CARTEL REGULATION

Vietnam

LEXOLOGY
Getting The Deal Through

Consulting editor
McMillan LLP

Cartel Regulation

Consulting editors

Dr. A. Neil Campbell

McMillan LLP

Quick reference guide enabling side-by-side comparison of local insights, including relevant law and institutions; application of the law and jurisdictional reach; international cooperation; specifics of investigations and cartel proceedings; criminal, civil and administrative sanctions; private damage claims and class actions; treatment of cooperating parties; defending a case; getting any fine down; and recent trends.

Generated 03 December 2021

The information contained in this report is indicative only. Law Business Research is not responsible for any actions (or lack thereof) taken as a result of relying on or in any way using information contained in this report and in no event shall be liable for any damages resulting from reliance on or use of this information. © Copyright 2006 - 2021 Law Business Research

Table of contents

LEGISLATION AND INSTITUTIONS

Relevant legislation

Relevant institutions

Changes

Substantive law

Joint ventures and strategic alliances

APPLICATION OF THE LAW AND JURISDICTIONAL REACH

Application of the law

Extraterritoriality

Export cartels

Industry-specific provisions

Government-approved conduct

INVESTIGATIONS

Steps in an investigation

Investigative powers of the authorities

INTERNATIONAL COOPERATION

Inter-agency cooperation

Interplay between jurisdictions

CARTEL PROCEEDINGS

Decisions

Burden of proof

Circumstantial evidence

Appeal process

SANCTIONS

Criminal sanctions

Civil and administrative sanctions

Guidelines for sanction levels

Compliance programmes

Director disqualification

Debarment

© Copyright 2006 - 2021 Law Business Research

Parallel proceedings

PRIVATE RIGHTS OF ACTION

Private damage claims

Class actions

COOPERATING PARTIES

Immunity

Subsequent cooperating parties

Going in second

Approaching the authorities

Cooperation

Confidentiality

Settlements

Corporate defendant and employees

Dealing with the enforcement agency

DEFENDING A CASE

Disclosure

Representing employees

Multiple corporate defendants

Payment of penalties and legal costs

Taxes

International double jeopardy

Getting the fine down

UPDATE AND TRENDS

Recent cases

Regime reviews and modifications

© Copyright 2006 - 2021 Law Business Research

Contributors

Vietnam

Nguyen Anh Tuan
tuan.nguyen@lntpartners.com
LNT & Partners

Tran Hai Thinh
thinh.tran@lntpartners.com
LNT & Partners

Tran Hoang My
my.tran@lntpartners.com
LNT & Partners

© Copyright 2006 - 2021 Law Business Research

LEGISLATION AND INSTITUTIONS

Relevant legislation

What is the relevant legislation?

The Competition Law 2018, which came into force on 1 July 2019, is the primary legislation regulating cartel activities in Vietnam. A number of provisions of the legislation are guided by Decree 35/2020/ND–CP (the Guiding Decree), which provides for, among other matters, guidance on the substantial lessening of competition test (including safe harbours) and the competition proceedings.

Competition-related provisions and industry-specific infringements and exemptions can also be found in specialised instruments such as the Insurance Business Law 2000, the Telecommunications Law 2009 and the Law on Credit Institutions 2010.

The Penal Code 2015 (as amended) is the sole legislation governing criminal cartel offences.

Law stated - 07 October 2021

Relevant institutions

Which authority investigates cartel matters? Is there a separate prosecution authority? Are cartel matters adjudicated or determined by the enforcement agency, a separate tribunal or the courts?

The National Competition Commission (NCC) is Vietnam's principal competition watchdog. Under the purview of the Ministry of Industry and Trade, the NCC amalgamates the investigative and adjudicative functions formerly discharged by the Vietnam Competition and Consumer Authority (VCCA) and Vietnam Competition Council respectively. The NCC is in charge of administrative competition violations.

Criminal competition violations are investigated by the police, prosecuted by the procuracy (ie, public prosecutors) and adjudicated by the courts. There is no separate investigative body, tribunal or court dealing with criminal competition violations.

Law stated - 07 October 2021

Changes

Have there been any recent changes, or proposals for change, to the regime?

The most significant change to date is the Competition Law 2018, which introduces, among other things, a shift in regulatory approach from form-based to effect-based (ie, cartel violation is now assessed on the basis of its impact on competition rather than whether it falls within a statutorily prescribed list of prohibited conducts), a leniency policy, the NCC and a new merger control regime.

A decree providing for the formal establishment of the NCC is expected to promulgate later in 2021, although the exact date has not been publicly disclosed.

The Penal Code 2015 (as amended), which came into force on 1 January 2018, is another noteworthy development because for the first time it criminalises certain cartels and imposes criminal liabilities on commercial entities.

Law stated - 07 October 2021

© Copyright 2006 - 2021 Law Business Research

Substantive law

What is the substantive law on cartels in the jurisdiction?

The Competition Law 2018 provides for a non-exhaustive list of restrictive agreements, some of which are illegal per se and some subject to the substantial lessening of competition test (articles 11 and 12 respectively).

Accordingly, the following behaviour is strictly prohibited among horizontal and vertical cartels:

- bid rigging;
- restriction of non-cartel participants' market access or business development; and
- removal of non-cartel participants from the market.

The following behaviour is strictly prohibited among horizontal cartels and conditionally prohibited (ie, are only prohibited if they actually or potentially restrict competition) among vertical cartels:

- price fixing;
- allocating market share or customers; and
- restricting output.

