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Competition in the Banking Sector

REPORT ON

THE REGULATIONS CONCERNING COMPETITION IN THE BANKING SECTOR OF VIETNAM

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Prepared by:

BAO ANH THAI
LL.M. Attorney at Law, Managing Partner of Bao & Partners Law Firm

In cooperation with

Mr. NGUYEN THANH HA
Attorney at Law, Managing Partner of Vietbid Law Firm

Ms. NGUYEN VAN ANH
Attorney at Law, Senior Legal Counsel of Vietbid Law Firm

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EXECUTIVE SUMMARY

The purpose of this Report is to make an overview about (i) the competition regulations in Vietnam, (ii) the unfair-competition in the banking sector, (iii) issues need to be addressed in the to-be-issued-regulations on competition in the banking sector of the State Bank of Vietnam, (iv) the competition legal framework and experience of the People's Bank of China, and (v) suggestions for building a legal framework for competition regulations in the banking sector.

In the first part of this report, we summarized the major aspects of the existing law and regulations on competition in Vietnam. In part two, discuss about the current situation of competition in banking sector

In part three, we analyze the existing regulations on competition in general and the application in the banking sector in particular. We also discuss the possible explanation of some fundamental concepts such as "relevant market", "dominant market position", "market share" in the banking sector.

With respect to the regulation of the State Bank on competition, we suggest that the Bank, wherever possible, referring to the equivalent concepts already provided in other legal texts instead of developing a new whole system of concepts. This would help to keep the regulation flexible and avoid potential conflicts with other legal texts. In part four, we summarize the experience of the People's Bank of China which has to deal with unfair/unlawful competitive conducts. We see the similarity of unfair competition between the banking sectors of the two countries. While we suggest that the State Bank of Vietnam to consider the experience of its Chinese counterpart in dealing with particular unfair competitive activities, we still believe that the Chinese legal system on competition in banking sector is less comprehensive than that of Vietnam.

Part five is our suggestions for building a legal framework for competition in the banking sector.

AN ANALYSIS OF COMPETITION LAW IN BANKING SECTOR

INTRODUCTION

Reforms of the banking sector in Vietnam started in late 1980's with the major reform is a "level playing field" for the competition between state-owned commercial banks and private banks. From a small number in 1990s, the number of the private banks and joint-venture banks has reached 42 with 37 private commercial banks and 5 joint-venture banks. As the result of increasing number of private banks and opening of the banking sector to foreign competitors, the competition amongst the banks increases.

Vietnam is now in the final phase of negotiation for its WTO membership. And in the near future, it is expected that competition in the banking sector will be tougher with the participation of foreign competitors.

In 2004, the Competition Law was passed by the National Assembly and became the fundamental legal framework governing competition. The State Bank of Vietnam is under process of drafting a regulation providing guidance on the unlawful/unfair competition in the banking sector. This report is written by legal consultant Thai Bao Anh, managing partner, Bao & Partners Law Firm (baoanh_thai@baolawfirm.com.vn) in cooperation with Mr. Nguyen Thanh Ha, managing partner, and Ms. Nguyen Van Anh, senior legal counsel of Vietbid Law Firm (vietbid@hn.vnn.vn).

The purpose of this report is (i) to provide the readers an overview of the law and regulations on competition in Vietnam, (ii) to discuss the current situation of competition in the banking sector, (iii) to discuss a number of theoretical issues in relation to competition, (iv) to summarize the experience of the People's Bank of China (the Central Bank) in dealing with unfair/unlawful competition, and our suggestions to the regulation on competition in the banking sector to be issued by the State Bank.

This report is divided into six parts.

In Part I, we provide the reader with an overview of the law and regulations on competition in Vietnam. In Part II, we discuss about the current situation of unfair competition in the banking sector. Part III is reserved for discussion on a number of theoretical issues in relation to anti-competitive conducts of credit institutions. In Part IV is a summary of the experience of the People's Bank of China in dealing with unlawful competition in the banking sector. In Part V, we discuss our suggestions for building a legal framework for competition in the banking sector.

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PART I: AN OVERVIEW OF COMPETITION REGULATIONS IN VIETNAM

The Competition Law of Vietnam was passed by the National Assembly on 9 November 2004 – after four years the first draft was introduced to the public for discussion. The new law came into effect on 1 July 2005 and is an important step in the progress of development a comprehensive system of trade law.

Generally, the Competition Law regulates (i) unfair competitive practices and (ii) practices in restraint of competition carried out by businesses in Vietnam (including foreign companies doing business in the country).

1. UNFAIR COMPETITIVE PRACTICES

Unfair competitive practices are defined by the law as "business practices that are contrary to the normal norms of business ethics and that cause, or might cause, detriment to the interests of the State or the legitimate rights and interests of other enterprises or consumers."[1]

Unfair competitive practices which are prohibited (without any exception) consist of: (i) falsifying product information, (ii) infringing business secrets, (iii) coercing; (iv) defaming another enterprise, (v) disrupting the business activities of another enterprise, (vi) advertisements with the purpose of unfair competition, (vii) promotion with purpose of unfair competition, (viii) discriminating within an industry association, (ix) engaging in illegal multilevel selling of goods, and (x) other acts of unfair competition as prescribed by the government.[2]

2. PRACTICES IN RESTRAINT OF COMPETITION

The Law defines the practices in restraint of competition as practices that reduce, distort or hinder competition in the market which include (i) agreements in restraint of competition, (ii) abuse of dominant market position and monopoly position, and (iii) economic concentrations.

2.1. Agreements in restraint of competition

In accordance with the law, the strictly prohibited agreements are the ones with the purposes of

1. collusive tender,
2. boycotts (in order to prevent, hinder or restrain other enterprises to enter into a market or to develop their business), and

[1] Article 3, Point 4, the Competition Law.

[2] Article 3, Point 4, the Competition Law.

