on important issues. These reports include, amongst others, their business activities, investment plans and investment structure of their core and non-core business, capital mobilisation, bank, real estate and stock market activities, and the form and level of cooperation amongst enterprises within each economic group. Accordingly, SOEs and economic groups are often free from the supervision of functional third parties such as the State auditor.

In addition, managers of SOEs often lack managerial experience and business administration capacity as they are appointed without undergoing a sufficient review of qualifications. Therefore, it is not unheard of to have large-scale SOEs being managed by individuals who do not possess adequate managerial experience.

Last but not least, in the common bureaucrats’ perception, State monopolies are considered as a ‘normal phenomenon’ and should be protected rather than regulated by law (Bui and Nguyen, 2001). Accordingly, SEOs can rely on support from the state agencies to impede the development of privately owned enterprises.

Recently, there have been calls to reorganise SOEs into autonomous enterprises and to remove their State subsidies. However, the SOEs remain directed by State agencies through their representatives in management board.

These facts have put the government in a dilemma on how to regulate State monopolies. On the one hand, there are concerns that retaining State monopolies in a wide range of sectors would lead to market failure and hamper the formation of a new-born competitive environment in Viet Nam as a whole. Those concerns called for a specialised law, like the Sherman Act, that can effectively control State monopoly and limit the State's intervention in the operation of markets (N. D. Pham, 2002). On the other hand, SOEs' crucial role in preserving the nation's economic goal and social orientation during transition also makes policymakers reluctant to abolish the monopolistic nature of these SOEs. It was therefore suggested that the State monopoly should be maintained at least in some industries that require large capital investment or in strategic sectors (Bui and Nguyen, 2001). However, as shall be discussed below, given the aforementioned characteristics, a specific approach to monopoly would be necessary for Viet Nam.

3. Competition Law and Policy on SOEs in Viet Nam

3.1. The principles for designing competition law and policy in Viet Nam

Viet Nam's mixed-market system after decades under its Đổi Mới (Renovation) policy may be characterised by the growing friction between three economic sectors: namely, the SOE sector, the domestic private sector, and the foreign sector. Although SOEs still play a dominant role in key industries, the newly established but dynamic privately owned enterprises—including domestic and foreign-invested enterprises—quickly became a promising force for enhancing economic growth. (Asian Development Bank, 2005). The presence of private sector enterprises has brought about vigorous competition in many industries.

Nonetheless, most private domestic enterprises are small and medium sized and lack a competitive capability (Asian Development Bank, 2005). Moreover, there are still a number of administrative barriers that hinder the development of private enterprises and distort fair competition amongst private enterprises and public counterparts, such as the discriminatory policies on bank credit, land leasing, allocation of export quotas, and tariffs. (Asian Development Bank, 2005). Hence, how to create an equal playing field for private and public enterprises has become a subject of discussions amongst policymakers and scholars over the years.

Given this context, the general opinion is that the competition policy, particularly during the early stages of transition, should focus on enhancing competition by attracting investment, maximising allocation proficiency, and creating a level playing field for businesses (Le, Hoang, and Nguyen, 2006). Moreover, suitable institutions that work to maintain and protect a fair and competitive market and to guarantee equal treatment amongst businesses are also needed if one were to get the State to productively regulate competitive practices and ensure a socialist market-orientated policy. The provisions of a competition law thus should, on the one hand, create a fair environment for the non-State-owned sector to equally compete in the market and, on the other hand, create an 'appropriate shield' against unfair competition practices, abuse of dominant position, and cartels that may harm the trade liberalisation regime (H.H. Le, 2001).

Accordingly, the call for the enactment of competition laws actually stem from the need (1) to regulate the market economy by supporting a legal institution that does not deviate from the foundation of competition laws; (2) to control monopolies and monopolisation, particularly in the midst of a global economic integration; and (3) to create and maintain a level playing field (Vietnam Ministry of Trade, 2003). In this regard, a workable competition (Hovenkamp, 1999) approach that permits a proactive State intervention seems to be best fit for Viet Nam's specific conditions. The Viet Nam competition policy during the transitional period protected the market structure by de-concentrating oligopolistic markets, constraining monopolisation and protecting small and medium companies from larger rivals.