The following behaviour is conditionally prohibited among horizontal and vertical cartels:

- restrictions on research and development;
- agreements to impose certain contractual conditions on other businesses or forcing other businesses to accept obligations not directly related to the subject matter of the contract;
- agreements on refusal to deal;
- agreements to limit the upstream or downstream markets; and
- other restrictive agreements.

'Restrictive agreement' is defined as an agreement in any form which has or is capable of having a competition-restraining effect. As such, informal exchanges such as instant messages or verbal conversations can also be considered an agreement. Furthermore, information exchange is also forbidden if it enables undertakings to engage in anticompetitive conducts. The NCC may in practice rely on such form of agreement and other circumstantial evidence to ascertain a cartel violation.

As for conditionally prohibited cartels, the NCC will assess whether they cause or are capable of causing a significant competition-restraining impact on the basis of the factors stipulated in article 13.1 of the Competition Law 2018 and elaborated in article 11.2 of the Guiding Decree, namely:

- the individual and combined market share of the cartel participants;
- market barriers;
- restrictive impact on R&D or technological advance;
- impact on access to essential infrastructure;
- any increase in purchase price or switching costs; and
- any control over sector-specific essentials.

© Copyright 2006 - 2021 Law Business Research

Article 11.3 of the Guiding Decree provides for safe harbours on the basis of the market share of the involved undertakings. Accordingly, conditionally prohibited horizontal cartels will not be deemed to have an actual or potential competition-restraining impact if the combined market share of the participants is less than 5 per cent. For vertical cartels, the threshold is if the individual market share of each cartel participant is less than 15 per cent.

The Competition Law 2018 also provides for exemptions in certain cases. In particular, except for bid rigging and the restrictive agreements on the removal of non-participants from the market or on the restriction of non-participants' market access or business development, illegal cartels are eligible for exemption for a maximum of five years if they are beneficial to consumers and satisfy one of the conditions provided in article 14.1 of the Competition Law 2018.

Furthermore, as from 1 January 2018, under article 217 of the Penal Code 2015, the following cartels are criminally prosecutable if they generate an illegal gain of at least 500 million Vietnamese dong or cause another undertaking a loss of at least 1 billion dong:

- restriction of non-participants' market access or business development;
- removal of non-participants from the market; and
- the following horizontal cartels where the parties' combined market share totals at least 30 per cent:
  - price fixing;
  - allocation of market or customers;
  - output restriction;
  - R&D restriction;
  - agreements to impose certain contractual conditions on other businesses; or
  - forcing other businesses to accept obligations not directly related to the subject matter of the contract.

Bid rigging is prosecutable under a separate provision (article 222 of Penal Code 2015) and only individuals can be held criminally liable.

Law stated - 07 October 2021

Joint ventures and strategic alliances

To what extent are joint ventures and strategic alliances potentially subject to the cartel laws?

Restrictive agreements are broadly defined and include an agreement of any kind that has an actual or potential substantial competition-lessening impact. As such, joint ventures and strategic alliances may be caught by the Vietnamese cartel regime.

However, it is noteworthy that under Vietnamese competition law a joint venture that results in the creation of a new independent legal entity is deemed an economic concentration and thus will not be subject to cartel laws.

Law stated - 07 October 2021

APPLICATION OF THE LAW AND JURISDICTIONAL REACH

Application of the law

Does the law apply to individuals, corporations and other entities?

The Competition Law 2018 applies to 'undertakings', which is defined as organisations and sole proprietorships conducting business activities, and include, among other things, public service companies and foreign businesses operating in Vietnam. When a person acting on behalf, at the direction or with the approval of a corporate commits an

© Copyright 2006 - 2021 Law Business Research

offence, only the corporate is held liable for administrative sanctions. For criminal sanctions, both individuals and corporates are independently criminally prosecutable.

Law stated - 07 October 2021

Extraterritoriality

Does the regime apply to conduct that takes place outside the jurisdiction (including indirect sales into the jurisdiction)? If so, on what jurisdictional basis?

Article 1 of the Competition Law 2018 widens the scope of governance. Accordingly, anticompetitive conduct outside of Vietnam will be caught if such conduct has an actual or potential competition-restraining impact on the domestic market. This is so irrespective of whether the foreign entity has a presence in Vietnam.

Law stated - 07 October 2021

Export cartels

Is there an exemption or defence for conduct that only affects customers or other parties outside the jurisdiction?

Export cartels that only affect foreign markets are not subject to the Competition Law 2018 because the legislation only applies to cartels that cause or are capable of causing a restrictive impact on the Vietnamese market.

Law stated - 07 October 2021

Industry-specific provisions

Are there any industry-specific infringements? Are there any industry-specific defences or exemptions?

Several industry-specific legislations, mainly in the banking and insurance sectors, do provide for industry-specific infringements and exemptions. Article 14.2 of the Competition Law 2018 also recognises that industry-specific agreements are to be conducted in accordance with the relevant industry-specific legislation.

In particular, article 9.2 of the Law on Credit Institutions 2010 (as amended) prohibits anticompetitive conducts that are actually or potentially harmful to national monetary policies, the safety of the credit institution system, national interests or the lawful rights and interests of others. Horizontal and vertical cartels on market division and foreclosure are illegal per se under article 10.4 of the Insurance Business Law 2000 (as amended). Article 10.1 of the same, however, provides for exemptions for insurers and insurance brokers with respect to, among other things, reinsurance, co-insurance, loss assessment and information exchange for risk management.