3. elimination the competition of other enterprises.[3]

Enterprises that hold a combined market share of 30 per cent or more of the "relevant market" are prohibited from entering into

1. price fixing and market sharing agreements;
2. agreements to restrict output, commodities and service supplies;
3. restraints of production and sales,
4. restraints of technical developments, technology or investment; and
5. agreements to impose trading conditions on other parties.[4]

There are several exemptions for the above activities if such an agreement is to reduce production cost which is beneficial for consumers and if the purpose of the agreement is one of the follows:

(i) optimizing the business structure, (ii) promoting technical or technological progress, improving the quality of goods and services, (iii) promoting uniform applicability of quality standards and technical norms of certain types of products, (iv) unifies commercial practices except price-related-conditions, (v) increases the competitiveness of medium and small-sized enterprises, or (vi) increases the competitiveness of Vietnamese enterprises in the international market. Such exemptions are granted by the Ministry of Trade.[5]

2.2. Abuse of dominant market position or monopoly

There are six activities that enterprises having dominant market positions are prohibited[6]:

1. below cost;
2. fixing unreasonable selling or purchasing prices or minimum reselling prices;
3. restraining production or distribution;
4. restraining the market or technical or technological developments;
5. using discriminatory commercial conditions;
6. imposing unreasonable conditions or conditions not relating to the subject of the contract to other party; and
7. preventing other enterprises from entering the market.

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[3] Article 8, Points 6,7, and 8, the Competition Law.

[4] Article 8, Points 1,2,3,4, and 5, the Competition Law.

[5] Article 10, the Competition Law.

[6] Article 13, the Competition Law.

An enterprise will be considered as holding a dominant market position if it (i) holds a market share of 30 per cent or more of the relevant market or (ii) is capable of significantly restraining competition.

A group of enterprises will be considered as holding a dominant market position if they hold a combined market share of 50 per cent or more (for two enterprises), 65 per cent or more (for three enterprises) or 75 per cent or more (for four enterprises) in the relevant market.

2.3. Abuse of monopoly position

The six prohibitions of enterprises in dominant market positions are also imposed on an enterprise holding a monopoly market position. In addition, the monopoly enterprise is prohibited to impose disadvantageous conditions on customers or abuse its monopoly position to unilaterally change or rescind a signed contract without a legitimate reason.

An enterprise will be considered as holding a monopoly market position if there are no other enterprises competing with it in the relevant market.

2.4. State monopoly sectors

To control state-owned enterprises operating in sectors declared as state-monopoly, the Government decides the quantities, volumes, prices and market scope of goods and services provided by these enterprises.

2.5. Economic concentration

The Law has several restraints on economic concentrations which include (i) mergers, (ii) acquisitions, (iii) consolidations, (iv) joint ventures and (v) other forms of economic concentration.[7]

All economic concentrations which lead to the market share of involved parties is more than 50 per cent of the relevant market are prohibited.[8] If the market share of involved parties is between 30 per cent and 50 per cent of the relevant market they must obtain a confirmation from the Competition Commission that such concentration is not prohibited by the law.[9]

[7] Article 16, the Competition Law.

[8] Article 18, the Competition Law.

[9] Article 24, the Competition Law.

PART II: OVERVIEW ON UNFAIR-COMPETITION IN THE BANKING SECTOR IN VIETNAM

We have carried out a study on the practice of competition in the banking sector in Vietnam by interviewing a number of representatives from state agencies, business associations, private and state-owned banks.

Although the interviewees' opinions are sometimes contrary to each other, still we could identify a number of symptoms that interviewees considered as unfair competition as follows:

1. competition in mobilizing deposits;
2. misleading or falsifying advertisement; and
3. providing below cost services.

As there is no case of unfair-competition has been brought to the Competition Commission of the Ministry of Trade up to present, so we limit ourselves in summarizing the interviewees' opinions and do not analyze if the conducts considered as the interviewees are unfair competition.

1. COMPETITION IN MOBILIZING DEPOSITS

Some banks have been alleged to increase deposit from the public by offering interest rates which are not based on an efficient economic calculation. This type of conduct is in some cases named by the media as "deposit interest rate war". This competition, according to some interviewees is harmful for small banks which have limited resources.

Some banks have been alleged to use very generous promotion such as lucky draw with high-value-gifts (car or house) to expand their market share. This practice, according to some interviewees, does not help to improve the quality of banking services in general because it only exploits gambling habit of clients. If the abuse of this type of promotion is not prohibited, the banks, instead of competing with each other by better services and cheaper price, will be driven into a "promotion race".

1.1. misleading or falsifying advertisement

Some banks have been alleged that their use advertisement of misleading or even in some cases, falsifying nature to attracting more clients. The misleading information is normally about the financial capacity of the banks, the coverage of its service network, and the services (that sometimes are not available yet).

1.2. providing below cost services

Some interviewees, all are of private banks, said that they experienced tough competition from state-owned commercial banks – which normally offers cheaper service prices. Although competing by price is a most popular form of competition, but some interviewees' said that – in some cases – the state banks offer services with "unbelievable" price – especially for the service that the private banks have advantage. It's noteworthy that most interviewees did agree that state-owned banks have advantages of economic

scale, better network, strong financial base, and broad range of services for clients to choose. However, they said that, in some cases, they still believe that price has been offered bellows the cost as a measure to win the clients.

PART III: A NUMBER OF THEORETICAL ISSUES IN RELATION TO ANTI-COMPETITIVE CONDUCTS

In this part, we discuss a number of issues which - in our opinions - are necessary to be addressed in the State Bank's regulation.

Article 16 of the Law on Credit Institutions[10] defines unfair competition as:

1. unlawful promotion;
2. providing misleading information (in any forms) which is harmful to other credit institutions and clients;
3. speculation which leads to distortion of foreign exchange, gold and currency markets; and
4. other unlawful competitive activities.

Although the Directive has provided a list of unlawful competitive activities but it is not specific and there is no further guidelines for implementation.

In 2004, the State Bank of Vietnam, in its communication No. 339/NHNN-CSTT dated April 7, 2004 identified a number of "unfair competitive activities"[11]:

1. abuse of increasing interests to attract more deposits;
2. abuse of interest mechanism to compete in lending (i.e. some banks do not strictly follows the standards of lending procedures and conditions for granting credit in order to attract more clients).

Although the State Bank has identified a number of activities which could be considered as unfair competition, it is necessary to identify the major principles to determine an activity is unfair competition or not.