To meet the above requirements, the board commissioned to draft the VCL had specified three principles. First, the Competition Law is used as a tool for institutionalising the VCP's policy regarding the development of a socialist-oriented market economy under State regulation. The three main objectives of the first principle are (1) to create a wholesome, legitimate and civilised competition environment for the country's development; (2) to uphold the role of the state-owned sector in directing the development of the market economy; and (3) to restrain and control business monopoly. Second, there is a need to effectively control monopoly and the monopolisation of SOEs and transnational companies invested in Viet Nam so as to allow other businesses to fairly compete in the market. Finally, to ensure consistency between competition laws and other legal regulatory body, the VCL provisions should not conflict or overlap with current legal instruments such as the Civil Code, Enterprise Law, Commercial Law, and Intellectual Property Law (Vietnam Ministry of Trade, 2003).

The drafting of the VCL was initiated in 2000 with the participation of representatives from the Department on Economy and Budget, the Law Department of the National Assembly, the Ministry of Planning and Investment, the Ministry of Judiciary, the Government Office, the Vietnam Chamber of Commerce and Industry, research institutions, and universities. The board in charge of drafting the law also received technical assistance from Asia-Pacific Economic Cooperation (APEC) developed country-members such as the United States, Japan, Canada, Korea, and Taiwan as well as from donor agencies at both the drafting and enforcement stages. Furthermore, during the drafting phase, the board also gathered opinions from domestic and foreign specialists, businesses and the public by hosting many seminars and conferences in both Viet Nam and overseas and published the bills on the Internet (Vietnam Ministry of Trade, 2003). Finally, after 15 revisions, the Legislature XI of the National Assembly passed the draft VCL during its 6th session on 3 December 2004.

3.2. Competition Law's application on SOEs

The VCL for the first time covers almost every aspect of the competition policy. Moreover, the law also stipulates the structure for the institutional environment that a competition law necessitates and identifies agencies responsible for handling competition cases. All forms, legal documents and statements indicate that Viet Nam is ready to adopt a competition law, and more importantly, to enforce the law's mandates on foreign, domestic and state firms consistently.

In general, there is a consensus that SOEs must not be exempted from the scope of the VCL. Article 2 of the VCL provides that all organizations conducting business will be governed by such law, including public and private entities. Accordingly, SOEs and their commercial activities fall within the governing scope of the VCL.

Nevertheless, there are different opinions on the role of the SOE sector and thus on how the competition policy should be crafted to define this role. For some, state economic management is limited to ensuring that growth is socialist in its orientation, with measures meant to address inequality and enhance rural development at the top of the list. For others, state economic management is and will continue to be manifested in the direct control of large SOEs, where the State exercises its powers on macro-economic adjustment and *de facto* powers for managing the spread and size of domestic private sector enterprises (OECD, 2005; Bui and Nguyen, 2001; H. H. Le 2001; World Bank, Asian Development Bank and UNDP, 2000). The latter appears to prevail when one closely examines the content of the VCL. Indeed, as discussed below, the VCL is designed in a way that the State authority can control SOEs through some vague criteria of exemptions or even exclude the SOEs from the scope of VCL if necessary.

(i) Exclusion of state monopolies from the scope of VCL

The VCL exempts enterprises operating in State monopoly sectors. In principle, SOEs created for commercial purposes and do not fall under the State monopoly sectors would be subjected to the scrutiny of the law. Regrettably, 'State monopoly sectors' remain a mysterious annotation in the law as there is no list or definition of monopoly sectors under the VCL and its promulgating documents. Instead, the term 'State monopoly sectors' is merely mentioned in Article 15 of the VCL.

Since 'State monopoly sector' itself is not clear, such has led to different interpretations. The scope of the application of this provision is also undefined: For example, it is unclear whether such immunity still applies when such enterprises conduct unfair competition practices.

Article 15.1 of the VCL reads:

> 1. The State shall control enterprises that operate in State monopoly sectors by taking the following measures:
> (a) Deciding the selling price or purchasing price of goods and services in State monopoly sectors;
> (b) Deciding the quantity, volume, price and market scope of goods and services in State monopoly sectors.

Accordingly, the VCL preserves the right of the State to decide the price, quantity, volume and scope of goods and services in State monopoly sectors, and to control enterprises that produce or supply public utility products or services by placing orders, assigning plans or conducting tenders in accordance with prices or fees stipulated by the State. It is noted that these provisions are not applicable to SOEs when they are conducting business activities outside State monopoly sectors or activities other than the production or supply of public utility products or services (VCL, Article15.3). There is also no business test or equivalent method of verifying whether an activity of a SOE would be exempted from the scope of VCL is applicable in this regard.

