

Review

Current legal framework of economic concentration control in the retail sector in Vietnam

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Abstract: In the context of Vietnam's extensive international integration, economic concentration emerges as a pivotal strategy employed by businesses across various sectors, notably the retail industry, to foster expansion and bolster competitiveness within the market. As this trend evolves, it necessitates the formulation by the Vietnamese Government of a comprehensive and stringent legal framework tailored to regulate economic concentration among enterprises. Such measures are imperative to preclude the curtailment of market competition, which could potentially undermine the equity and vitality of the business environment in Vietnam. This paper meticulously examines and elucidates theoretical nuances surrounding economic concentration in the retail sector. Additionally, it scrutinizes the current landscape, assessing the impact of extant legislation governing economic concentration and the efficacy of enforcement activities in this realm within the Vietnamese retail sector. Consequently, the paper proffers judicious recommendations to enhance the efficacy of legal mechanisms governing economic concentration to foster competition and fortify Vietnam's overall economic prowess, particularly within the retail sector.

Keywords: economic concentration; competition law; Vietnam competition law 2018; anti-competitive impact; retail industry

1. Introduction

In recent years, as part of an overarching economic restructuring and integration initiative, coupled with active participation in World Trade Organisation (WTO) commitments related to market liberalisation and the execution of new-generation free trade agreements (FTAs), Vietnam has emerged as a highly sought-after destination for foreign investors. Substantial investment inflows have been directed into the market, facilitated by corporate economic concentration initiatives, predominantly manifesting as mergers and acquisitions (M&A). Notably, given its sizable population and remarkable growth trajectory, the retail sector in Vietnam stands out as a key driver of economic expansion, particularly in the aftermath of the COVID-19 pandemic. Over the preceding decade, the Vietnamese retail landscape has undergone considerable transformation, marked by alterations in the positioning of retail chains resulting from a series of transfers, acquisitions, and mergers. Despite the positive repercussions on investment and commercial endeavours within the market, economic concentration activities within Vietnam's retail sector, from a regulatory standpoint, pose discernible risks that encumber competition and exert influence on market structure.

In order to oversee and regulate economic concentration activities at large, and specifically within the retail sector, the Government of Vietnam has promulgated a

comprehensive framework of legal instruments pertaining to competition, including the Competition Law 2018 (which supersedes the Competition Law 2004), Decree 35/2020/ND-CP providing guidance on the implementation of the Competition Law 2018, and Decree 75/2019/ND-CP delineating penalties for administrative violations in the realm of competition. Notably, the Competition Law 2018 has introduced a paradigm shift in the regulation of economic concentration, emphasizing the evaluation of both the overall impact and the beneficial effects of economic concentration on the market. In recent periods, the legislation governing economic concentration, both in a general sense and within the specific context of the retail sector, has demonstrated discernible positive effects. Nevertheless, concomitant with the processes of innovation, economic integration, and the continual expansion of business activities, it is evident that the legal framework overseeing economic concentration still harbors certain limitations requiring refinement. These refinements are essential to fortify the control of economic concentration activities, fostering effectiveness and contributing to the establishment of an equitable and robust business environment in Vietnam.

Commencing from the aforementioned concern, this paper aims to conduct a comprehensive inquiry into the existing legal framework governing economic concentration in Vietnam, with a specific focus on the retail sector. Through this examination, the objective is to elucidate both the merits and drawbacks inherent in the prevailing legal structure. Subsequently, the study endeavors to proffer strategic solutions aimed at fortifying and enhancing the efficacy of the legal apparatus governing economic concentration within the retail sector in Vietnam. In pursuit of this objective, the subsequent sections of the study are organized as follows: Part 2 undertakes a review of scholarly research pertaining to the regulation of economic concentration, both globally and within the specific context of the retail sector, examining implementations worldwide and in Vietnam. Part 3 then conducts a comprehensive evaluation of the legal framework overseeing economic concentration in the retail industry in Vietnam, offering an assessment of both attained accomplishments and extant limitations within the legal system. Lastly, Part 4 of the study proffers strategic recommendations aimed at enhancing the effectiveness of legislation governing economic concentration within Vietnam's retail sector.

