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## COMMERCIAL LAW

### Carefree firms face vertical restraints

*Nguyen Vu Thang*

Recently, vertical restraints have been increasingly referenced in Asia, given the rising number of cases dealing with this matter. At first glance, companies involved in vertical restraints may be subject to not only significant fines, but also major disruption and damage to their reputation which arise from lengthy investigations or subsequent litigation involving customers, competitors and consumers. To avoid these risks associated with vertical restraints, it is necessary for multinational companies investing in Asia to review domestic competition laws, including the Vietnamese law, and how they relate to vertical restraints to ensure that their business practices are in compliance with these laws.

#### **So what are vertical restraints?**

Although the definition and terminology of vertical restraints differs according to jurisdictions, vertical restraints can be basically understood as competition restriction agreements between enterprises, which operates at a different level in a supply chain (e.g., an agreement between a manufacturer or supplier and a distributor). Vertical restraints are different from horizontal restraints, which are competition restriction agreements between enterprises at the same level of a supply chain (i.e., agreements between actual or potential competitors). Vertical restraints are broadly considered to be less harmful to competition than horizontal restraints mostly because vertical restraints may have considerable pro-competitive effects (e.g., promoting non-price competition or improving the quality of services). Generally, vertical restraints are prohibited only if their anti-competitive effects are deemed to offset their pro-competitive effects.

Types of vertical restraints vary from jurisdiction to jurisdiction. Some of the most typical types of vertical restraints as recognized by the European Commission's Guidelines on Vertical Restraints (2010) include resale price maintenance, tying, franchising, exclusive distribution, exclusive customer allocation, selective distribution, upfront access payments, and category management agreements.

#### **Vertical restraints under the current law of Vietnam**

Except for franchising, which has been recognized by the Vietnamese law as a lawful commercial activity and is currently subject to the governing scope of the Commercial Law (2005) and its guiding documents, vertical restraints have yet to be defined in the Vietnamese law. However, certain types of typical vertical restraints do fall under certain regulated domestic laws.

The Law on Competition (2004) (Competition Law) stipulates eight groups of agreements to be deemed "competition restriction agreements," regardless of

whether they are in horizontal or vertical relationships<sup>1</sup>. Among these eight stipulated groups of “competition restriction agreements”, Article 9.2 of the Competition Law further stipulates that agreements under Groups 1, 2, 3, 4 and 5 are forbidden only if the contracting parties have a “combined market share” of 30 per cent or more in the relevant market. However, given that each party in a vertical restraint operates in a different level of a supply chain, their market shares cannot be combined. Hence, it is widely believed that vertical restraints cannot be prohibited by Article 9.2 of the Competition Law, regardless of whether they may fall into the agreements of Groups 1 to 5 of Article 8 of the Competition Law.

Furthermore, agreements under Group 8 seems to be designed to catch only bid rigging, or collusive tendering, a very typical type of horizontal restraint, so that this provision cannot be interpreted to regulate any typical types of vertical restraints.

Using this exclusion method, the only two remaining groups of “competition restriction agreement” which may be interpreted to include vertical restraints are agreements of Groups 6 and 7 which, under Article 9.1 of the Competition Law, are illegal per se (prohibited only because of their existence). However, the interpretation of these articles in such a way poses a risk.

Under Article 19 of Decree No. 116/2005/ND-CP dated 15 September 2005 detailing the implementation of a number of articles of the Competition Law (“**Decree 116**”), agreements of Group 6 include, among others, the practice of “reaching agreement not to trade with non-contracting enterprises”. The per se prohibition of such a practice, if interpreted to apply to enterprises in vertical relationships, would be extremely detrimental because it forbids some types of vertical restraints which are widely used in Vietnam without considering their pro-competitive effects, such as single branding agreements (according to which a distributor is obliged or induced to concentrate its orders for a particular product with one supplier and hence not to trade with other suppliers for the same product), exclusive distribution agreements (according to which a supplier agrees to sell its products to only one distributor for resale in a particular territory) and exclusive supply agreements (whereby a supplier is obliged or induced to sell the contract products only or mainly to one buyer in general or for a particular use) (collectively herein referred to as exclusive dealings).