(ii) Broad criteria for exemption

The Prime Minister has the authority to exempt an economic concentration that would otherwise be prohibited if it is considered to contribute to the nation's socio-economic development or technology advancement (VCL, Article 25.2). Such authority to exempt shall be under the Minister of Industry and Trade (the Minister) in case a party of the prohibited economic concentration is at risk of dissolution or bankruptcy. In addition, the Minister also has the authority to grant exemptions for cartels (VCL, Article 25.1).

Article 10(1) of the VCL exempts cartels that have the purpose of (i) rationalizing the business organization of cartel members; (ii) promoting technical advantages; (iii) promoting the uniform application of quality standards and technical norms of products of different kinds; (iv) harmonising business operation conditions; (v) enhancing the competitiveness of small and medium enterprises; or (vi) enhancing the competitiveness of Vietnamese enterprises in the international market.

These aforementioned criteria are quite broad and ambiguous, and thus need to be detailed. However, there is no further guideline on how these criteria should be elaborated in terms of their effects on competition. Therefore, it is unclear how the competition authority will balance the positive and negative effects of the restrictive agreements as a ground for granting the exemption. Recent decisions of the Prime Minister to grant exemption for a merger between two financial switching services companies as discussed in the following sections well illustrates this concern.

A deeper look into the exemption criteria for cartels also suggests that the design of this provision would appear to protect the interests of State-sanctioned cartels. This can be noted from Japan's past experiences. Section 23-4(1) of Japan's Anti-Monopoly Act (AMA) prescribed that reasons for rationalisation cartels to be exempt from the AMA include the purposes of 'effecting an advancement of technology, an improvement in the quality of goods, a reduction in costs, an increase in efficiency, or any other rationalization.' This provision had been extensively used to exempt State-sanctioned cartels until it was abolished in 1999. (Iyori and Akinori, 1983).

The Vietnam Competition Administration Authority (VCA) is responsible for evaluating exemption requests and proposing to the Minister that such be granted. Official letters seeking opinions on the exemption request are first sent to ministries, ministerial equivalent bodies, government bodies and other organisations and agencies concerned before an evaluation report is submitted to the Prime Minister for his consideration and decision.

The decision to grant an exemption shall consider, amongst others, the duration of the exemption, and the conditions on and obligations of the parties. Note though that the VCL does not provide further guidance or criteria on how to determine the duration, conditions, and obligations.

(iii) Lack of robust and independent enforcement agencies

Under the current structure, Vietnamese competition authorities include the VCA, which plays the role of a watchdog, and the Vietnam Competition Council (VCC) as the quasi-judicial body.

Whilst the VCA is a department under the Ministry of Industry and Trade (MOIT) and has an executing power that is limited by the MOIT's decisions, VCC's decisions may be influenced by related industrial policies given the fact that its members are public officials appointed from line ministries, including MOIT. The structure imposes barriers on both the VCA and the VCC when executing their role as moderators of the competition policy. It also allows the Prime Minister and the MOIT Minister—as higher VCA authorities—to implement state economic management functions through their administrative decisions, thus bypassing the competition procedures.

The main issue was that a competition authority established under the MOIT would be ineffective in controlling and preventing major SOEs, which are usually owned by ministries, from abusing their market power. Moreover, the MOIT itself also owned many important SOEs[7], and there was no guarantee that the MOIT would not abuse its power as the superior agency directing the decisions of the VCA. The independence, fairness and objectivity of the VCA were therefore questioned (A. Pham, 2006).

In response to these concerns, the drafters' resolution favoured placing the VCA under the MOIT, but allowed the structural organisation and key personnel of the VCA to be decided by the Prime Minister.[8] At the same time, restrictive practices that may have the effect of distorting competition (namely, cartelisation and monopolisation) will be handled by the VCC, which is independent from the ministries.

Currently, the Prime Minister has appointed 14 members to the VCC. The chairman is the deputy minister of the MOIT and the two vice chairmen are the Deputy Minister of Justice and the Deputy Minister of Finance. They are also in charge of the offices at their respective ministries. As a result, as soon as the list of VCC councillors was released to the public, concerns about the independence of the VCC were raised. As the other VCC councillors—with the exception of the chairman and two deputy chairmen—are department-level officials at sectional ministries, there is always that possibility that higher-ranking officials at their respective ministries would direct their judgments (VCA, 2013).