As the activities regulated by the Competition Law are divided into two categories (i) unfair competition and (ii) restraints of competition, so there are particular principles to be applied to each category.

1. UNFAIR COMPETITION

1.1. General principles:

According to Article 3, point 4 of the Competition law, the principle to determine an activity as unfair competition is:

1. The activity is contrary to the normal norms of business ethics and

[10] Law on Credit Institutions No. 07/1997/QHX passed by the National Assembly on December 12, 1997.

[11] In Vietnamese the State Bank mentioned such activities as "*cạnh tranh không lành mạnh*" which could be translated into English as "unhealthy competition" or "unfair competition"

2. that causes, or might cause detriment to the interests of the State or the legitimate rights and interests of other enterprises or consumers.

However, because the detriment effects to the interests of the State or other enterprises or consumers are not necessary materialized ("that causes, or might causes"), the determination of unfair competition is mostly based on torts of the enterprise. This means, an activity is considered unfair competition when it falls into one of nine activities stipulated in Article 39 of the Law without the necessary to determine if such activity has already caused any detriment effects or not. These activities are:

1. providing misleading information,
2. infringing business secrets,
3. coercing other party in business;
4. defaming another enterprise,
5. disrupting the business activities of other enterprises,
6. advertisements with the purpose of unfair competition,
7. promotion with purpose of unfair competition,
8. discriminating within an industry association, and
9. engaging in illegal multilevel selling of goods.

If the activity does not clearly fall into one of these nine activities, it will be determined by the principle in Article 3, point 4 of the Competition law.

1.2. Principles to determine unfair competition of each activity:

Although the Competition Law has identified nine particular activities which could be considered as unfair competition, still there are not much detailed guidelines on each activity in implementing documents of this Law. In the regulation to be issued by the State Bank, it is necessary to stipulate in more details which could help credit institutions to know, to a reasonable certainty, what competition is prohibited and what is allowed by law.

As the nine activities stipulated in Article 39 are subject to some other laws too, so it would be more efficient if the State Bank's regulation refers to the principles which are already set forth by such laws. References to other laws also help to maintain the integrity of the whole legal system and avoid overlap of scope of applications of legal documents. A new set of rules of unfair competition is needed to be stipulated only in the case where there is no guideline of other laws or in the case where due to the particular characteristics of the banking sector.

1.2.1 Providing misleading information:

Providing misleading information, which could lead to clients' confusion in using a service or product, is mostly in connection with the confusion of the identification of service providers (trademark or brand). Article 40, Point 1 of the Competition Law provides the

major principle for determining misleading information. Furthermore, the Intellectual Property Law[12] also provides a number of principles to determine the misleading information.[13] We suggest that the State Bank's regulation refers to the principles stipulated in this law and implementing legal documents.

An example of this reference:

> "**Article ....** Misleading information
>
> Misleading information to confuse customers with respect to trade mark, business slogan, logo, package, geographic specifications and other elements for the purpose of competition is prohibited. The confusion is determined by the principles of the Intellectual Property Law and legal texts providing guidance of that law… »

1.2.2 Infringing business secret:

Article 41 of the Competition Law provides in details four conducts which are considered as infringement of business secret and are prohibited. Article 3 Point 10 of the Competition Law defines the "business secret" protected by law as the information meets three requirements:

1. which is not ordinary knowledge and is not obtained in ordinary manner;
2. which help the holder of such information have advantages over the others who do not have such information or do not use such information;
3. which is protected by the owner from disclosing and is not accessed in ordinary manner.

The Law on Credit Institutions also has a number of provisions in relation to client's secret in Articles 17 and 104. The Law on Intellectual Property and implement legal texts also have detailed provisions on business secret.

We suggest that the State Bank's regulation use to those laws and implementing legal documents as references.

1.2.3 Coercing other party in business:

Article 42 of the Competition Law prohibits an enterprise to force a client to stop doing business with other enterprise or not doing business with that enterprise.

Coercing can be in many forms but typical examples are conditions that many banks put in contract with their clients prohibiting the clients to use service of other banks.

Here are some examples of such conditions:

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[12] The Intellectual Property Law No. 50/2005/QH11 passed by the National Assembly on 29 November 2005 (the "Intellectual Property Law")

[13] Articles 74 and 78 of the Intellectual Property Law.

Example 1: Bank A grants a loan to client B. A condition in the loan agreement is client B should not have any other account in other banks.

Example 2: Bank A grants a loan to client B. A condition in the loan agreement is that all international payments of client B should be carried out via Bank A.

1.2.4 Defaming other enterprises:

Article 43 of the Competition Law defines defaming other enterprises as the act of directly or indirectly providing falsifying information which could harmfully affect the reputation, financial situation and business of other enterprises. However, this definition is still too general and requires careful consideration on a case-by-case basis.

For further guidance of this definition, the State Bank may consult the definition of "defaming other enterprises" in Decree 24/2003/ND-CP dated March 13, 2003 providing in details the Ordinance on Advertisement. The Decree defines this conduct as:[14]

> "Article 3. A number of prohibited advertisements as provided in Article 5 of the Ordinance on Advertisement are provided in details as follows:
>
> …..
>
> 7. Defaming, comparison or misleading information which lead to confusion about the producer, services and products of other producers; using name, image of other organizations and individuals [for advertisement] without their consents."

With respect to defaming other enterprises, the recent Decision No. 20/HDTP-DS of the Council of the Supreme Court Judges on the dispute between three plaintiffs Van Thanh, Uu Viet, and Anh Dung companies versus Kym Dan company might be used as reference. In this Decision, the Council held that the defendant has violated the law on advertisement by comparing its products against the plaintiffs' products in a manner that defame the later.

1.2.5 Disrupting the business activities of other enterprises

Article 44 of the Competition Law defines these activities as the conducts directly or indirectly hinder, or disrupt the business activities of other enterprises. For further guidance, we suggest that the principle to determine if a conduct of a bank is unfair competition as follows:

1. it is a conduct with intention. Which means the Bank is aware of the fact that its conduct could cause disruption of the other's business. In case, where there is no evidence for such awareness, the authority could decide whether the Bank is aware of such consequence based on the reasoning that whether an ordinary person in such situation could be aware of that consequence or not.
2. There is an actual disruption of the other enterprise's business;

[14] Article 3, Point 7 of Decree 24/2003/ND-CP.