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<sup>(1)</sup> Article 8 of the Competition Law stipulates eight groups of competition restriction agreements as follows:

1. Agreements either directly or indirectly fixing the price of goods and services;
2. Agreements sharing consumer markets or sources of supply of goods and services;
3. Agreements restricting or controlling the quantity or volume of goods and services produced, purchased or sold;
4. Agreements restricting technical or technological developments [and/or] restricting investment;
5. Agreements imposing on other enterprises conditions for signing contracts for the purchase and sale of goods and services or forcing other enterprises to accept obligations which are not directly relevant to the subject matter of the contract;
6. Agreements preventing, restraining [and/or] disallowing other enterprises to enter the market or developing business;
7. Agreements excluding from the market other enterprises which are not parties to the agreement;
8. Collusion in order for one or more parties to win a tender for supply of goods and services.

Likewise, in combination with Article 9.1 of the Competition Law and Article 20 of Decree 116, agreements of Group 7, if interpreted to apply to vertical restraints, also prohibits enterprises from engaging in exclusive dealings while together performing one of several additional acts such as requiring, encouraging or enticing one's own customers not to purchase goods from non-contracted enterprises, or purchasing or selling goods at prices sufficient to ensure that other enterprises will not be able to enter the relevant market, among others.

Since the application of provisions on “competition restriction agreements” to agreements in vertical relationship seems troublesome, it is highly unlikely that state authorities will rely on these to regulate vertical restraints. Instead, they may use provisions on prohibiting the abuse of a dominant market position as an alternative tool to regulate these restraints, although under international practice of such competition laws, rules on vertical restraints are normally designated to regulate practices of enterprises whose market power does not yet amount to such a point as to be regarded as dominant.

Under the provisions on the abuse of a dominant market position in the Competition Law, certain vertical restraints may constitute practices of such abuse if any contracting party has a dominant market position (i.e., such a party has a market share of 30% or more in the relevant market or is capable of substantially restraining competition). Such prohibited practices include two of the above-mentioned most common vertical restraints such as minimum resale price maintenance – whereby a manufacturer and a distributor agree that the distributor will sell the manufacturer's products at or above a price floor (Article 13.2 of the Competition Law as detailed by Article 27.3 of Decree 116) and tying – whereby customers that purchase one product are required also to purchase another distinct product from the same supplier or some designated by the latter (Article 30.2 of Decree 116). In addition, territorial restraints – where a supplier imposes restrictions on the location where a distributor resells their products, and customer restraints – whereby a supplier imposes restrictions on the class of customers which a distributor must or must not sell the supplier's products to, which are another two common variations of vertical restraints under the international practice of competition law, may also constitute abuses of a dominant market position and be respectively prohibited under Articles 30.1.(b) and 30.1.(c) of Decree 116.

### **Legal risks for enterprises with respect to vertical restraints**

From this analysis, there are at least two risks for enterprises engaging in vertical restraints in Vietnam. First, as mentioned previously, the vagueness of Articles 8.6 and 8.7 in the Competition Law and its corresponding guidance can result in an uncertainty as to whether exclusive dealings of all types are prohibited per se in Vietnam. Although the possibility for state authorities to apply such regulations in this direction is low, the risk still exists. Second, since vertical restraint also has pro-competitive effects, under the international practice of such competition laws, they can sometimes be exempted from being prohibited if the contracting parties can successfully prove that the pro-competitive effects of their vertical restraint outweigh the anti-competitive effects. However, it cannot be the case in Vietnam. Although Article 10.1 of the Competition Law stipulates a number of criteria for “a competition restriction agreement” prohibited under Article 9.2 of the Competition

Law to be entitled to exemption for a definite period (e.g., if such an agreement increases the competitiveness of small and medium-sized enterprises), such exemptions cannot apply to vertical restraints since the prohibition of vertical restraints in Vietnam lies in Article 9.1 and other provisions on the abuse of a dominant market position outlined in the Competition Law./.