Law stated - 07 October 2021

Government-approved conduct

Is there a defence or exemption for state actions, government-approved activity or regulated conduct?

According to article 8.1(a) of the Competition Law 2018, government-sanctioned or government-mandated actions are exempted from cartel regulation in declared states of emergency. It follows that during a declared emergency crisis

© Copyright 2006 - 2021 Law Business Research

cartels are permitted if approved by, or formed at the request of, the competent authority.

Law stated - 07 October 2021

INVESTIGATIONS

Steps in an investigation

What are the typical steps in an investigation?

A National Competition Commission (NCC) investigation can be initiated by whistle-blowers (via the leniency programme), formal complaints from aggrieved parties, or information from third parties on the potential existence of a restrictive agreement.

In the event that a party lodges a formal complaint, the NCC has seven working days from receipt of the complaint to assess its validity and completeness before notifying the complainant and defendant. Then within 15 calendar days of such notification, the NCC will assess the substantive content of the complaint to either formally launch an investigation or request the complainant to supplement further information.

Alternatively, the NCC can at its own initiative commence a competition probe within three years of the date on which the alleged cartel activity started if there are probable grounds to believe a cartel violation has been committed.

The time limit for investigation is nine months for a typical cartel and one year for a complex case. During the course of the investigation, if there are indications of a criminal offence then the NCC shall transfer the file to the competent authorities.

Law stated - 07 October 2021

Investigative powers of the authorities

What investigative powers do the authorities have? Is court approval required to invoke these powers?

The NCC is empowered to request information on the violation from relevant parties, collect information and conduct 'investigative measures' via its subordinate the Competition Investigation Agency, and request other competent authorities to temporarily seize evidence, facilities used to commit the violation, licences or practising certificates, search vehicles, objects or premises.

Neither the Competition Law 2018 nor the Guiding Decree elaborates on the meaning of 'investigative measures'. It is also understood that the Competition Investigation Agency may also cooperate with other competent authorities to conduct a dawn raid on suspected undertakings, although in practice the agency has never done so. Note that court orders are not required to invoke these investigative actions and interim measures.

Law stated - 07 October 2021

INTERNATIONAL COOPERATION

Inter-agency cooperation

Is there cooperation with authorities in other jurisdictions? If so, what is the legal basis for, and extent of, such cooperation?

The Vietnam Competition and Consumer Authority (VCCA) has engaged in various multilateral and bilateral cooperation programmes with international organisations and national competition watchdogs, ranging from

© Copyright 2006 - 2021 Law Business Research

International Competition Network, UNCTAD, to OECD and Japan Fair Trade Commission. For the time being, these programmes mainly focus on competition policy-making and enforcement experience.

Given the Competition Law 2018's widened scope of application to cover extraterritorial conduct, the National Competition Commission (NCC) is expected to continue and reinforce cooperation on areas such as consultation and information exchange with its overseas counterparts to detect, investigate and prosecute any potential cross-border infringements.

Most recently, VCCA officials attended the virtual 16th East Asia Top Level Officials' Meeting on Competition Policy and 13th East Asia Conference on Competition Law and Policy in September 2021.

In 2020, the VCCA also chaired the ASEAN Experts Group on Competition and coordinated with overseas agencies and organisations, such as the Japan Fair Trade Commission, German Corporation for International Cooperation GmbH, the Australian Embassy and the Australian Competition and Consumers Commission (ACCC), in various projects aimed at enhancing antitrust enforcement and promoting consumer welfare.

Law stated - 07 October 2021

Interplay between jurisdictions

Which jurisdictions have significant interplay with your jurisdiction in cross-border cases? If so, how does this affect the investigation, prosecution and penalising of cartel activity in cross-border cases in your jurisdiction?

The authors have not observed any significant interplay with other jurisdictions in cross-border cases to date. Whether and to what extent interplay between jurisdictions affects the investigation remain to be seen.

Law stated - 07 October 2021

CARTEL PROCEEDINGS

Decisions

How is a cartel proceeding adjudicated or determined?

Once the investigation is concluded, the National Competition Commission (NCC) chairperson must establish a council comprising of NCC members to decide on the case. The council may request the investigating body (ie, the Competition Investigation Agency) to conduct additional investigation for a maximum of 60 calendar days if the evidence is found insufficient to ascertain a cartel violation, or hold an investigative hearing if there is sufficient evidence; the hearing must be conducted in public unless the case involves sensitive matters such as state secrets or trade secrets. Within 60 calendar days of its establishment or receipt of the investigative report and conclusions on additional investigation, the council must decide whether to impose sanctions on and, where necessary, apply remedies to the parties concerned. This decision will be published on the NCC's website for 90 consecutive days from its effective date.

Law stated - 07 October 2021

Burden of proof

Which party has the burden of proof? What is the level of proof required?

The burden of proof lies with the NCC in administrative cases, or public prosecutors if the case is criminally

© Copyright 2006 - 2021 Law Business Research

prosecuted. If the offence is established, the onus will shift to the defendant to form a defence. The burden also falls on the undertaking seeking exemption under article 14 of the Competition Law 2018 to satisfy the provision.

Where the NCC has issued a decision on a competition case, the aggrieved party seeking to claim damages must establish that they in fact incurred a loss or damage and such loss or damage was caused by the illegal cartel activity. In the absence of such decision by the NCC, in addition to proving losses and causation, the claimant must also prove that the defendant engaged in an illegal cartel activity.