3. There is a causal linkage between the business disruption and the Bank's conduct. This means that the disruption should be a direct consequence of the Bank's conduct.

1.2.6 Advertising with the purpose of unfair competition:

Article 45 of the Competition Law stipulates four types of advertisement with the purpose of unfair competition:

a. Direct comparison between the products or services of the advertiser with those of other enterprises;

b. Imitating the advertisement of other enterprises which could confuse the customers;

c. Providing clients with falsifying or confusing information about:

   i. Price, quantity, quality, utility, design, goods category, package, production date, expiry date, goods origin, producer, factory, processor, place of processing;

   ii. Usage, service, and guarantee;

   iii. Other falsifying or confusing information;

d. Other advertising activities prohibited by the law.

Of these four activities, comparison and providing falsifying or confusing information most likely happen. Nevertheless, the Competition Law and legal texts implementing this Law do not have further guidance on these issues.

We suggest the guidance in the State Bank's regulation on these activities as follows:

a. With respect to comparison of products and services, the State Bank may refer to the principles of Decree No. 37/2006/ND-CP providing in details the implementation of the Trade Law on trade promotion dated April 4, 2006. In this Decree[15], enterprises can using comparison advertisement in case where it is:

   i. a comparison between the fake and original products; or

   ii. a comparison between original product and the products are determined by the competent authority as infringing its intellectual property.

b. With respect to falsifying advertisement we suggest the State Bank's regulation refers to the principle provided in Article 3 of Decree 24/2003/ND-CP providing in details the Ordinance of Advertisement dated March 13, 2003. Point 4 of this Article defines falsifying advertisement as

[15] Article 22.

(i) advertising falsely about the quality of services and products, (ii) fake address of producer's or service provider.

We suggest that the State Bank provides in details the requirement of minimum information that a bank should provide in its advertisement of each type of service. The minimum information should include all information that could affect client's interests (for example, an advertisement on bank card should include all information about fees and requirements of minimum deposits, etc.)

1.2.7 Promotion with the purpose of unfair competition:

Article 46 of the Competition Law prohibits five types of promoting conducts. For more detailed guidelines, the State Bank could consult the principles of trade promotion in Decree No. 37/2006/ND-CP providing in details the implementation of the Trade Law on trade promotion dated April 4, 2006. In this Decree, regulations of promotion are provided in Chapter II.

1.2.8 Multilevel marketing (or "pyramid" marketing)

In "pyramid" marketing[16] a client can become an agent for a producer and has commission from the distribution of the product or by getting other people to join the distribution network. However, in banking sector, such type of marketing should be prohibited for two reasons.

Firstly, such pyramid marketing network would lead to the danger for the commercial banking system where its business is broadened without proper control by a network of profit-eager-agents.

Secondly, the Law on Credit Institution does not allow individuals who are not the bank's employees to work with bank as an agent in its marketing network.

2. RESTRAINTS OF COMPETITION

The Competition Law defines the practices in restraint of competition as practices that reduce, distort or hinder competition in the market which include (i) agreements in restraints of competition, (ii) abuse of dominant market position and monopoly position, and (iii) economic concentrations.

2.1. Agreements in restraints of competition

Article 8 of the Competition Law provides eight types of agreements on restraints of competition:

i. Price-fixing (direct or indirect) agreement;

ii. Agreement to divide markets or sources of supply of goods and services;

[16] For the definition of pyramid marketing please see Article 3, Point 11 of the Competition Law.

iii. Agreement to restrain or control quantity or volume of production, purchase or sale of goods or supply of services;

iv. Agreement to restrain technical or technological development or restrain investment;

v. Agreement to impose on other enterprises conditions for entering into contract for purchase/sale of goods or services or to force other enterprises to accept unrelated obligations;

vi. Agreement to prevent, impedes, or does not allow enterprises to participate in a market or to develop business;

vii. Agreement to exclude non-agreed parties from the market; and

viii. Collusive tender agreement to win a tender.

2.1.1 Forms of agreement

Decree 116/2005/ND-CP[17] ("Decree 116") provides in details these conducts. However, it's worth noticing that in Decree 116, the form of an "agreement" is not defined. Article 14 of the Decree provides that an agreement is a collective action of agreed parties. However, in other related articles – Articles 15, 16, 17, 18, 19 20 and 21 – the term "agreement" is not clearly defined.

We suggest that the State Bank's regulation uses the suggestion in commentary to Article 3 of the Model Law on Competition of the United Nations:[18]

"1. Prohibition of the following agreements between rival or potentially rival firms, regardless of whether such agreements are written or oral, formal or informal: …"

This means that a conduct could be considered as an agreement in restraints of competition if:

i. it is an agreement or arrangement of a conduct provided in Article 15 of Decree 116 regardless of whether such agreement or arrangement is written or oral, formal or informal;

ii. in case where there is a lack of evidence of such agreement/arrangement – it is a collective action of the involved parties to carry out one of the conducts provided in detailed by Article 15 of Decree 116.

2.1.2 "Relevant market"

According to Article 9 of the Competition Law, five conducts which are list from point 1 to point 5 of Article 8 are prohibited if the combined market share of the parties is of or

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[17] Decree 116/2005/ND-CP dated September 15, 2005 providing in details the implementation of the Competition Law.

[18] United Nations, *Model Law on Competition,* 14, TD/RBP/CONF.5/7, (available at www.unctad.org/en/docs/tdrbpconf5d15.en.pdf)

more than 30 per cent of the "relevant market". Nevertheless, Article 4 of Decree 116 defines the "relevant market" as "the market of products, services which are substitutable in terms of characteristics, usage and price." This definition is too general to apply in banking sector. Therefore it is necessary to have more detailed definition of the "relevant market" in the State Bank's regulation.