It is noteworthy that, apart from competition procedures for handling anti-competitive practices, there are no complaint procedures in place in relation to government policy. According to the current law on administrative procedures, parties may file complaints against a competition decision. One may also file a complaint against an action of government bodies that directly interferes with the competition in the market. In particular, according to Article 6 of the VCL, government bodies are prohibited from performing activities that affect the competitive environment and the

[7] Several major state-owned corporations are under the MOIT, including Vietnam Oil and Gas Group (PVN), Vietnam Electricity (EVN), Vietnam National Petroleum Group (Petrolimex), Vietnam National Coal - Mineral Industries Group (Vinacomin), Vietnam National Textile Garment Group (Vinatex), Vietnam National Chemical Group (Vinachem), Vietnam Paper Corporation (VCOaco), Vietnam Steel Corporation (VN Steel), Vietnam Industrial Construction Corporation (Vinaincon), Hanoi Beer Alcohol and Beverage Joint Stock Corporation (Habeco) and Saigon Beer Alcohol Beverage Joint Stock Corporation (Sabeco).

[8] Under the Law on Organizational Structure of Government (2001), this is at the Ministry's discretion.

enterprises. Any violation of this provision will be subject to administrative sanctions in accordance with Article 120 of the VCL, which specifically addresses the handling of violations by individual State agents. Accordingly, the VCL does not directly govern the activities of State bodies.

It is a fact that competition policy is also being governed vertically. In most cases, to meet the priorities in the growth in a developing country, industrial policies supersede the rules of the Competition Law. The vertical governing is shown in the way ministries and their bodies build up policies and give directions for industry development, and implement those plans using SOEs as an economy-moderating tool.

As far as enforcement of the competition law is concerned, SOEs could leverage on the fact that it is government owned to circumvent the scrutiny of the VCL. This may be done by obtaining an administrative ruling from the Prime Minister, the Minister of Industry and Trade, or other administrating ministries. To provide the readers with a comprehensive understanding of this issue, the next section of this study will review the enforcement of economic concentration regulations.

4. Competition Law Enforcement against SOEs

Although the VCL has a proviso on how SOEs can be exempted from the application of the Competition Law, the reality is that this is often ignored. Instead, SOEs prefer to seek administrative sanctions from State management agencies to avoid complicated and lengthy competition review procedures. As illustrated in the following case studies, this is a common practice in the area of economic concentration. Generally, SEOs had sought the expressed endorsement of State authorities until recently, when the Prime Minister for the first time issued an exemption for the merger of Banknet and Smartlink, only two companies providing financial switching services in Viet Nam.

Restructure of nine commercial banks

How industrial policies prevailed over competition policies is best illustrated by the restructuring of the banking industry in 2012. It started with the VCP's policies on how to restructure the economy in October 2011, where the commercial banking system was an important focus area. To elaborate on this policy, the Prime Minister issued the Schedule to Restructure the System of Credit Institutions for 2011–2015, where ‘encouraging voluntary merger, amalgamation, and acquisition of credit institutions’ is one of its covered topics. As the institution vested with the authority to approve and decide mergers, consolidations and dissolution of credit constitutions (Law on State Bank of Vietnam, Article 4.9-12), the State Bank of Vietnam issued the decisions to legalise the deals. For this reform, nine commercial banks (Sacombank, Ficombank, Vietnam Tin Nghia Bank, Habubank, Saigon Hanoi Bank, Dai Tin Bank, Trust Bank, Western Bank, and Petro Vietnam Finance Cooperation) were involved in a chain of mergers, consolidations, and acquisitions (Voice of Vietnam, 2013).

The legal bases for mergers and acquisitions in the banking industry stem from specialised laws such as Law on Financial Institutions, Securities Law, and other related laws such as the Law on Enterprises, Investment Law, and Competition Law as well as international laws such as World Trade Organization commitments and bilateral trade agreements.

On the aspect of market governance, both specialised and Competition Law provide regulations on the level of economic concentration in merger-and-acquisition activities. However, the restrictions differ in these two types of law: Whilst the Competition Law limits the economic concentration level based on the calculated market share (VCL, Articles 3.5-6, 9.2), specialised laws base the threshold level on the charter capital of related parties (Decree 69, Article 4). The lack of a unified method to determine the restricted level of economic concentration has led to vague legal consequences, where it cannot be definitively stated whether the competition policy has been violated or not.

During the restructuring of the banking industry, the deals involving the nine commercial banks were completed briefly without any report of Competition Law violations. In fact, these moves in the banking industry were carried out on the order of administrative decisions, leaving out Competition Law principals.