In respect of civil enforcement, the standard of proof is essentially the balance of probabilities. In a criminal case, the standard of proof is more onerous, and the evidence must satisfy the definition provided in article 86 of the Criminal Code Procedure 2015. Vietnam's criminal justice system however does not have any equivalence to the 'beyond reasonable doubt' standard.

Law stated - 07 October 2021

Circumstantial evidence

Can an infringement be established by using circumstantial evidence without direct evidence of the actual agreement?

Given that direct evidence is not always available, especially when it comes to cartel activities, circumstantial evidence is usually acceptable to initiate an investigation into complaints by aggrieved parties or whistle-blowers. However, circumstantial evidence alone may not be sufficient to establish an offence in a criminal proceeding or to conclude that there exists an anticompetitive agreement prohibited by laws.

Law stated - 07 October 2021

Appeal process

What is the appeal process?

A party may appeal against a decision by the NCC following a two-phased process.

Administrative complaint

The first phase, the administrative complaint, unfolds as follows.

Within 30 calendar days from the date of receipt of a decision on the alleged infringement, any party dissatisfied with such decision, either in part or in whole, may lodge a complaint to the NCC's chairperson (complainant).

Within 10 calendar days of the date of receipt of such complaint, the NCC's chairperson must notify the complainant and concerned parties in writing of their decision whether to accept or refuse jurisdiction; in the event of refusal, a reason must be clearly stated.

Within five working days from the date of accepting jurisdiction, the NCC chairperson shall establish a complaint resolution council, which comprises of him or herself and the remaining NCC members who did not sit in the council adjudicating the infringement.

Within 30 calendar days for normal cases or 45 calendar days for complex cases from the date of its establishment, the council must issue a decision resolving the complaint.

Administrative litigation

© Copyright 2006 - 2021 Law Business Research

The second phase, the administrative litigation, commences when the appellant is still unsatisfied with the decision on resolution of the complaint and unfolds as follows:

Within 30 calendar days of receiving the complaint resolution decision, an unsatisfied undertaking shall file a lawsuit against a part or the whole of such decision at a competent administrative court.

Within three months (in normal cases) or four months (in complex cases) of acceptance, the court must issue the first instance judgment. The time-limit may be prolonged if the first instance stage is temporarily suspended, adjourned or otherwise delayed.

Any appeal must be made within 15 calendar days of pronouncement of the first instance decision.

Within three months (in normal cases) or five months (in complex cases) of acceptance, the court must issue the appellate judgment. Similarly, the time limit may also be prolonged due to any suspension, adjournment or delay.

Law stated - 07 October 2021

SANCTIONS

Criminal sanctions

What, if any, criminal sanctions are there for cartel activity?

With respect to criminally prosecutable cartels (except bid rigging), primary penalties vary depending on the severity of the behaviour and whether the violator is an individual (eg, executives of the undertaking participating in the illegal cartel) or corporate. Accordingly, if the cartel generates an illegal gain of more than 500 million dong and less than 3 billion dong, or causes loss to a third party in the range of 1 billion dong to less than 5 billion dong:

- individuals will be fined from 200 million to 1 billion dong, or subject to a non-custodial sentence of up to two years, or a prison sentence from three months to two years; and
- corporates will be fined from 1 billion to 3 billion dong.

If the illegal gain generated from, or loss caused by, the cartel exceeds the above thresholds, or if the cartel crosses either of the above thresholds and involves an exacerbating factor (ie, recidivism, implementing the cartel with sophisticated and elaborate means, or implementing the cartel in abuse of dominant or monopolistic position):

- individuals will be fined from 1 billion to 3 billion dong, or subject to a prison sentence from one year to five years; and
- corporates will be fined from 3 billion to 5 billion dong, or subject to suspension from six months to two years.

As a secondary sanction in combination with any of the above primary sanctions, individuals may also be fined from 50 million to 200 million dong or prohibited from holding a position or practising for one to five years. Corporates may be fined from 100 million to 500 million dong or prohibited from conducting certain business(es), or mobilising capital for one to three years.

With regard to bid rigging, an individual may be sentenced for up to 20 years and forbidden from holding a position or practising for up to five years or confiscated of part or all of their assets.

It is noteworthy that the leniency policy does not apply in case of criminal prosecution. Instead, a separate amnesty regime shall apply.

As of this writing, the authors are not aware of any criminally prosecuted cartels.

© Copyright 2006 - 2021 Law Business Research

Law stated - 07 October 2021

Civil and administrative sanctions

What civil or administrative sanctions are there for cartel activity?

The main administrative sanction is a monetary fine (except where the violator is a state agency, in which case the National Competition Commission (NCC) shall request the agency in question to cease the violation, take remedial actions and recompense).

The maximum fine is 10 per cent of the violator's total turnover in the previous year for prohibited horizontal cartels, and 5 per cent for unlawful vertical cartels. In any event, the imposed administrative fine cannot exceed the lowest level of criminal monetary fine.

In addition to fines, the NCC may impose supplementary penalties (eg, confiscation of illegal gains) on and take remedial measures (eg, removal of unlawful terms and conditions in agreements or commercial transactions) against the violators depending on the nature and severity of the breach.

The minimum fine for all types of prohibited cartels is 1 per cent of the violator's total turnover.