There are several types of market stipulated in the Law on Credit Institutions: (i) market of currency, (ii) market of gold, (iii) market of foreign currency,[19] (iv) market of tendering treasury notes, (v) inter-bank market, (v) market of receivables,[20] (vi) capital market[21]. Because the banking sector develops very fast with new types of services and banking products are introduced every year, any "fixed" definition of relevant market in the State Bank's regulation could be outdated very soon. We suggest that instead of having a "fixed" definition of each type of market in banking sector, the State Bank's regulation refers to the "market" definitions in other legal texts (for example, the Ordinance on Foreign Currencies, etc.)

It's worth noticing that in modern banking sector, combined services are common. A bank can offer to its client a "facility" which may include more than one type of service: loan, banking guarantee, letter of credit, and negotiation of export bills. A group of banks who offer such type of facility would have an agreement to restrain the competition of non-party banks. In this case, the combined services would result in difficulty for the authority to have a fixed definition of "combined" market. We suggest that, in the State Bank's regulation, instead of determining a "combine" market – which sometimes is impossible – the authority will consider separately the "relevant market" of each type of service. And if in any relevant market, the combined market share of the parties is of or more than 30 per cent, the agreement will be considered as restraint of competition.

Example

Banks A, B, and C – all have advantage over other banks in terms of capital, have an agreement to reduce the competition of other banks from the market of big state-invested projects by offer loans with low costs. The three banks know that the agreement may be considered by the authority as restraints of competition because the combined market share of three banks in lending market would be 45 per cent.

In order to avoid such consequence, three banks agree in their agreement that they will offer their banking services in a form of facility which include: loan, letter of credit and bank guarantee, cash management, negotiation of export bills. They understand that, although the facilities include several services, the clients would use only lending service – which they are very competitive by offering low cost loans. They anticipate that because their market shares in the markets of letter of credits, cash management, and negotiation of export bills are not much so it could trade off with their market share in lending.

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[19] Article 16, point 3.b, the Law on Credit Institutions.

[20] Article 70 of the Law on Credit Institutions.

[21] Article 115 of the Law on Credit Institutions.

If the authority uses the "combination" methodology to calculate the relevant market, the three banks' market share would be lower than 30 per cent – and the agreement is not a restraint of competition (although in fact it is). If the authority uses the "separate" relevant market calculation, the three banks clearly restrain the competition of other banks in lending market.

2.1.3 Exemptions

Article 10 of the Competition Law provides six (06) exemptions for the prohibition of restraints of competition. Of these, two exemptions in point (dd) and (e) need to be considered by the State Bank in its regulation. These two exemptions are the agreement for:

đ) strengthening the competition of small and medium-size enterprises; and

e) strengthening the competition of Vietnamese enterprises in international market.

To the best of our knowledge, there is no definition of small and medium-size credit institutions in the Law on Credit Institutions as well as the implementing legal texts of this law. It is necessary for defining the small and medium-size credit institutions in the State Bank's regulation.

2.2. Abuse of dominant market position and monopoly position

2.2.1 Prohibitions

There are six conducts that an enterprise which has "dominant market position" and "monopoly position" is prohibited:[22]

i. selling below cost;

ii. fixing unreasonable selling or purchasing prices or minimum reselling prices,

iii. restricting production or distribution;

iv. restricting the market or technical or technological developments;

v. applying discriminatory commercial conditions, imposing conditions for signing contracts; and

vi. bundling unrelated obligations into a contract or preventing other enterprises from entering the market.

[22] Article 13 the Competition Law.

2.2.2 Dominant market position

An enterprise will be considered as holding a dominant market position if it (i) holds a market share of 30 per cent or more of the relevant market or (ii) is capable of significantly restraining competition.

A group of enterprises acting together will be considered as holding a dominant market position if they hold a combined market share of 50 per cent or more (for two enterprises), 65 per cent or more (for three enterprises) or 75 per cent or more (for four enterprises) in the relevant market. It appears that parallel action by the group of enterprises is sufficient to constitute action together, without need for an agreement.

2.2.3 Relevant Market

To determine if an enterprise having a dominant market position or not, two factors should be considered: "relevant market" and "market share" of each enterprise or of a group of enterprise.

With respect to the concept of "relevant market" we have discussed above in Point 2.1.2 of this report.

2.2.4 Market Share

The concept of "market share" needs to be discussed more in details. As defined by Point 5 of Article 3 of the Competition Law, the market share of a service or a product of an enterprise is the percentage of the revenue (buying or selling) of the enterprise in comparison with the total revenue of other enterprises in the relevant market during a period of month, quarter or year.

It's worth noticing that there are three elements the use of which could distort the result of market share calculation: (i) the definition of product or service to be used in calculation, (ii) the relevant market, and (iii) the period to be used in calculation of revenue.

i. *the definition of a product or a service:* as credit and financial institutions rely more and more on combined services as a weapon of competition (for example, instead of providing the lending, cash management, and foreign exchange separately, a bank usually provides a "facility" which contain all of these services). For this reason the State Bank should make clear in its regulation the methodology to calculate the market share in case of combined service.

   Example:

   The bellows table illustrates a theoretical case in which the market share of Bank A can be different depending on whether the State Bank calculates its market share based on a separate or a combined service. If the market share is calculated based on each type of service – the Bank A's market share on lending market would be 40% - which means Bank A having dominant market position. However, if the market share is calculated based on combined service (the "facility"), it is only 24.52%.

	Lending (VND billions)	L/C and Guarantee (VND billions)	Foreign Exchange (VND billions)	Combined Service (VND billions)
Bank A	10	1	2	13
Other banks	15	10	15	40
Bank A's Market share	40%	9.09%	11.76%	24.52%

For this reason, we suggest the State Bank to use the methodology of calculating the market share of "separate" services in case banks provide combined service.

ii. *Relevant market*: the relevant market is discussed in Point 2.1.2 of this report;

iii. *Period in which the revenue is calculated*: the Competition Law provides that the period to calculate revenue might be month, quarter or year. However, there is no further guidance about in which case the period of month or quarter or year will be used. As the matter of fact, the calculation of market share may be very different if the period in which it is calculated is changed from month to year. For example, the market share of opening L/C service of the banks calculated by year maybe very different if it is calculated in the 1st quarter of a year (the period of low imports). For this reason, we suggest that the State Bank's regulation clearly states the cases in which the periods of month, quarter or year may be used to calculate market shares.

