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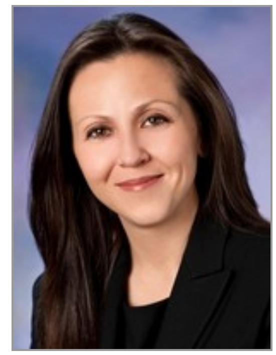
Phone: +1 646 783 7100 | Fax: +1 646 783 7161 | customerservice@law360.com

Problems In Proposed Changes To Vietnam's Competition Law

By **Koren Wong-Ervin, Global Antitrust Institute at George Mason University's Scalia Law School**


Koren Wong-Ervin

Law360, New York (May 10, 2017, 12:21 PM EDT) -- The Vietnam Competition Authority (VCA) is currently working on proposed amendments to the Competition Law of the Socialist Republic of Vietnam, which illustrate the need for economically sound effects-based competition analysis. Among the troubling provisions in the current draft is Chapter IV, Articles 18-20 on abuse of dominance, which would create a presumption of dominance for entities with market shares of 30 percent or more; create competition liability for collective dominance; and treat refusals to license as presumptively unlawful and a number of vertical restraints, including predatory pricing, exclusive dealing, tying, and minimum resale price maintenance, as essentially per se unlawful. Such an approach is contrary to the teachings from modern economics and likely to generate many Type I (false positive) errors, which, as the U.S. Supreme Court has explained, "are especially costly, because they chill the very conduct the antitrust laws are designed to protect."[1]

As the Global Antitrust Institute (GAI) at Scalia Law School at George Mason University explained in our recent comment to the VCA, modern economics counsels against presuming competitive harm. Indeed, economic theory, empirical evidence, and experience teach that vertical restraints (which include vertical territorial restrictions, resale price maintenance, exclusive dealing, loyalty discounts, tying, and other related business practices) rarely harm competition and often benefit consumers by reducing costs, aligning manufacturer and distributor incentives by decreasing free-riding, lowering price, increasing demand by inducing greater supply of promotional services, or creating a more efficient distribution channel.[2] As the Federal Trade Commission's former director of the Bureau of Economics explained when summarizing the body of economic evidence analyzing vertical restraints, "it appears that when manufacturers choose to impose [vertical] restraints, not only do they make themselves better off but they also typically allow consumers to benefit from higher quality products and better service provision."[3]

Dominant Market Position

The GAI strongly urged that Article 18(1), which sets out market shares above which a dominant market position would be presumed, be omitted in its entirety. Instead, we recommended that Article 18 (1) state that an entity will be found to have a dominant market position only if it is able profitably to maintain market prices above or market output below competitive levels for a significant period of time.

Presumptions based upon market shares discourage more rigorous effects-based economic analyses of the restraint at issue in favor of relying upon easier to apply but less accurate forms of analysis. Indeed, there is very little empirical basis to presume any systematic relationship between concentration and market power.[4] While older studies provided some empirical support for the market concentration doctrine, newer studies have not. Instead, “correlations between market concentration and various measures of market power turn out to be less persistent and considerably weaker or even nonexistent than in the earlier work.”[5] In other words, market structure, as presently defined by reference primarily to market shares and ease of entry, provides at best a very crude signal of the likely impact a merger or single-firm conduct will have upon future competition.

Further, the experience in the United States counsels that a market share of 30 percent is too low to provide a firm with market power, and that even when a firm has a high market share (e.g., above 60 or 70 percent), whether the firm has a dominant market position is a fact-specific issue that must be analyzed on a case-by-case basis. Such an analysis includes an examination of barriers to entry, the likelihood of leapfrog competition, and the durability of high market shares, to determine whether the firm actually has the power profitably to maintain prices above or output below competitive levels for a significant period of time.

The GAI also highly recommended that Article 18(2), which provides for presumptions concerning collective dominance, be omitted in its entirety. These presumptions may harm rather than promote competition. For example, treating the second and third largest firms in a market as dominant is likely to deter them from competing aggressively against the market leader, which is likely to harm competition given that they are often in the best position to compete most effectively against the market leader.

Prohibited Acts by Dominant Firms

Article 20 of the proposed amendments sets forth prohibited acts for dominant firms, imposing either a per se unlawful or presumptively unlawful approach. The GAI strongly urged the VCA to eliminate all presumptions of illegality and instead adopt an effects-based approach in which conduct is condemned only when any anti-competitive harm they cause outweighs any pro-competitive benefits they create.