## **Other Sectors**

### **Finance**

- On 10 April 2014, the Government stipulated Decree No. 29/2014/ND-CP promulgating the authority and procedures for the establishment of State ownership over assets, and the management and handling of properties over which the State ownership is established.
- Decision No. 739/QĐ-BTC dated 11 April 2014 of the Ministry of Finance on the amendment and supplement to a number of schemes, policies and mechanisms to implement the Strategy on development of State Treasury up to 2020 accompanying Decision No. 937/QĐ-BTC dated 25 April 2011 of the Minister of Finance.
- On 24 April 2014, the Minister of Finance issued Circular No. 54/2014/TT-BTC providing guidelines for the implementation of the sanctioning of administrative violations in the field of the State Treasury in accordance with Decree No.192/2013/ND-CP dated 21 November 2013.
- Circular No. 48/2014/TT-BTC dated 22 April 2014 of the Ministry of Finance providing guidelines for the implementation of deferment of time-limit for payments of land use levies and purchase prices of residential housing owned by the State according to Resolution No. 01/NQ-CP dated 2 January 2014 of the Government on the main tasks and solutions to direct and manage the implementation of Plan of socio-economic development and State Budget in 2014.
- On 8 April 2014, the Ministry of Finance stipulated Circular No. 42/2014/TT-BTC on promulgating the Sample Charter for Investment funds for local development.

### **Banking**

- Decree No. 26/2014/ND-CP dated 7 April 2014 on the organization and operations of Inspectorate and monitoring agencies of the Banking industry.
- On 26 April 2014, the Prime Minister issued Decision No. 29/2014/QĐ-TTg on the credit program for households, HIV-acquired patients, rehabilitated drug abusers, persons undergoing opioid replacement therapy, and reformed prostitutes.
- Circular No. 47/2014/TT-BTC dated 22 April 2014 of the Ministry of Finance providing guidelines for the implementation of a number of contents of Decision No. 03/2011/QĐ-TTg dated 10 January 2011 promulgating the Regulation on guarantees for loans provided to small and medium enterprises by commercial banks.

- On 31 March 2014, the State Bank of Vietnam issued Circular No. 12/2014/TT-NHNN providing the conditions for foreign loans of enterprises without the Government's guarantees.

## **Taxation**

- Decision No. 1114/QD-TCHQ dated 10 April 2014 of the General Department of Customs promulgating the list of exported goods that are exposed to value risks, the list of imported goods that are exposed to value risks, and the reference price rates attached.
- On 8 April 2014, the General Department of Customs issued Decision No.1101/QD-TCHQ on the amendment and supplement to Article 2 of Decision No. 1105/QD-TCHQ dated 1 June 2010 of the General Department of Customs on the issuance of monetary receipt forms.
- Decision No. 1100/QD-TCHQ dated 8 April 2014 of the General Department of Customs on issuing the Process of extending time-limits for payments of taxes, late payment amounts, and monetary fines for exported and imported goods.
- On 1 April 2014, the Ministry of Finance issued Circular No. 40/2014/TT-BTC providing guidelines for the special preferential import tax applicable to imported goods that have originated in the Kingdom of Cambodia.

## **Trade**

- Resolution No. 27/NQ-CP dated 22 April 2014 of the Government on approving the Framework Agreement on Economic and Trade Co-operation between the Government of the Socialist Republic of Vietnam and the Government of the Plurinational State of Bolivia.
- On 22 April 2014, the Government issued Resolution No. 26/NQ-CP approving the Trade and Investment Framework Agreement between the Government of the Socialist Republic of Vietnam and the Eastern Republic of Uruguay.
- Decision No. 1253/QD-TCHQ dated 25 April 2014 of the General Department of Customs on promulgating the Temporary Regulation on receiving and processing information to support people (help desk) using focused information technology application systems of Customs industry.
- On 7 April 2014, the Prime Minister issued Decision No. 28/2014/QD-TTg providing for the structure of new electricity retail tariff.
- Decision No. 1086/QD-TCHQ dated 4 April 2014 of the General Department of Customs on the internal inspection process of Customs branch.