2.3. Economic concentrations

In accordance with the Competition Law, economic concentrations include mergers, acquisitions, consolidations, joint ventures and "other forms of economic concentration".[23] If the participating parties have a combined market share above 50 per cent in the relevant market, an economic concentration is prohibited. However, the parties may apply to the Competition Commission for an exemption from such prohibition if[24]:

i. one or more of the parties to the economic concentration is at risk of being dissolved or declared bankrupt or

ii. the economic concentration has contribution to socioeconomic development, technical progress or the increase of exports or

iii. if the proposed economic concentration would result in a 'small or medium-sized enterprise'.

[23] Article 16 of the Competition Law.

[24] Articles 18 and 19 of the Competition Law.

If the parties to an economic concentration have a combined market share of between 30 per cent and 50 per cent of the relevant market they must notify the Competition Commission 30 days before the proposed economic concentration. The proposed economic concentration can only be carried out after a written confirmation has been received from the Competition Commission that the economic concentration is not prohibited.

Nevertheless, the State Bank's regulations need to provide guidance on the following issues:

i. exemptions from prohibition of economic concentration: "contribution to socioeconomic development, technical progress or the increase of exports";

ii. "small-and-medium-sized enterprises".

2.3.1 "Contribution to socioeconomic development, technical progress or the increase of exports":

This provision is very unclear for credit institutions to figure out if their merger is prohibited or not. We could foresee that in near future there will be a new wave of merger and establishment of joint-ventures amongst small Vietnamese banks and between Vietnamese banks and foreign banks. The merger is necessary in many cases to increase the competition of small banks when the banking sector is opened to foreign competition.

Nevertheless, the State Bank's regulation needs to clarify a list of sectors in which the merger could be considered as "contribution to socioeconomic development, technical progress". For example, the rural areas in Vietnam are not attractive to urban banks. This situation might lead to the fact that while the rural banks are still in need of capital due to the low rate of saving of peasants, the urban banks still have problems with finding new projects for funding. A merger or a joint venture between several rural banks and urban banks could create more options of banking products for peasants and with cheaper cost (although the combined market shares of such merger may be higher than 50% of the relevant market). In this case, the merger should be considered as contribution to socioeconomic development.

2.3.2 "Small and medium sized enterprises"

The Law on Credit Institutions does not stipulate the criteria to determine if a credit institution is of small or medium size. For this reason, it is necessary to clarify these criteria in the to-be-issued regulation. The criteria are suggested to include:

i. chartered capital of the bank;

ii. the competitiveness of the bank;

iii. the graphic market of the bank;

iv. the characteristics of the services that bank provides.

The criteria for determining whether a bank is of small or medium size should not be only based on the chartered capital of the bank. It should be considered the competitiveness of

that bank in its geographic area or in its services. For example, a bank with chartered capital of VND 10 billions could be considered as a small bank if it is an urban bank. However, that bank could be considered as a big one if it provides services to peasants in mountainous area.

PART IV: EXPERIENCE OF CHINA, PRACTICE AND REGULATIONS

In this part we summarize the experience of China in dealing with anti- competition activities in the banking sector and the major legal texts issued by the People's Bank of China on this issue.

Similar to Vietnam, China is a country in transition from a highly centralized planning economy to market oriented economy. The similarity between the central bank system of the two countries as well as the dominant role of state-owned commercial banks in the banking sector makes China's experience in dealing with anti-competitive practices is worth to be considered by Vietnam.

1. UNFAIR/ILLEGAL COMPETITION IN THE BANKING SECTOR OF CHINA

The People's Bank of China, in its Circular on Regulating the Competition in the Banking Market No. 354 (2002), summarized the anti-competitive practices in the banking sector as follows:

> "Recently, some banking institutions have been engaged in unfair competitions to enlarge the business scale and to increase the market shares randomly. Some lower the price randomly without taking account of the cost, open businesses by charging less than the costs. Some soften the requirements for business examination and credit extension to contend for business from the standpoint of short-term interests. Some disclose the information of other banking institutions, maliciously debase their competitors and make unfair propaganda in their marketing activities to mislead customers. Some institutions offer obstacles in the operational system of the unit against the transactions of other banks. And a few institutions deal in activities beyond their business scope, canvass savings with high interests and demand their interior employees to complete the deposit tasks. The above-mentioned acts have increased the banks' operational costs and risks and have impaired the normal financial order. Some acts violate Anti-unfair Competition Law of the People's Republic of China, Price Law of the People's Republic of China, Commercial Banking Law of the People's Republic of China etc., and have resulted in bad consequences."

The main legal text in competition of China is the Anti-unfair Competition Law. Under this law, the People's Bank of China has issued several legal texts to provide detailed guidance. Generally, a bank may be considered as having unfair/illegal competition if it

i. provides bonus and remuneration for employees based only on the level of deposit mobilization;

ii. lower the price randomly without proper reasons, or offers services bellows the costs;

iii. grant a loan to a customer so they can use it as minimum deposit for opening an account;

iv. eases the conditions which are mandatory to clients in reviewing their loan proposals;

v. discloses information about problems and difficulties of other banking institutions, defames their competitors and provides falsifying information to mislead customers;

vi. unreasonably obstructs or delays payment transactions with competing banks;

vii. engages in transactions and activities beyond their business scope;

viii. offers interest rates which is higher than these permitted by the People's Bank of China; and

ix. sets a quota for employees in mobilization of deposit.

Unfair/illegal competition practices can be mainly divided into two categories: (i) competition in deposit mobilization, and (ii) competition to increase market share and expand the client base. Other forms of anti-competition practices (such as technical barrier, or abuse of dominant position) are mentioned here and there in various legal texts but there is not much detailed guidance.

2. REGULATORY FRAMEWORK IN UNFAIR/ILLEGAL COMPETITION

From 1996 to 2002, the People's Bank of China (PBOC) issued four Notices and Circulars to deal with unfair/illegal competition in the banking sector, i.e.:

i. Notice no. 66/1996 of PBOC on prohibition of soliciting for deposits by unreasonable high interest rates or unfair competition measures;

ii. Notice no.35/2000 of PBOC on prohibition of unfair competition for mobilizing deposits amongst financial institutions.

iii. Notice no.253/2000 of PBOC on a number of principles in prohibiting unfair competition for mobilizing deposits.

iv. Circular no. 354 2002 of the PBOC providing the Regulations on Competition in the Banking Market.