Given that the current cartel regulation regime is in its early stage (Decree No. 75/2019/ND–CP on dealing with competition law violations only took effect from 1 December 2019), the authors have not observed any instance where a violator was fined under the new regulations. As for the expired Competition Law 2004, there were only two cases in which several undertakings were found to have engaged in prohibited cartels. The first case, a pupil insurance cartel, resulted in no fine because all participants had prematurely terminated the price-fixing agreement, while the other, a 19-participant car insurance cartel, was fined a total (including procedural fees) of 1.8 billion dong.

Law stated - 07 October 2021

Guidelines for sanction levels

Do fining or sentencing principles or guidelines exist? If yes, are they binding on the adjudicator? If no, how are penalty levels normally established? What are the main aggravating and mitigating factors that are considered?

Decree No. 75/2019/ND–CP provides for, among other things, general principles for the calculation of administrative fines as well as comprehensive lists of aggravating and mitigating factors.

For each of the aggravating or mitigating factors, the violator shall respectively be given a fine increase or reduction of no more than 15 per cent of the average of the fine range. The fine range for illegal horizontal cartels is 1 per cent to 10 per cent of turnover, and 1 per cent to 5 per cent for prohibited vertical cartels. In principle, the authority will start at the average of the applicable range and the fine reduction or increase must not exceed the minimum or maximum level of fine.

Accordingly, a cartel participant may receive a fine reduction if they:

- prevent, mitigate or remedy inflicted damage;
- come forward and fully assist with the investigation;
- are a first-time offender; or
- commit the offence under duress.

© Copyright 2006 - 2021 Law Business Research

Factors already taken into account when applying the leniency policy are not considered mitigating factors for administrative sanction purposes.

By contrast, a cartel participant may receive a heavier administrative fine if they:

- are not a first-time offender;
- take advantage of situations of hardship (eg, war, natural disasters, pandemic) to commit the offence;
- continue the cartel despite a cessation request from the authority; or
- commit the offence on a large scale (eg, in terms of volume or value of goods).

In respect of criminally prosecutable cartels, the Penal Code 2015 (as amended) also provides for sentencing principles. As a general rule, when deciding the sentence, the court shall consider the nature and severity of the offence as well as any mitigating or aggravating factors. For individuals, the court also considers the violator's personal background and character.

Accordingly, a cartel participant may receive a more lenient criminal sanction if they:

- prevent, mitigate or remedy inflicted damage;
- did not inflict considerable damage; or
- fully assist with the detection and investigation of the crime.

In addition to the above factors, others may be taken into consideration depending on whether the violator is an individual or a corporate. In the former case, other relevant mitigating factors include that the violator committed the offence under duress, turns themselves in, expresses a cooperative attitude or contrition, or makes atonement for their violation. On the other hand, a corporate violator may receive a lighter sanction if it has made considerable contributions to social welfare.

The list of mitigating factors applicable to criminal sanctions is not exhaustive. The court has considerable leeway to decide whether to accept other factors when deciding on a sentence.

As for aggravating factors, second-time offenders or dangerous recidivists will be subject to heavier sanctions. In addition, for individuals, abusing one's power or position to carry out the prohibited cartel is also an aggravating factor.

Law stated - 07 October 2021

Compliance programmes

Are sanctions reduced if the organisation had a compliance programme in place at the time of the infringement?

The mere existence of a compliance programme will not help reduce administrative fines because it is not a factor in the exhaustive list of mitigating factors. On the other hand, with regard to criminal sanctions, the court may take such a programme into account when deciding the sentence. Considering that there has not been any instance where a competition violation has been criminally prosecuted, this matter remains untested. In any case, an effective compliance policy may prove crucial for early detection of cartel activity, thereby putting an undertaking in a favourable position in the leniency application process or strengthening the undertaking's defensive strategy should a criminal prosecution be pursued.

Law stated - 07 October 2021

© Copyright 2006 - 2021 Law Business Research

Director disqualification

Are individuals involved in cartel activity subject to orders prohibiting them from serving as corporate directors or officers?

Yes. Individuals found guilty of a criminally prosecutable cartel may, in addition to a pecuniary fine or prison sentence, also be prohibited from holding a position or practising for up to five years.

Law stated - 07 October 2021

Debarment

Is debarment from government procurement procedures automatic, available as a discretionary sanction, or not available in response to cartel infringements?

Debarment from government procurement procedures is available as a discretionary sanction in response to cartel infringements and depends on the nature and severity of the infringement. As such, the relevant decision-making authority varies.

The primary authority is the organisation or individual entitled to issue debarment decisions with respect to projects within their scope of management. The ministries, heads of ministerial-level agencies and chairpersons of provincial people's committees have the authority to, upon recommendation by such organisations or individuals, debar violators within their respective scope of management, or, in the case of the Ministry of Planning and Investment, nationwide.

The length of debarment ranges from six months to five years depending on the severity of the infringement.

Law stated - 07 October 2021

Parallel proceedings

Where possible sanctions for cartel activity include criminal and civil or administrative penalties, can they be pursued in respect of the same conduct? If not, when and how is the choice of which sanction to pursue made?

If the violation is criminally prosecutable, criminal penalties shall be pursued to the exclusion of administrative sanctions. Otherwise, if the violation does not meet the threshold for criminal prosecution, administrative sanctions shall apply.

In either case, a violator may in addition to criminal or administrative sanctions be held liable for damages pursued in a civil action.