2. Literature review

2.1. Concept and definition of economic concentration

In the realms of economics and legal scholarship, the concept of economic concentration is examined through various perspectives. Notably, three fundamental approaches are discerned (MOIT, 2019):

Primarily, viewed as a process intricately tied to the formation and alteration of market structure, economic concentration within the market is conceived as: “the process whereby the number of independent businesses engaging in market competition diminishes, either through mergers (in a broad sense) or via the internal expansion of enterprises by augmenting production capacity” (MOIT, 2019). This perspective elucidates the causal factors and repercussions of economic concentration on the competitive market structure. Simultaneously, it incorporates the phenomenon

of capital accumulation as an integral facet of the economic concentration concept.

Secondly, construed as a manifestation of business conduct, economic concentration is defined as “the augmentation of capital resulting from the amalgamation of multiple capitals, or the attraction of other capital by a singular capital” (MOIT, 2019). While this conceptualization does not delineate specific manifestations of economic concentration, it does elucidate the fundamental nature and modus operandi of the phenomenon.

Thirdly, viewed through the lens of legal science, numerous jurisdictions worldwide institute regulations governing merger control. As per the UNCTAD Model Law on Competition (2010), the terms “acquisition” and “merger” are employed to denote situations wherein two or more enterprises lawfully engage in activities to consolidate ownership of assets, shares, or capital contributions that were previously under separate control. In consonance with Article 3 of Regulation 139/2004 of the European Commission (EC), economic concentration encompasses mergers, consolidations, and other modalities whereby one or more enterprises alter the control structure of the entire enterprise or a segment thereof. Conversely, the French Commercial Code, as articulated in Article L430-1, defines economic concentration as either the merger or consolidation of (i) two or more independent enterprises; or (ii) one or more enterprises, or individuals exercising control over that enterprise, wielding influence over a portion or the entirety of another enterprise, directly or indirectly, in any form.

In Vietnam, the regulation of economic concentration initially surfaced in the Competition Law 2004 and was subsequently reaffirmed in the Competition Law 2018. In contrast to certain jurisdictions that furnish detailed definitions of economic concentration, Vietnam’s legal framework merely enumerates its various manifestations. Specifically, the prescribed forms of economic concentration encompass mergers, consolidations, acquisitions, joint ventures between businesses, and other forms of economic concentration as stipulated by law (National Assembly of Vietnam, 2018). Consequently, Vietnam’s competition law delineates the recognised forms of economic concentration without furnishing specific criteria or indicators for these activities.

2.2. Research on competition and the legal framework governing competition in general

Globally, existing research on M&A and the control of economic concentration often exhibits limitations in geographical and temporal scope, concentrating on specific economic and legal contexts. The SCP model, as elucidated in the seminal work of Joe Bain (1956), has emerged as a prevalent analytical tool for examining the interplay between market structure, firm behaviour, and market performance. Jean Tirole’s research in 1988 delves deeply into the theory of industrial organisation, specifically addressing M&A activities, encompassing the dynamics and repercussions of such transactions on competition and market structure. The publication by Einer Elhauge and Damien Geradin in 2007 scrutinises the antitrust legal framework in the United States and the European Union (EU) from an economic standpoint, centering on the economic analysis of concentration control through

corporate mergers. Additionally, the study “Competition Law and Economics: Advances in Competition Policy and Antitrust Enforcement” (2010) concentrates on scrutinising the economic underpinnings of merger control, evaluating competition law regulations, and introducing EU policies regarding corporate mergers. Noteworthy is the emphasis on changes in merger control regulations and their economic ramifications for businesses. The research conducted by Pavlov (2011) compares controls on economic concentration in Russia, the United States, and the EU, with a specific focus on elucidating the relationship between M&A and economic concentration.

In Vietnam, several economists and scholars have undertaken studies and proffered insights into economic concentration, predominantly within the purview of competition law and the regulation of economic concentration, encompassing the Competition Law 2004 and its subsequent amendments and supplements in 2018. Notably, Bui Nguyen Anh Tuan’s work (2017) delves into the theory of economic concentration and the regulatory mechanisms governing it, analyses international experiences in economic concentration control, advocating for legal improvements to augment control efficacy. Ha Ngoc Anh’s dissertation (2018) systematises the theoretical framework of economic concentration, posing recommendations for amendments to the Competition Law and the enhancement of the independent state management mechanism. Furthermore, the research conducted by Nguyen Van Doi (2022) expounds upon the concept of economic concentration, analyses M&A activities, and examines the control of economic concentration within the ambit of the Competition Law.