3. MEASURES TO DEAL WITH UNFAIR COMPETITION IN MOBILIZING DEPOSIT:

The People's Bank of China deals with the unfair competition in mobilizing deposits by strictly requires the banks to:

i. follow the regulation on the statutory deposit interest rates, and not disguise the high interest rates in other forms of bonus or promotion.

ii. not give any kinds of bonus or promotion or incentives to depositors based on the amount of their deposits.

iii. not set quotas of deposit mobilization for departments which is not responsible for mobilizing deposits and not set the quotas of deposit mobilization to employee as a norm for the payment.

iv. strictly follow the statutory loan interest rates with proper operation fees.

v. not ease the requirements for granting credits for the purpose of expanding its client base.

vi. not increase the client's outstanding deposit by lending to customers for them to deposit to banks or lending to the clients to use it as minimum deposit in their accounts.

4. MEASURES TO DEAL WITH UNFAIR COMPETITIVE PRACTICE TO INCREASE MARKET SHARE

In dealing with competition to increase market share and expand the client base, the People's Bank of China requires the banks to:

i. not increase market shares by offering bellow the cost services.

ii. obtain approval from the PBOC for their new deposit methods of mobilizing deposit.

iii. not provide cards and machines free-of-charges to other party when the bank cooperates with them to issue a payment card service.

iv. not provide other party with free-of-charge equipment, computer software and hardware system. Without the approval of the People's Bank of China, the bank shall not have a service point in the client's working place.

v. not discriminately increase or lower the service fees.

5. CONCLUSION

Generally, it could be said that the competition legal framework of China is not a comprehensive system. The People's Bank of China has issued a series of legal texts to deal with specific issues arisen in daily practice. Instead of providing general principles the Bank stipulates specific provisions applicable to particular activities. The advantage of this approach is the provisions are specific and clear to banks. However, the disadvantage is the banks are always able to find out a way to go around such specific and inflexible regulations. As a consequence, the regulations are always "behind" the development of banking practices. In our opinion, the legal framework that Vietnam is developing is more comprehensive than the Chinese system.

PART V: SUGGESTIONS FOR BUILDING A LEGAL FRAMEWORK FOR COMPETITION IN THE BANKING SECTOR

On 6th June 2006, the draft of this report was presented by the author in a seminar co-organized by MUTRAP and the State Bank of Vietnam. In the seminar, a number of issues were raised by the audience which the author needed to carry out further study. Then, on 15th December 2006, the supplementary study carried out after the 6th June 2006 seminar were discussed in a round-table discussion between local consultants for the project and a number of senior officials of the State Bank of Vietnam. The result of the supplementary study and issues raised in the discussion are discussed in this Part V.

In this part, we discuss the issues and have a number of recommendations as follow:

(i) Special impacts of competitive practices in the banking sector;

(ii) Identifying the governing law of a competitive practice; and

(iii) Recommendations for building a legal framework of competition.

1. SPECIAL IMPACTS OF COMPETITIVE PRACTICES IN THE BANKING SECTOR

The competitive practices of banks, in theory and practice, are regulated by the Competition Law and the Law on Credit Institutions. Basically, these laws share the same purpose on regulating competitive practices.

Clause 2 of Article 16 of the Law on Credit Institutions stipulates as follows: "Competitive practices which are illegal, which hinder the implementation of national monetary policy and *the safety of the system of credit institutions*[25] and legitimate interests of the parties are strictly prohibited"

Meanwhile, Clause 2 of the Article 4 of the Law on Credit Institutions stipulates as follows: "Competition must be on the basis of the following principles: be honest, not to violate the legitimate rights and interests of the State, *the public*, enterprises and consumers and be in compliance with the law"

Basically, the "safety of the system of credit institutions" is an element constituting the "public interests". However, negative effects [of a competitive practice] on the "safety of the system of credit institutions" have some characteristics which are very different from those of negative effects on the public interests.

The first characteristic is that the safety of the system of credit institutions is quickly affected by a competitive practice and it is necessary to have urgent remedies to deal with such effects. Time necessary for dealing with banking crisis is not calculated by weeks, but days and in many cases, by hours. The typical example is the crisis of Asia Commercial Bank ("ACB") which was a consequence of bad rumor in July 2003.

[25] Emphasized by the author.

Anticipating ACB couldn't stand firm, the State Bank of Vietnam had to intervene in by a guarantee of the Governor on the safety of deposits in the bank as well as necessary financial support to ACB for its daily operations.

The second characteristic is that hazardous practice has a "domino" effect on the safety of the system of credit institutions. The collapse of almost the whole system of people's credit funds in 1990s was a typical example of domino effect on the system safety.

The third characteristic is that the damage caused by negative effects on the system safety increases as the crisis spreads to other industries. It is still vivid in memory of people how financial crises in 1998-1999 swept from Thailand to Indonesia, Korea, Russia and Argentina like a tsunami.

Therefore, the effects of an unfair competitive practice in the banking industry are different from the effects of the same practice in another industry (i.e. aviation industry). For example, if A airlines says that B airlines' planes are not completely safe, this might reduce the revenue of the B airlines and cause inconvenience for B's clients due to having less choice of services. Even if B had bankrupted, it is unlikely that other airlines would go bankrupt too. However, in banking industry, if Bank C leaks false information to the public and cause a crisis for Bank D, and Bank D goes bankrupt, the consequence does not stop here. The domino effect of the bankruptcy of Bank D may lead to the bankruptcy of the other banks and a crisis for the economy.

Briefly, effects of a competitive practice on the bank sector have the following characteristics:

(i) the consequences come fast,
(ii) contagious effect,
(iii) scope of impacts does not limit in the banking industry but expands to other industries.

Taking into account of these characteristics, we analyze and have recommendations on the legal framework for the banking sector in the next section.