**Health**

- On 16 April 2014, the People's Committee of Ho Chi Minh City stipulated Decision No. 1865/QD-UBND approving the Planning for development of the health branch in Ho Chi Minh City up to 2020, with an orientation to 2025.
- Decision No. 14/2014/QD-UBND dated 14 April 2014 of the People's Committee of Ho Chi Minh City promulgating the Regulations on the issuance of Certificates of qualified entity on food safety to food service businesses.
- On 2 April 2014, the Ministry of Health issued Decision No. 1129/QD-BYT correcting Circular No. 37/2013/TT-BYT dated 11 November 2013 of the Ministry of Health providing guidelines for the elaboration of tendering dossier for purchase of medicines in medical establishments.
- Circular No. 14/2014/TT-BYT dated 14 April 2014 of the Ministry of Health providing for the transfers between the medical examination and treatment establishments.
- On 9 April 2014, the Ministry of Health, Ministry of Agriculture and Rural Development, and Ministry Industry and Trade jointly stipulated Inter-ministerial Circular No. 13/2014/TTLT-BYT-BNNPTNT-BCT providing guidelines for the assignment of works and co-ordination in the State management on food safety.

**Education**

- Circular No. 13/2014/TT-BGDDT dated 28 April 2014 of the Ministry of Education and Training amending and supplementing a number of provisions of Circular No. 52/2011/TT-BGDDT dated 11 November 2011 of the Minister of Education and Training providing for the conditions for and dossier and process of opening the training majors, suspending the enrolment, and recovering decisions on opening the training majors at professional intermediate level.
- On 22 April 2014, the Ministry of Labour, War Invalids and Social Affairs issued Circular No. 08/2014/TT-BLDTBXH promulgating the Law program and curriculum used in training at vocational intermediate level and vocational junior college level.
- Circular No. 12/2014/TT-BGDDT dated 18 April 2014 of the Ministry of Education and Training amending and supplementing Articles 23 and 24 of the Regulation on organization and operations of the specialized high schools accompanying Circular No. 06/2012/TT-BGDDT dated 15 February 2012 of the Minister of Education and Training.
- On 18 April 2014, the Ministry of Education and Training issued Circular No.11/2014/TT-BGDDT promulgating the Regulation on enrolments of the secondary schools and high schools.



- Circular No. 10/2014/TT-BGDDT dated 11 April 2014 of the Ministry of Education and Training on promulgating the regulation on management of Vietnamese citizens studying abroad.

**Transport**

- On 22 April 2014, the Government stipulated Decree No. 32/2014/ND-CP on the management, exploitation and maintenance of the highway building works.
- Decree No. 30/2014/ND-CP dated 14 April 2014 on the conditions for maritime transportation business and maritime transportation support services.
- On 29 April 2014, the Ministry of Transport issued Decision No. 1617/QD-BGTVT promulgating the Regulations on method testing tire tread on the asphalt as determined by Wheel tracking equipment.
- Decision No. 1594/QD-BGTVT dated 29 April 2014 of the Ministry of Transport approving the Planning for the system of stop and wayside stations along the main route of Ho Chi Minh road project.
- On 18 April 2014, the Government stipulated Decision No. 561/QD-TTg on approving the detailed planning for Ring Road 5 - Hanoi Capital Region.
- Decision No. 966/QD-BGTVT dated 31 March 2014 of the Ministry of Transport on approving the Planning for land road motor vehicle driving schools and land road motor vehicle driver examination centres up to 2020, with an orientation towards 2030.
- On 23 April 2014, the Ministry of Transport issued Circular No. 10/2014/TT-BGTVT on amending and supplementing a number of article of Circular No.56/2012/TT-BGTVT dated 27 December 2012 of the Minister of Transport providing for the technical safety and environmental protection verification of land road motor vehicles and Circular No. 10/2009/TT-BGTVT dated 24 June 2009 of the Minister of Transport on the technical safety and environmental protection inspection of land road motor vehicles.
- Circular No. 08/2014/TT-BGTVT dated 15 April 2014 of the Ministry of Transport providing for the connection of signal traffic lights and road signal lights at crossroads, providing information to support watches in the realm of intersections between land roads and rail ways.
- On 7 April 2014, the Ministry of Transport stipulated Circular No. 06/2014/TT-BGTVT promulgating the National technical regulations on the classification and technical supervision of the marine pipeline system and National technical regulations on decentralization and technical supervision of floating storehouses.
- Circular No. 15/2014/TT-BCA dated 4 April 2014 of the Ministry of Public Security providing for the registration of vehicles.

- On 31 March 2014, the Ministry of Transport issued Circular No. 05/2014/TT-BGTVT on promulgating the standard forms of minutes and decisions sanctioning administrative violations in the field of land road and rail traffic.