Viettel’s acquisition of EVN Telecom

Viettel Telecommunications Group (Viettel) is a leading SOE in the telecommunications industry with capital fully owned by the State. It was established in 1989 as a military corporation trading telecommunications equipment. Several years after joining the telecom market in 2000, it quickly became one of the fastest growing telecom operators, with year-on-year revenue doubling for seven consecutive years between 2005 and 2012 (Viettel, 2013).

For the past seven years, the telecom market in Viet Nam has been dominated by Viettel and Vietnam Post and Telecommunication Group network operators, another telecommunication SOE, both of which have a total market share of over 90 percent.

In 2011, at the time of the restructuring of EVN Telecom, there were five 3G-service providers: EVN Telecom, Hanoi Telecom (HTC), Vinaphone, VMS (Mobifone), and Viettel. Amongst them, HTC shared a license to exploit the 3G-frequency band with EVN Telecom and used the 3G infrastructure of EVN Telecom. Therefore, HTC applied for the government's approval to acquire the 3G infrastructure of EVN Telecom upon the latter's liquidation. Later on, Viettel took the initiative to buy EVN Telecom in October 2011 to become the rival of HTC in the expected acquisition. Note that according to the Competition Law, economic concentrations between competitors with an aggregate market share of more than 50 percent are prohibited unless exempted under certain conditions.

Thus, HTC submitted a public letter to the VCA and the VCC, claiming that the merging of EVN Telecom with Viettel would lead to a violation of the Competition Law (Official Letter No. 585/CV-HTC 2011). The crux of the letter stated the following:

(i) Viettel already held a dominant position in the mobile market (allegedly 37% market share in the relevant market). The successful acquisition would grant it with a potential power to abuse its position (VCL, Article 13), thereby causing great harm to other competitors and customers.

(ii) The combined market shares of Viettel and EVN Telecom would exceed 50 percent in the 3G service market, which is prohibited under regulations on economic concentration under the Competition Law (VCL, Article 18). Therefore, this acquisition would contravene the Competition Law unless it was established that an exemption applied—i.e., demonstrating that EVN

> Telecom is facing bankruptcy or the acquisition would contribute to socio-economic development and technology advancement (VCL, Article 19).

Whilst the receipt of public letter was reported, no reply was received from the agencies.

On 5 December 2011, the Prime Minister signed Decision No. 2151/QD-TTg, which transferred EVN Telecom to Viettel effective from 1 January 2012.

Viet Nam Airlines' acquiring control over Jetstar Pacific Airlines

By 2007, there were four competitors in the aviation industry: Vietnam Airlines (VNA), Pacific Airlines, Air Mekong, and Vietjet Air. The market was dominant by VNA, an SOE with pure state capital and 80 percent market share. The remainder of the market was shared between Pacific Airlines (17%) and the other small competitors (3%).

Back in August 2006, Pacific Airlines had 100 percent share capital owned by the State, represented by the SCIC under the Ministry of Finance (86.49%), and Saigon Tourist (13.06%), and Tradevico (0.45%). In 2007, when Australia Qantas bought 30 percent of Pacific Airlines' total shares, the latter was renamed as Jetstar Pacific Airlines (JPA). This was a remarkable step and turning point in the aviation industry, it being the first time that a foreign investor entered the market and was expected to spice up the competition and remove the monopoly of VNA. As it chose to be a low-fare airline, JPA had become the top competitor of VNA.

However, when fuel prices started to escalate, the two parties bore the financial burden, leading to losses for both. Jetstar Pacific Airlines even had to bear the heavier brunt as it was denied fuel by the aviation fuel monopoly Vietnam Air Petrol Limited, a subsidiary of VNA. The pressure, where increasing fuel price was the most critical, led to continuous losses for JPA. Although it was never clear how bad JPA's losses were, there was some noise about SCIC's request for a transfer plan of the State's capital from SCIC to another SOE that had better expertise in operations.

By the end of 2011, Mr. Vu Duc Dam, head of Governmental Office, confirmed that JPA had planned to restructure due to continuous loss in the last years. At the time of this official announcement, it was highly unlikely that the State's shares in JPA would be transferred into the hands of VNA and lead VNA to dominate the market with a 90 percent share. Such a scenario was anticipated to violate the Competition Law, which prohibits economic concentration of over 50 percent of the combined market share. However, there were two explanations that served as exit routes for this deal to push through: (i) This is not a merger nor acquisition since the State's capital simply stemmed from a transfer of shares from SCIC to VNA—i.e., purely a change in capital representative; (ii) This transfer of ownership is still within the bounds of the law—i.e., since 'one or more of the parties participating in the economic concentration is on the verge of dissolution or bankruptcy' (VCL, Article 19).