2.3. Research on economic concentration and laws controlling economic concentration in the retail sector

Over the past decade and a half, scholarly inquiries into economic concentration activities within the retail market have garnered substantial global attention. Noteworthy investigations, exemplified by the works of Hosken, Olson, and Smith (2012), have underscored that mergers within the grocery retail sector can precipitate price escalations, exerting adverse effects on both competition dynamics and consumer rights. Kaufman (2013) directs attention to merger control mechanisms in Croatia as a means of sustaining competitive environments. UNCTAD’s comprehensive examination in 2016 delves into competition policy within food retail chains, offering propositions for regulatory frameworks to mitigate unfair business practices. The OECD’s 2019 exploration of competition policy in grocery retailing in Mexico serves as a contextual backdrop for evaluating merger behaviours. Durand’s meticulous analysis in 2021 scrutinises how competition authorities in the UK, Germany, and France assess the competitive ramifications of mergers. Meanwhile, Taylor and Warren’s 2021 investigation into competition dynamics within the UK’s grocery retail sector underscores the pivotal role of delineating the relevant market in evaluating competitive interactions among industry participants.

This prevailing research trend is discernible within the Vietnamese context; nevertheless, a paucity of articles has undergone publication and rigorous scientific peer review in esteemed academic journals. Despite this, certain seminal studies merit

mention, such as Hoang Van Nhan's (2021) investigation, which delves into legal theories and regulations while conducting an assessment of state management spanning the period from 2015 to the present. Nhan also proffers solutions for enhancement. Additionally, Tran Manh Dung and colleagues (2020) concentrate on establishing a theoretical framework for economic concentration, specifically M&A, within the retail sector. Their work encompasses the classification of economic concentration types and furnishes an overview of the Vietnamese retail market, albeit with a constricted focus on specific case analyses.

3. The current legal status concerning the control of economic concentration in the retail sector in Vietnam

3.1. Legal system on controlling economic concentration in the retail sector in Vietnam

3.1.1. System of regulations related to competition in trade agreements and international commitments to which Vietnam is a member

Retailing is a service sector characterised by widespread popularity and significant ties to production, goods circulation, and retail operations, profoundly shaped by the ongoing process of international economic integration. An analysis of international commitments pertaining to the retail industry reveals that the Vietnamese retail market, in general, and economic concentration activities within the retail sector in Vietnam, in particular, are primarily influenced by two major categories: commitments associated with WTO integration and FTAs.

In terms of both content and guiding principles, the retail industry and market will experience differential degrees of influence from all categories of commitments outlined in the aforementioned agreements. Nonetheless, the commitment group exerting the most direct impact on Vietnam's retail industry is that which pertains to the liberalisation of the retail market.

a) Commitment to opening the retail market in the WTO

Vietnam has undertaken commitments to liberalise all distribution services in accordance with the classification established by this organisation, with retail services being one of the four specified services. Concerning the extent of openness, the progressive opening framework is applied to foreign retailers. Subsequent to Vietnam's accession to the WTO on 11 January 2007, foreign investors were permitted to engage in distribution activities within Vietnam, initially in the mandatory form of a joint venture alongside Vietnamese partners, wherein their capital contribution could not exceed 49% of the shares. Starting from 1 January 2008, foreign investors were granted the opportunity to operate as joint ventures without restrictions on capital contribution ratios, allowing for full ownership up to 99.99%. As of 1 January 2009, foreign investors obtained the right to establish wholly-owned enterprises with 100% foreign ownership in the retail sector. Consequently, Vietnam has progressively liberalised business services within the retail market.

Nevertheless, Vietnam imposes certain constraints on foreign investors in terms of the scope of operations and the distribution of products. Specifically, in accordance with the stipulated commitments, foreign service providers are exclusively permitted

to engage in retail services by establishing retail establishments (such as stores or supermarkets), with proactive initiation limited to a singular establishment. For subsequent facilities, explicit approval must be sought from the competent authority. The decision of the competent authority hinges on various criteria, encompassing the number of service providers in a given geographic area, market stability, and geographical scale, determining whether additional retail establishments can be established. These criteria constitute the Economic Need Test (ENT), serving as a technical barrier aimed at constraining foreign retail giants to safeguard the domestic retail industry. The ENT is designed as a regulatory tool, affording Vietnam the capacity to regulate the quantity of retail establishments operated by a foreign retailer within its borders, contingent upon specific economic requirements.