Law stated - 07 October 2021

PRIVATE RIGHTS OF ACTION

Private damage claims

Are private damage claims available for direct and indirect purchasers? Do purchasers that acquired the affected product from non-cartel members also have the ability to bring claims based on alleged parallel increases in the prices they paid ('umbrella purchaser claims')? What level of damages and cost awards can be recovered?

© Copyright 2006 - 2021 Law Business Research

The applicable laws, specifically the Competition Law 2018 and the Law on Protection of Consumer Rights 2010 (as amended), do not differentiate between direct and indirect purchasers. Likewise, the laws are also silent on passing on and double recovery issues. As of this writing the authors are not aware of any private cartel damage claims in Vietnam. Therefore, it remains to be seen whether the courts would accept a passing on defence, whereby the defendants seek to prove that the claimants incurred no actual loss because they have passed it on to parties further down the supply chain (eg, end consumers) in the form of, for instance, price increases or reduction in discount rate.

The laws do not provide for double, treble, or any other forms of punitive or exemplary damages for that matter. On the other hand, cost awards, which include attorney's fees and other reasonable expenses for preventing and alleviating damages (eg, interim measure charges, examining service fees, etc), can be recovered. In practice, it is usually subject to the court to determine whether expenses used to prevent and alleviate damage or loss are reasonable.

Law stated - 07 October 2021

Class actions

Are class actions possible? If so, what is the process for such cases? If not, what is the scope for representative or group actions and what is the process for such cases?

Class actions for civil or commercial disputes are generally not available and often only allowed in certain limited cases such as labour or consumer protection issues.

In a consumer protection dispute, for instance, the Law on Protection of Consumer Rights 2010 (as amended) mandates that the Provincial Consumer Associations shall be in charge of filing the lawsuit either on behalf of the consumers to protect the latter's rights and interests or in their own name to protect public interests.

The Civil Procedure Code 2015 (as amended) also provides for a mechanism that arguably bears some resemblance to class action regimes. In particular, under article 42, the court may consolidate or merge similar cases (usually if they have the same defendant(s) or the same or similar legal relations) that it has already accepted into a single case for resolution provided that the merger and resolution of such cases adhere to the laws. How this mechanism works in practice, especially when there is a significant number of individual disputes, remains to be seen.

To the authors' knowledge, there has not been any competition law class action so far in Vietnam.

Law stated - 07 October 2021

COOPERATING PARTIES

Immunity

Is there an immunity programme? If so, what are the basic elements of the programme? What is the importance of being 'first in' to cooperate?

The Competition Law 2018 provides for a leniency programme, under which co-conspirators participating in a cartel may turn themselves in and assist with a National Competition Commission (NCC) investigation in exchange for either full immunity from, or a reduction of, fines for breach of competition law which the NCC would have otherwise imposed on them. This is the first time the leniency programme is introduced.

As the Competition Law 2018 regulates individuals and corporates alike, either may apply for leniency and the policy applies to all leniency seekers in the same manner.

To qualify for leniency an applicant must:

- have partaken or is currently partaking in a cartel;

© Copyright 2006 - 2021 Law Business Research

- voluntarily come forward before an investigation is launched;
- declare honestly and provide all evidence of the infringement which is significantly valuable to dismantle the cartel;
- cooperate fully with the competition authority during the investigation; and
- not be a ringleader or a coercer.

Furthermore, only three whistle-blowers are eligible for leniency, with the first entitled to full immunity, while the second and third shall receive a 60 per cent and 40 per cent fine reduction respectively.

The leniency policy is only applicable to administrative sanctions and does not extend to criminal penalties. Instead, a separate amnesty mechanism under the Penal Code 2015 (as amended) is applied (the word 'amnesty' is used when referring to the Penal Code leniency policy to avoid confusion).

Accordingly, amnesty may be available to individuals if they turn themselves in, cooperate with the investigation, inform on accomplices, and make reparation or compensation for damage inflicted; and to corporates if they actively cooperate in the uncovering or investigation of the crime, make reparation or compensation for damage inflicted, and proactively prevent or mitigate consequences.

A corporate may be exempt from criminal sanctions if it has fully remedied and compensated for all damage or loss inflicted. This exemption is, however, entirely at the court's discretion.

There is currently no official guideline on how the NCC shall implement the leniency policy. As such, many areas related to the leniency policy and the implementation thereof remain largely untested.

Law stated - 07 October 2021

Subsequent cooperating parties

Is there a formal programme providing partial leniency for parties that cooperate after an immunity application has been made? If so, what are the basic elements of the programme? If not, to what extent can subsequent cooperating parties expect to receive favourable treatment?

After the first whistle-blower has come forward, only two subsequent cartel participants are eligible for a partial fine reduction. They are subject to similar eligibility requirements as the first whistle-blower, although the NCC may apply a higher threshold in assessing the overall value to the investigation of the evidence they provide.

Given the lack of official leniency guidelines, the NCC would have significant discretion in determining whether an undertaking qualifies for leniency.

Cartel participants not eligible for leniency policy can attempt to reduce the fine level by taking advantage of the mitigating factors stipulated in Decree 75/2019/ND–CP.

Law stated - 07 October 2021

Going in second

How is the second cooperating party treated? Is there an 'immunity plus' or 'amnesty plus' treatment available? If so, how does it operate?

The first whistle-blower will be entitled to full immunity, while the second and third shall receive a 60 per cent and 40 per cent fine reduction respectively. Other than the policies mentioned above, there is no 'immunity plus' or 'amnesty plus' option, nor a 'penalty plus' regime.