By the end of 2012, the State's shares in JPA were officially transferred into the hands of VNA without any reported violations of the Competition Law, although it was still unclear whether the losses were severe enough to put JPA on the verge of dissolution or bankruptcy.

The merger between Banknetvn and Smartlink

In 2014, there were only two companies providing financial switching services in Viet Nam, namely, Smartlink Card Services JSC (Smartlink) and Vietnam National Financial Switching JSC (Banknetvn). The two companies are the result of a joint venture amongst commercial banks operating in Viet Nam to provide electronic payment services for bank, payment cards and other related services. It is worth noting that the State Bank of Vietnam (SBV) became a major shareholder of Banknetvn in March 2010. Since these companies are exclusive providers for banks in Viet Nam, their merger would result in a monopoly in financial switching services. As such, the initial proposal of merging Smartlink with Banknetvn in 2012 was considered controversial, despite the SBV's endorsement (Thuy, 2012)

The main concern was that the monopolistic status of Banknetvn would effectively eliminate competitions in the market and relieve the banks of the pressure to innovate. Furthermore, the monopoly could give existing bank members some commercial advantage over those that have yet to join the system. In response to this concern, a Banknetvn representative assured the public that after the merger, Banknetvn would have various business plans to serve the nation and consumer interests (Vietnamnews, 2014). According to Banknetvn, benefits of the merger include:

- developing infrastructure for retail banking and non-cash payments in Viet Nam;
- providing better services to customers without interfering with the banking services; and
- developing the national chip card standard set copyrighted by Viet Nam, which is also compatible with international standards.

As the combined market share of participating parties exceeded 50 percent, an exemption is required for this merger. Upon a lengthy process of preparation, the application for exemption was finally submitted to the VCA in July 2014. Under Decision 2327, the exemption was for an initial term of five years, which will be automatically renewed every five years subject to the monopoly's compliance with certain conditions.

As the first economic concentration exemption issued under the VCL provision, Decision 2327 presents a positive sign on the enforcement of the Competition Law regime in Viet Nam. With Decision 2327, more compliance with the law is expected, particularly in the public sector.

On the other hand, despite its positive outlook, Decision 2327 missed the chance to clear the murky exemption rules under the VCL. The decision failed to present the authorities' viewpoint on the economic benefits and potential anti-competitive effects of the merger. In particular, the decision did not provide any rationale for exemption (e.g., factors that would justify how the merger can contribute to the nation's socio-economic development or technology advancement). Likewise, since possible anticompetitive effects of the merger was not discussed in Decision 2327, it is hard to say whether or not the conditions listed in the decision are adequate or even necessary to ensure that the merger would not cause any harm to consumers. Finally, Decision 2327 did not devise a sound mechanism to monitor and control the post-merger company's compliance with the exemption condition. This brings doubt on the enforceability of the decision because such a monitor-and-control mechanism is not available in the VCL. Indeed, this concern appears to be real as, within only a few months after the merger, there are complaints about increase of ATM charges (Dung, 2015).

Given that no cost–benefit analysis was done for Decision 2327, the implication of the decision is unclear for future cases of requests for similar exemptions. In addition, it may create potential discrimination in future cases since Viet Nam does not accept precedents.

The aforementioned case studies prove that the current VCL's ability to apply its provisions and conditions against SOEs is weak. Whilst the Competition Law has had some success in certain areas such as protection against abusive practices of market leaders and cartels, including SOEs,[9] the enforcement of the said law on SOEs with regard economic concentration is an obvious failure. These case studies are a perfect illustration of how industrial policies superseded competition policies, particularly since the State considers the need to accelerate structural reform as a priority over competition issues.

[9] The very first case handled by the VCC was against Vietnam Air Petrol Company for exploiting its monopolistic advantage in the supply of aircraft fuel in Vietnam, using its market dominance to refuse to supply fuel to domestic carriers. As a result, the State monopoly was imposed a fine of VND3.7 billion (approximately US$177,000). In September 2008, the VCC imposed a fine of VND1.9 billion (US$90,000) on 19 automobile insurers (many of which are SOEs) that had entered into a price-fixing agreement in late 2008.

5. Impacts of Economic Integration on the Implementation of Competition Law and Policy

The same case studies mentioned in the earlier section affirm how easy it is to pinpoint the legislative and administrative measures that the Vietnamese authorities had employed to create advantages for SOEs over their private counterparts.