### **Natural Resources - Environment**

- Decree No. 35/2014/ND-CP dated 29 April 2014 amending and supplementing a number of articles of Decree No. 29/2011/ND-CP dated 18 April 2011 of the Government providing for the strategic environmental assessments, environmental impact assessments, and commitments to environment protection.
- On 25 April 2014, the Prime Minister issued Decision No. 609/QD-TTg approving the planning for treatment of solid wastes in the capital Hanoi up to 2030, with an orientation to 2050.
- Decision No. 15/2014/QD-UBND dated 22 April 2014 of the People's Committee of Ho Chi Minh City on the implementation of collecting environmental protection charge applicable to industrial wastewater in the area of Ho Chi Minh City.
- On 24 April 2014, the Ministry of Finance issued Circular No. 52/2014/TT-BTC providing for the collection rates and the collection, submission, management and use of the assessment and appraisal charges and fees for issuance of certificates of qualification to provide environmental monitoring services.
- Circular No. 19/2014/TT-BTNMT dated 23 April 2014 of the Ministry of Natural Resources and Environment providing for the standards and card of public officials being specialized inspectors of the natural resources and environment branch.
- On 22 April 2014, the Ministry of Natural Resources and Environment issued Circular No. 18/2014/TT-BTNMT promulgating the Economic - technical norms of environmental monitoring operation regarding ambient air, continental surface water, soil, underground water, acid rain water, sea water, industrial exhaust gases and radioactive wastes.
- Circular No. 16/2014/TT-BTNMT dated 14 April 2014 of the Ministry of Natural Resources and Environment promulgating the Regulation on operations of the Mineral Mining Rights Auction Council.

### **Science - Technology**

- On 7 April 2014, the Government stipulated Decree No. 25/2014/ND-CP providing for the prevention of and fighting against crimes and other violations of laws using high technologies.
- Decision No. 3218/QD-BCT dated 14 April 2014 of the Ministry of Industry and Trade approving the Planning for development of Vietnam's Textile and

Garment Industry until 2020, with an orientation to 2030.

- On 4 April 2014, the Government issued Decision No. 27/2014/QD-TTg promulgating the functions, tasks, powers and organizational structure of the Directorate for Standards, Metrology and Quality under the Ministry of Science and Technology.
- Decision No. 1572/QD-UBND dated 1 April 2014 of the People's Committee of Ho Chi Minh City announcing the amended, supplemented and replacing administrative procedures in the field of Standards, Metrology and Quality under the settlement authority of the Department of Science and Technology of Ho Chi Minh City.
- On 31 March 2014, the Ministry of Industry and Trade stipulated Decision No.2757/QD-BCT approving the Planning for industrial development of Northern Vietnam key economic region until 2020, with an orientation to 2030.
- Circular No. 05/2014/TT-BKHCN dated 10 April 2014 of the Ministry of Science and Technology promulgating "Standard form of scientific research and technological development contract".
- On 8 April 2014, the Ministry of Science and Technology issued Circular No.04/2014/TT-BKHCN providing guidelines for the evaluation of manufacturing technology levels.
- Circular No. 03/2014/TT-BKHCN dated 31 March 2014 of the Ministry of Science and Technology providing guidelines on the conditions for the establishment and operation registration of scientific and technological organizations and their representative offices and branches.

### **Administration - Judiciary**

- On 18 April 2014, the Government stipulated Decree No. 31/2014/ND-CP detailing a number of articles of and methods for the implementation of Law on Residence.
- Decree No. 24/2014/ND-CP dated 4 April 2014 providing for the organization of professional agencies directly under the People's Committees of provinces and centrally-run cities.
- On 22 April 2014, the Government stipulated Decision No. 569/QD-TTg promulgating the Criteria, conditions and procedures for recognition of island communes.
- Decision No. 1714/QD-UBND dated 8 April 2014 of the People's Committee of Ho Chi Minh City announcing the newly-issued, amended and supplemented administrative procedures in the field of Administration and Justice under the settlement authority of the Department of Justice and People's Committees of ward, commune or township in the area of Ho Chi Minh City.