2. IDENTIFYING THE GOVERNING LAW OF A COMPETITIVE PRACTICE

At the same time, one practice could be regulated by different laws. For example: misleading advertisement can be regulated by the Ordinance on Advertisement, or the Intellectual Property Law or the Competition Law. Similarly, practice of a bank might be regulated by the Competition Law and the Law on Credit Institutions.

For example: Bank C leaks information causing Bank D's clients be suspicious on this bank's safety (for example: bank C alleges that bad debt ratio of Bank D highly exceeds acceptable ratio). As for the State Bank of Vietnam, the information is false. However, most clients are not banking experts, so for this reason, they believe in the information. Bank rush starts and Bank D goes to bankrupt. The panic spreads to other banks' clients and causes crises to these banks.

There are two laws which can be applied to this practice: the Law on Credit Institutions and the Law on Competition. The Law on Credit Institutions, in its preamble, stipulates that its purpose is to ensure "operations of credit institutions are healthy, *safe* and

effective". Meanwhile, the preamble of the Competition Law clearly stipulates that "this law regulates competition".

So, which law would govern that practice?

Let's come back to the case on ACB mentioned above. Suppose that the rumor is given by Bank X, a competing bank of ACB. In this case, which law could be applied?

We know that the rumor against ACB Bank began and broke out only on two days: Sunday and Monday. The crisis was only stopped when the State Bank committed to support or satisfy all financial needs of ACB for fulfilling its obligations towards its clients, and the Governor himself have a press conference to explain the issue. We think that there is a legal basis for these actions of the State Bank, because the State Bank uses its power in accordance with the Law on State Bank of Vietnam and the Law on Credit Institutions to prevent a practice which have bad effects on the safety of the bank system.

However, if the Competition Law is resorted to resolve this case (it's noteworthy to recall that we have supposed that the bank leak out such rumor had been identified), we do not find any provision in this law can be used as a legal basis for the financial intervention of the State Bank.

In short, the nature of a competitive practice might be different depending on the perspective of the analist. The practice, due to different views of the analist, might be subject to different laws. For example, the act of spreading false rumor on other bank might be an unfair competitive practice if it is viewed under the perspective of the motive of the bank spreading false rumor - and therefore, it is governed by the Competition Law. But if it is viewed under the perspective of state management in banking, that practice should be considered as an act which could have bad affects on the safety of the bank system and shall be subject to the Law on Credit Institutions and the Law on State Bank.

Thus, to identify the governing law of a practice, the following factors should be considered:

(i) Which bad affects shall get the priority to be dealt with? For example, dealing with a case of spreading false rumor about another bank, we should consider which one of the two effects (the effect of unfair competition or the effect to the safety of the bank system) shall get the priority to be dealt with.

(ii) The remedies that each law gives state agencies to restrain the bad effects of the practice. For example, to deal with one bank's crisis, the State Bank should have a commitment on financial support or directly financially support – so the question is which law allows the State Bank to use such financial support?

3. RECOMMENDING ON A LEGAL FRAMEWORK FOR COMPETITION IN BANKING SECTOR

As discussed in two sections above, in building a legal framework for competition in banking sector we should consider two groups of practices:

(i) THE COMPETITIVE PRACTICES WHICH HAVE ONLY EFFECTS ON FAIR COMPETITION OR WHICH RESTRAIN COMPETITION; AND

(ii) The competitive practices which not only have effects on fair competition (and which restrain competition) but also affect the safety of banking system.

For the practice of group (i), we see that Competition Law has all measures and remedies to regulate these practices. However, for the group of practice (ii) we think that the Law on State Bank and the Law on Credit Institutions has more measures and remedies to deal with these practices. For this reason, we think that whenever considering a competitive practice in banking sector, we should consider if this practice affects the safety of banking system. If it does, the practice will be subject to the Law on Credit Institutions and the Law on State Bank. If it only affects the competition environment, the practice will be subject to the Competition Law.

It is necessary to have two regulations. The first regulation governs the practices of the credit institutions which affect the safety of banking system. This regulation shall be incorporated to the Law of Credit Institutions and shall contain the principles to determine what practice could affect the safety of the banking system and the remedies. Moreover, the scope of functions of the State Bank needs to be modified in order to create a legal basis for the intervention the State Bank in case of the banking system unsafe. The codification of this regulation into the Law of State Bank and the Law on Credit Institutions (which are being drafted) shall be taken into account the commitments of Vietnam to the WTO in banking sector.

The second regulation may be a circular providing guidance on the implementation of the Competition Law in banking sector. This circular shall elaborate the concepts provided in the Competition Law in to the extent of banking sector (see Part III of this report). As the scope of study of this report is limited, we regret to not carry out further study on the contents of this circular. The drafting this circular certainly requires more efforts.

PART VI: CONCLUSION

Banking is a fast developing industry in which tens of new services and banking products are introduced every year. The determination of an unfair competitive conduct in banking is difficult due to the sophisticated of business structure and many derivatives and combinations of services. All fundamental concepts of "relevant market", "dominant market position", "market share" should be carefully interpreted taking into account all particular characteristics of the industry.

We suggest that where the determination of an unfair competitive conduct involving "hybrid" services, the services shall be considered not as a total combination but separately to ensure that the banks could not use combined services as a way to avoid prohibition of competition.

We also suggest that, in the State Bank's regulation on competition, whenever a concept has been defined by other equivalent laws, the regulation should refer to those laws instead of developing a new concept. That would help to save time for the regulation drafters and avoid possible conflict with other legal texts.

We also suggest the State Bank to consider the experience of the People's Bank of China, especially the experience in dealing with specific unfair competitive conducts. However, we do not think that the Chinese system is a good one to be applied into current situation of Vietnam given that the competition legal framework of Vietnam, in fact, is more comprehensive than that of China.

For the drafting the regulations concerning competition in banking sector, we think that it is necessary to have a clear regulation of the practices which, at the same time, affect both the competition environment and the safety of banking system. To deal with these practices, we think that the priority of governing law shall be given to the Law on Credit Institutions and the Law of State Bank because these laws are under the amending process (so it would be more easier to corporate the new regulation into the new laws). Moreover, only these laws could provide the State Bank with power and remedies (both administrative and financial ones) to prevent hazardous practice which could affect the safety of banking system.