Regardless of how favourable the current law is for SOEs, there are still positive changes made in favour of private sector enterprises, especially small and medium ones, in recent years. These changes were mainly driven by external factors following the government's bid to participate in the global economic integration in recent years.

The State has gradually removed trade protection measures when Viet Nam joined regional and bilateral trade agreements since the mid-1990s. Then in 2007, the government made its strongest bid to build a market economy with socialist orientation by becoming a WTO member. As a WTO official member, Viet Nam made tariff concessions in exchange for looser tax and import quotas from other members. The general WTO framework for trade on goods and services calls for the dismantling of trade protection barring competition policy. Therefore, joining WTO also means Viet Nam has to open its market and accept a fair competitive environment between domestic and foreign market players. In addition, it must commit to abolish subsidies to SOEs. As such, it was hoped that the trade liberalisation (especially WTO accession) would serve as external pressure for Viet Nam to remove the roadblock in its domestic economic reforms, particularly SOE reform.

From a legal perspective, its WTO accession requires Viet Nam to adopt WTO's fundamental values such as free trade, fair competition, and non-discrimination. For this purpose, Viet Nam has to create or amend hundreds of laws and regulations, including the Civil Code, Law on Enterprises, Law on Investment, Intellectual Property Law and the VCL. These legal changes arising from the WTO accession in 2007 may not be perceived as turning points but rather a step in the right direction. They are crucial in creating a legal foundation for the principles of a market economy to be recognised and implemented.

As discussed in Section 2.1 above, the reform of SOEs, although rather slow, began with their privatisation thereby giving room for the private sector to bloom. The discrimination between SOEs and privately owned enterprises was gradually removed when the Law on the State-owned Enterprises was abolished.

Another important step that gradually restrained the role of SOEs—giving way for a more dynamic and efficient private sector—was the amendment of the Constitution. Whilst it asserts that the state economy plays the main role in a market economy with socialist orientation, the 2013 Constitution affirms that all economic subjects are equal in cooperation and competition under the law (the Amended Constitution 2013, Article 51.1). It also indicates that the next direction in lawmaking and execution would assure the equality of SOEs and private enterprises.

However, as showed in Section 2.2, external economic commitments do not necessarily remove SOEs away from State-sanctioned competitive advantages nor transform them into more credible government disciplines. On the contrary, some believe that the creation of SEGs has significantly undermined the WTO's potential positive impacts on SOE reforms (Vu, 2014).

Accordingly, Viet Nam's participation in the ongoing Trans-Pacific Partnership (TPP) negotiations is a welcome development although it is still unsure whether it can be a catalyst for SOE reform (Vu, 2014). Although there is limited information about the TPP's content, what is known is that the TPP requires a high degree of market transparency and openness.

> The competition text will promote a competitive business environment, protect consumers, and ensure a level playing field for TPP companies. Negotiators have made significant progress on the text, which includes commitments on 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. (Office of the United States Trade Representative, 2011)

This involvement proves Viet Nam's determination to further integrate into the global economy. Whilst foreign investment started to come in after Viet Nam became a WTO member, its involvement in TPP is expected to draw in more investors.

Since the TPP strictly discourages discriminatory treatment between enterprises, the existing market advantages held by SOEs appear to be one of the biggest roadblocks in the TPP negotiations. Such impasse may be difficult to address due to the high degree of State intervention in the SOE sector (Global Policy Forum, 2013).

Therefore, to maximise its opportunities from joining TPP, the country has to either figure out how to enhance SOEs' competitive capacity by exposing them to competitive pressure, or continue to interfere in the market through administrative decisions. Furthermore, Viet Nam's regulatory system on competition is weaker than that of other TPP parties, and strengthening the effectiveness and enforceability of competition regime is a challenging task.

Moreover, the national economy has been highly protected by and closely connected with the government for years than any other TPP country. Therefore, it will be a challenge for Viet Nam to widen its room for foreign investment, especially in telecommunication and financial service sectors. Such will obviously test its public policy, especially in term of competition.

In all these, commitments to external economic factors such as the WTO and perhaps TPP can be a catalyst for SOE reforms but their impact would be limited without (internal) political commitment to such market reform.

6. Recommendations

Viet Nam is in the process of transitioning to a market economy, whereby the roles of SOEs are gradually reduced with the emergence of dynamic and efficient private sector enterprises. However, SOEs will continue to play a critical role in the future of the economy. The recently amended 2013 Constitution has foreshadowed that state-owned sectors would continue to dominate the economy and SOEs will be the mainstay of public ownership in the marketplace to ensure the socialist orientation of the national economy.