© Copyright 2006 - 2021 Law Business Research

Law stated - 07 October 2021

Approaching the authorities

Are there deadlines for initiating or completing an application for immunity or partial leniency? Are markers available and what are the time limits and conditions applicable to them?

Given the limited scope of the leniency policy, applications should be filed as soon as possible before the NCC commences a cartel investigation, even if there is currently no formal marker system.

In practice, for various reasons applying for leniency is not always a viable option for undertakings. Deciding the best possible course of action would therefore require a pros-and-cons analysis and risk assessment. Factors to be considered include without limitation:

- the possibility of another member abandoning the cartel and coming forward first (ie, the 'race to the courthouse' effect); game theory is usually applied in this case;
- the risk of the competition watchdog already pursuing the conspiracy;
- the exposure of participants to antitrust probes in other jurisdictions (especially in the case of a cross-border cartel); and
- the possibility and severity of the sanctions and remedies imposed, including criminal sanctions; for this particular factor, as the leniency policy does not extend to criminal sanctions, an undertaking should consider carefully if the cartel is criminally prosecutable.

Law stated - 07 October 2021

Cooperation

What is the nature, level and timing of cooperation that is required or expected from an immunity applicant? Is there any difference in the requirements or expectations for subsequent cooperating parties that are seeking partial leniency?

The Competition Law 2018 is silent on the nature, level and timing of cooperation that is required of or expected from a leniency applicant. Although all applicants are subject to the same leniency conditions, the 'significant value' required of the provided evidence may arguably differ between the first whistle-blower and subsequent applicants. In particular, emphasis will be placed on the quality of evidence provided, that is, whether and the extent to which it can help discover, investigate, penalise and remedy the violation. Examples of evidence that may prove useful to the investigators include, for instance, a signed agreement or memorandum, an implicating email or instant message exchange between the cartel participants, or a voice recording or minutes of a discussion on competitively sensitive topics (eg, pricing scheme) between them.

Law stated - 07 October 2021

Confidentiality

What confidentiality protection is afforded to the immunity applicant? Is the same level of confidentiality protection applicable to subsequent cooperating parties? What information will become public during the proceedings and when?

The Competition Law 2018 does not have any explicit provision on the confidentiality obligation in respect of leniency

© Copyright 2006 - 2021 Law Business Research

procedure. The Law, however, mandates that if requested the NCC must keep confidential the identity of and the information provided by the informant, be it an organisation or individual. The provision may be construed to encompass all leniency applicants.

Under article 25 of the Guiding Decree, all evidence must generally be publicly disclosed, except where it contains state, trade, professional or personal secrets. The latter three will be kept confidential if legitimately requested by the participants in the competition legal proceedings. In addition, if necessary and at any stage facilitative to the cartel investigation, the NCC has the discretion to publicly disclose in whole or in part the evidence.

In light of the above, to ensure the confidentiality of commercially sensitive information, all leniency applicants should attach a written request for confidential treatment to their application and specify therein which information they wish to be kept confidential.

Law stated - 07 October 2021

Settlements

Does the investigating or prosecuting authority have the ability to enter into a plea bargain, settlement, deferred prosecution agreement (or non-prosecution agreement) or other binding resolution with a party to resolve liability and penalty for alleged cartel activity? What, if any, judicial or other oversight applies to such settlements?

The laws of Vietnam are silent on this issue. Article 86.2 of the Competition Law 2018, however, allows the investigating authority to stay an investigation if the complainant withdraws the file and the respondent undertakes to cease the alleged violation and take remedial measures, and receives approval from the investigating authority. It is unclear to whom should the respondent's undertakings be made, and what must be approved by the investigating authority.

Law stated - 07 October 2021

Corporate defendant and employees

When immunity or partial leniency is granted to a corporate defendant, how will its current and former employees be treated?

Current and former employees of a corporate which is granted leniency are often not subject to any administrative sanction unless such individuals attempted to hinder or mislead the investigation. Criminal amnesty will be subject to criminal provisions.

Law stated - 07 October 2021

Dealing with the enforcement agency

What are the practical steps for an immunity applicant or subsequent cooperating party in dealing with the enforcement agency?

There is currently no provision on how a leniency application should be filed with the NCC. It would follow that an application filed by a legal representative of the undertaking or an authorised person (either an external counsel or employee) is acceptable.

It is unclear if a leniency application must be made formally in writing or can be made otherwise (eg, orally or

© Copyright 2006 - 2021 Law Business Research

anonymously). However, given the local bureaucratic practice, the authors take the view that a leniency application should be made formally in writing.

Law stated - 07 October 2021

DEFENDING A CASE

Disclosure

What information or evidence is disclosed to a defendant by the enforcement authorities?

All evidence must generally be publicly disclosed, except where it contains state, trade, professional or personal secrets. The latter three will only be kept confidential if legitimately requested by the relevant parties.

Law stated - 07 October 2021

Representing employees

May counsel represent employees under investigation in addition to the corporation that employs them? When should a present or past employee be advised to obtain independent legal advice or representation?

A counsel may concurrently represent a corporate and its employees as long as no actual or potential conflict of interest arises.

Whether and when a present or former employee should seek an independent counsel is a matter between this individual and the lawyer; the NCC would not intervene in this regard.

Law stated - 07 October 2021

Multiple corporate defendants

May counsel represent multiple corporate defendants? Does it depend on whether they are affiliated?