- Circular No. 13/2014/TT-BTP dated 29 April 2014 of the Ministry of Justice providing guidelines for the implementation of codification of the system of legal documents.
- On 29 April 2014, the Inspectorate of the Government issued Circular No.02/2014/TT-TTTP detailing and providing guidelines for the implementation of a number of articles of Decree No. 90/2013/ND-CP dated 8 August 2013 providing for the State agencies' responsibilities for making explanations in the implementation of assigned tasks and powers.
- Circular No. 50/2014/TT-BTC dated 24 April 2014 of the Ministry of Finance providing for the collection rates and the collection, submission, management and use of charges for judicial expertise in the field of criminal technology.
- On 23 April 2014, the Inspectorate of the Government issued Circular No.01/2014/TT-TTTP providing for the setting up and approval of the orientations on inspection programs and plans.
- Circular No. 04/2014/TT-BXD dated 22 April 2014 of the Ministry of Construction providing guidelines for a number of contents on judicial expertise in construction investment activities.
- On 17 April 2014, the Ministry of Justice issued Circular No. 11/2014/TT-BTP providing for the assurance of gender equality in the legal aid.
- Circular No. 10/2014/TT-BTP dated 7 April 2014 of the Ministry of Justice providing for the obligation to participate in the courses improving lawyers' professional knowledge and skills.

### **Agriculture - Forestry - Fishery**

- On 29 April 2014, the Government stipulated Decree No. 36/2014/ND-CP on the breeding, processing and exportation of Catfishes.
- Decision No. 580/QD-TTg dated 22 April 2014 of the Prime Minister on the supporting policies with varieties to convert from growing rice to growing crops in the region of Mekong Delta.
- On 16 April 2014, the Government issued Decision No. 540/QD-TTg on the credit policy in favour of the people breeding shrimps and catfishes.
- Decision No. 674/QD-BNN-KHCN dated 4 April 2014 of the Ministry of Agriculture and Rural Development approving the Scheme on framework of national products "high quality Vietnamese catfishes and products manufactured from catfishes".
- On 2 April 2014, the Ministry of Agriculture and Rural Development stipulated Decision No. 639/QD-BNN-KH on approving the Planning for agriculture and rural areas in the region of Mekong River Delta until 2020, with an orientation to 2030, in conditions of climate change.

- Inter-ministerial Circular No. 13/2014/TTLT-BNNPTNT-BKHDT-BTC dated 28 April 2014 of the Ministry of Agriculture and Rural Development, Ministry of Planning and Investment, and Ministry of Finance providing guidelines for a number of contents to implement Decision No. 11/2011/QD-TTg dated 18 February 2011 of the Government on the policy promoting the development of bamboo and rattan handicraft industry.
- On 28 April 2014, the Ministry of Agriculture and Rural Development issued Circular No. 14/2014/TT-BNNPTNT promulgating the list of high-yield domestic animal varieties.
- Circular No. 17/2014/TT-BTNMT dated 21 April 2014 of the Ministry of Natural Resources and Environment providing guidelines for the determination of boundaries and surface areas and the construction of a database on paddy land.
- On 18 April 2014, the State Bank of Vietnam stipulated Circular No.13/2014/TT-NHNN providing guidelines on the lending in accordance with Decision No.68/2013/QD-TTg dated 14 November 2013 of the Government on the supporting policies to reduce losses in agriculture.
- Circular No. 12/2014/TT-BNNPTNT dated 8 April 2014 of the Ministry of Agriculture and Rural Development providing for the logos, banners, flags traditions, costumes and sample cards of Fisheries surveillance force and the paint colours of Fisheries surveillance boats and vessels.
- On 1 April 2014, the Ministry of Agriculture and Rural Development issued Circular No. 11/2014/TT-BNNPTNT on the amendment and supplement to Annex 4 accompanying Circular No. 26/2013/TT-BNNPTNT dated 22 May 2013 on the management of aquaculture species.

**Miscellaneous**

- Decree No. 27/2014/ND-CP dated 7 April 2014 detailing the implementation of Labour Code with respect to household labour.
- On 23 April 2014, the Ministry of Construction issued Decision No. 395/QD-BXD approving the duty of Planning for water supply in the region of Mekong Delta until 2030, with an orientation to 2050.

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