Accordingly, the two biggest challenges that Viet Nam's competition authorities must overcome are political interference in the name of 'state economic management' and potential conflicts between competition policies and industrial policies during the direct control of larger SOEs. In this context, neutralising the advantages of SOEs is critical to enhancing the effectiveness of the SOE sector as well as the efficient use of public resources. The process may be accelerated once Viet Nam realises its obligations to international and regional treaties as well as stand by its commitment to support market reforms and trade liberalisation. It is also critical to recognise the prospect that the private sector enterprises can replace the leading role of the SOE sector in domestic markets.

To create a level playing field between its SOEs and privately owned enterprises, Viet Nam should adopt the following measures:

Boost the political commitments to market reforms through international treaties such as WTO and TPP. Conventional competition policies and laws are based on the assumption of a free market with appropriate supporting institutions that are so imperative that if absent, the law of supply and demand cannot fully function. Therefore, Viet Nam needs both the necessary market conditions and supporting institutions to fully enforce competition law regimes.

On one hand, the business rivalry condition, which is essential for a market-oriented economy, can be achieved by gradually reducing and eventually abolishing the preferential treatments given to SOEs and welcoming the competition policy and culture. This should be in parallel with measures to eliminate the barriers to entry and exit so as to provide more room for privately owned enterprises to develop, thereby reducing the impact of SOEs.

On the other hand, competition advocacy and capacity building are important to help create the necessary institutional foundations, including a workable competitive neutrality policy, for the market economy to properly function. The more consumers, businesses and authorities are aware of the concept of Competition Law, the greater the support competition authorities will receive. To increase the likelihood of success, proactively advocating the sound application of the law ought to come from both inside and outside the government.

The VCL was enacted as a result of pressure on the country to join the WTO. Although there remain unresolved issues in relation to enforcing non-discriminatory policies between SOEs and private sector enterprises, the law successfully covers SOEs under the scope of its regulations despite opposition from conservative representatives. This should be regarded as the first critical milestone to gradually neutralise the advantages of SEOs in Viet Nam. Perhaps, further neutralising measures would be achieved during the TPP negotiations and implementation.

Delineate the boundaries between the Competition Law and other administrative regulations. It is critical to clarify what areas of the concept of 'State monopoly sectors' are excluded from the scope of the VCL's regulation. As discussed, SOEs usually take advantage of regulatory loopholes, which would otherwise violate the VCL, and justify their conduct by asserting that they are abiding by administrative orders. Therefore, a clear and concise definition of 'State monopoly sectors' will delineate the boundary between Competition Law and other administrative regulations.

In the beginning, the scope of State monopoly sectors may be wide enough to cover strategic industries, but will gradually be limited to those pursuing non-profit making activities such as providing public goods or services. The principles supporting competitive neutrality policy should be adopted for all SOEs outside the scope of State monopoly sectors, and the competition authorities must be given absolute discretion to enforce the law against these enterprises (i.e., free from any ministerial interference).

In addition, State intervention, where necessary, should be clearly identified in terms of its extent and level. This can be compromised by expressly excluding certain key sectors that require aggressive state economic management for structural reform, such as banking or telecommunication. Except for these sectors, State intervention is not allowed in any form and the list of excluded sectors shall be subject to periodic reviews.

Create an effective complaints mechanism against industrial policies that are in conflict with competition policies. A complaints mechanism that allows interested parties to challenge government policies heavily in favour of SOEs should be carried out either through independent arbitration or advocacy. Currently, complaints against the government's decisions are carried out through administrative proceedings in courts. However, this often takes time and decisions are ineffective as courts rarely rule against the authorities' decisions unless manifestly wrong. Thus, between the two options proposed here—i.e., independent arbitration or advocacy—the latter appears to be more effective given the weakness of Viet Nam's enforcement system.

Enhance competition authorities' independence. The competition authorities can play a dynamic role in streamlining the process of adopting a competitive neutrality policy. Such a policy can never be achieved unless the competition authorities are powerful enough to, on one hand, advocate the policy and, on the other hand, take on large incumbent market players, especially big SOEs. Independence from political pressure is the only way competition authorities can take on these SOEs. Specifically, the VCA and the VCC thus need to be granted independent status from the government or, at least, equal status with other ministries. It is also necessary to remove institutional constraints that limit the authority of the VCA. For example, the VCA should be granted the power to enact guidelines and define exemptions, as well as be responsible for post-decision enforcement. The VCL should be effective enough to cease to protect SOEs from their private rivals.

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