The default method of evaluating antitrust-relevant conduct is the rule of reason, which involves costly, comprehensive weighing of any pro- and anti-competitive effects of the challenged conduct. Truncated analysis such as presumptions of illegality, by way of comparison, harnesses decision theory to develop shorthand analytical tools based upon judicial and market experience with the restraint at issue, as well as accumulated economic knowledge to identify conduct that is likely to harm competition.[6] Truncated analysis is appropriate when it, rather than the full-blown or unstructured rule of reason, minimizes the sum of the error costs and the administrative costs of adjudicating antitrust claims. The benefit of truncation is that it economizes on existing judicial and economic knowledge to produce more efficient legal rules. In short, truncated analysis is at its core intended to be an easily administrable, effects-based application of the rule of reason.[7] As the Supreme Court has recognized, the “abandonment of the ‘rule of reason’ in favor of presumptive rules (or a ‘quick-look’ approach) is appropriate only where ‘an observer with even a rudimentary understanding of economics could conclude that the arrangements in question would have an anticompetitive effect on customers and markets.’”[8] None of the conduct prohibited by Article 20 satisfies this criteria.

Conclusion

The VCA should be commended for seeking comments on its proposed amendments to Vietnam’s Competition Law. Adoption of recommendations such as those from the GAI would go a long way toward rectifying the troubling use of market share screens and truncated antitrust analysis and bringing Vietnam in line with mainstream effects-based competition analysis.

Koren W. Wong-Ervin is the director of the Global Antitrust Institute at George Mason University's Scalia Law School, an adjunct professor at Scalia Law, and former counsel for intellectual property

and international antitrust at the Federal Trade Commission.

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[1] Verizon Commc'ns Inc. v. Law Offices of Curtis V. Trinko, LLP, 540 U.S. 398, 414 (2004) (internal quotation marks omitted).

[2] Comment of the Global Antitrust Institute, Antonin Scalia Law School, George Mason University, on the Proposed Amendments to the Competition Law of the Socialist Republic of Vietnam at 1-2 (May 7, 2017), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2964476 (citing James C. Cooper et al., Vertical Antitrust Policy as a Problem of Inference, 23 Int'l J. Indus. Org. 639, 642, 658 (2005) (surveying the empirical literature, concluding that although "some studies find evidence consistent with both pro- and anticompetitive effects . . . virtually no studies can claim to have identified instances where vertical practices were likely to have harmed competition," and, "in most of the empirical studies reviewed, vertical practices are found to have significant pro-competitive effects"); Benjamin Klein, Competitive Resale Price Maintenance in the Absence of Free-Riding, 76 Antitrust L.J. 431 (2009); Bruce H. Kobayashi, Does Economics Provide a Reliable Guide to Regulating Commodity Bundling by Firms? A Survey of the Economic Literature, 1 J. Comp. L. & Econ. 707 (2005); Daniel P. O'Brien, The Antitrust Treatment of Vertical Restraints: Beyond the Possibility Theorems, in The Pros and Cons of Vertical Restraints 40, 72–76 (2008) ("[W]ith few exceptions, the literature does not support the view that [vertical restraints] are used for anticompetitive reasons" and "[vertical restraints] are unlikely to be anti-competitive in most cases.")).

[3] Francine Lafontaine & Margaret Slade, Exclusive Contracts and Vertical Restraints: Empirical Evidence and Public Policy, in Handbook of Antitrust Economics 391 (Paolo Buccirossi ed., 2008).

[4] See, e.g., Harold Demsetz, The Market Concentration Doctrine: An Examination of Evidence and a Discussion of Policy, AEI-Hoover Policy Study at 7 (Aug. 1973).

[5] Id. at 1.

[6] Joshua D. Wright, Comm'r, Fed. Trade Comm'n, Intellectual Property Rights, Truncation, and Actavis: Who's Afraid of the Rule of Reason?, Remarks at the Global Competition Review Live 2nd Annual IP & Antitrust USA 2-3 (Apr. 14, 2015), https://www.ftc.gov/system/files/documents/public_statements/636901/150414gcr-ip-antitrust.pdf.

[7] Andrew I. Gavil et al., Antitrust Law in Perspective: Cases, Concepts and Problems in Competition Policy 185–87 (2d ed. 2008); Timothy J. Muris & Brady P.P. Cummins, Tools of Reason: Truncation Through Judicial Experience and Economic Learning, Antitrust, Summer 2014, at 46, 46–47, 50.

[8] FTC v. Actavis, 133 S. Ct. 2223, 2237 (2013) (quoting Cal. Dental Ass'n v. FTC, 526 U.S. 756, 770 (1999)).