Multiple corporate defendants may be represented by the same counsel irrespective of their affiliation, if any, provided there is no actual or potential conflict of interest.

Law stated - 07 October 2021

Payment of penalties and legal costs

May a corporation pay the legal penalties imposed on its employees and their legal costs?

As a general principle, any undertaking found to have committed a violation shall bear the legal consequences.

In practice, corporates might reimburse employees but such amount would not be treated as tax-deductible expenses.

Law stated - 07 October 2021

© Copyright 2006 - 2021 Law Business Research

Taxes

Are fines or other penalties tax-deductible? Are private damages payments tax-deductible?

Fines and penalties are not tax-deductible.

On the other hand, private damages awards, which are not considered non-deductible expenses under tax regulations, may be eligible for deduction if there is valid and accurate documentation.

For tax implications, seeking consultation from a tax specialist is advised.

Law stated - 07 October 2021

International double jeopardy

Do the sanctions imposed on corporations or individuals take into account any penalties imposed in other jurisdictions? In private damage claims, is overlapping liability for damages in other jurisdictions taken into account?

Neither the Competition Law 2018 nor Decree No. 75/2019/ND–CP specifies rules on international double jeopardy for administrative sanctions or private damages awards.

Likewise, the Penal Code 2015 (as amended) is also silent on international double jeopardy in respect of criminal sanctions.

Law stated - 07 October 2021

Getting the fine down

What is the optimal way in which to get the fine down?

The best way to mitigate legal repercussions, in general, is through early cooperation with the authority in discovering or investigating the offence and through remedies and compensation. These actions will be considered by the authority when assessing either leniency application or mitigating factors under both administrative and criminal sanction regimes. Thus, even if leniency is not an option, a violator may nevertheless have their fine reduced by mitigating factors.

Law stated - 07 October 2021

UPDATE AND TRENDS

Recent cases

What were the key cases, judgments and other developments of the past year?

Since the National Competition Commission (NCC) has not been established, there is arguably lack of legal standing for the Vietnam Competition and Consumer Authority (VCCA) (ie, the competition authority under the former regime that is currently acting as a quasi-competition watchdog under the new regime) to investigate or handle cartel claims. Therefore, for the time being, the VCCA generally does not proactively enforce cartel cases. However, enforcement practice is expected to be more robust once the NCC is formally established.

The latest publicly known case handled by the competition regulator concerns a group of companies in the medical

© Copyright 2006 - 2021 Law Business Research

equipment sector. Specifically, the complainant, An Phu Trading and Medical JSC, lodged a complaint against Central Pharmaceutical 1 JSC (CPC 1) and Bbraun Vietnam Limited (Bbraun Vietnam) for refusing to provide them with the documentation necessary for their participation in a medical equipment tender solicited by a local health department. Given that the complainant was bidding with Bbraun-manufactured products, the health department required the complainant to submit a sale authorisation from Bbraun Vietnam and proof of collaboration between Bbraun Vietnam and CPC1. Bbraun Vietnam refused to provide the complainant with the former on the ground that it had issued one to the complainant's competitor, while CPC 1 refused to provide the latter citing lack of Bbraun Vietnam's consent. Under these circumstances, the competition regulator initially took the view that the respondents' behaviour indicated a violation of the Competition Law 2018. However, when the regulator requested the parties to provide further information for the investigation, they all committed to 'permit [the complainant] to perform the awarded contract as per the bidding package', thereby effectively closing the case without any final decision or imposition of penalties.

Law stated - 07 October 2021

Regime reviews and modifications

Are there any ongoing or anticipated reviews or proposed changes to the legal framework, the immunity/leniency programmes or other elements of the regime?

The most anticipated development at the moment is the formal establishment of the new competition regulator, the NCC. With the new law effective recently and the new regulator to be established, the competition landscape in Vietnam is expected to see drastic changes in the coming years. In the past years, cartels were one of the most common violations detected and sanctioned by the competition authority. In the near future, with the removal of the market share threshold for initiating a cartel probe and the introduction of a leniency programme, the authors anticipate that cartel investigations and enforcement will be more vigorous.

Law stated - 07 October 2021

© Copyright 2006 - 2021 Law Business Research

Jurisdictions

Argentina	Marval O'Farrell Mairal
Australia	Allens
Austria	Baker McKenzie
Belgium	Strelia
Brazil	OC ARRUDA SAMPAIO Sociedade de Advogados
Bulgaria	Wolf Theiss
Canada	McMillan LLP
China	DeHeng Law Offices
Costa Rica	.
Denmark	Bruun & Hjejle
European Union	Dechert LLP
Finland	Frontia Attorneys Ltd
Germany	Glade Michel Wirtz
Hong Kong	Linklaters LLP
India	Saikrishna & Associates
Japan	Nagashima Ohno & Tsunematsu
Malaysia	Zaid Ibrahim & Co
Mexico	Valdes Abascal Abogados
Portugal	Gómez-Acebo & Pombo Abogados
Singapore	Drew & Napier LLC
Slovenia	Odvetniska druzba Zdolsek
South Korea	Yoon & Yang LLC
Switzerland	CORE Attorneys Ltd
Turkey	ELIG Gurkaynak Attorneys-at-Law
Ukraine	Sergii Koziakov & Partners

© Copyright 2006 - 2021 Law Business Research

USA	Dechert LLP
Vietnam	LNT & Partners

© Copyright 2006 - 2021 Law Business Research