Presently, Vietnam has refrained from making commitments to liberalise the market for specific product groups in international treaties of which Vietnam is a signatory. These product groups include: oil and lubricants; essential commodities such as rice and sugar; recorded items; and publications such as books, newspapers, and magazines. The approval of licences for retail distribution activities by foreign enterprises in Vietnam for these specified product categories is contingent upon meeting specific conditions and criteria.

b) Commitment to opening up the retail market in the FTA

Concurrently with its membership in the WTO, Vietnam adheres to competition-related commitments within the ambit of regional and bilateral FTAs. The two FTAs to which Vietnam has the deepest commitments on competition-related issues are the Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP) and the Vietnam-EU Free Trade Agreement (EVFTA):

- CPTPP: Members within the CPTPP commit to: (i) establishing or maintaining national competition laws that prohibit anti-competitive business practices; (ii) striving to apply Competition Law to all commercial activities within their respective territories; and (iii) upholding an authority tasked with the enforcement of national competition laws. Simultaneously, CPTPP member countries are obligated to ensure equity and transparency in the enforcement procedures of national competition laws. This entails the explicit delineation of written procedures governing the investigative processes of Competition Law, alongside regulations governing procedures and evidentiary matters applicable throughout the enforcement process. Furthermore, the CPTPP encourages members to foster collaboration, information exchange, and share concerning competition law and policy. This includes addressing human resource training issues and aiding a country in the application of new competition laws. Additionally, member countries are urged to exchange information on measures aimed at promoting compliance with Competition Law.
- EVFTA: Vietnam and the EU acknowledge the significance of fostering a robust competitive environment, recognising that anti-competitive practices have the potential to distort the proper functioning of markets and undermine the benefits derived from trade liberalisation. Grounded in this principle, both parties pledge to adopt and sustain a comprehensive framework for competition law and policy, addressing anti-competitive practices encompassing agreements with anti-

competitive effects, abuses of dominant market positions, and impeding economically significant concentrations that may substantially lessen competition.

3.1.2. Domestic legal system

The Competition Law 2004 directly addressed the matter of economic concentration control, including activities within the retail market. On 12 June 2018, the 14th National Assembly enacted Competition Law No. 23/2018/QH14, thereby supplanting the Competition Law 2004. In conjunction with this legislative change, a suite of accompanying documents was introduced to provide specific guidance on the implementation of the Competition Law 2018, including (i) Decree 35/2020/ND-CP, issued by the Government on March 24, 2020, which delineates guidelines for the Competition Law; (ii) Decree 75/2019/ND-CP, governing penalties for administrative violations within the realm of competition; and (iii) Decree 07/2015/ND-CP, regulating the functions, tasks, powers, and organisational structure of the Competition Council.

In general, the Competition Law 2018 and Decree 35/2020/ND-CP intricately integrate economic and legal considerations, with a focal emphasis on increasing the efficacy of competition law enforcement at large and, more specifically, within the realm of economic concentration. Substantive amendments and enhancements pertaining to the control of economic concentration encompass: (i) Expanding the regulatory scope and the range of applicable entities; (ii) Undergoing a fundamental paradigm shift to refine regulations governing economic concentration control; and (iii) Enhancing regulations to oversee practices constituting unfair competition.

3.2. Overview of the basic content of the law on controlling economic concentration in the retail sector in Vietnam

3.2.1. Regarding the entities participating in economic concentration within the retail sector

The Competition Law 2018 stipulates regulations concerning the control of economic concentration conducted by organisations, individual businesses (collectively referred to as enterprises, including both Vietnamese and foreign entities), and affiliated domestic and foreign entities and individuals (Article 2). Enterprises operating in Vietnam are deemed to have a commercial presence if they engage in trade activities within the country (through the main company, subsidiaries, branches, or representative offices) or generate revenue in the Vietnamese market. In comparison to the Competition Law 2004, the 2018 legislation introduces an expansion of the regulated entities. Consequently, not only enterprises subject to the Competition Law in performing economic concentration activities but also related organisations and individuals (typically associated with affiliated business groups) fall within the scope of examination when competition authorities assess economic concentration profiles.

The expansion of the scope of application under the 2018 Law on Competition constitutes a noteworthy development, yielding positive implications for the oversight of economic concentration in general and, specifically, within the retail sector. Firstly, this provision establishes a legal framework for addressing cross-border economic

concentration cases that may potentially have adverse effects on competition within the Vietnamese market. This holds particular significance for vital and essential sectors of the economy, necessitating a high degree of competition to ensure market freedom, exemplified by distribution and retail. Secondly, this regulation is instrumental in fostering collaboration between the Vietnamese competition authorities and those of other nations to enhance the effectiveness of state management in the competition domain, ensuring the proper enforcement of Vietnam's competition commitments in various FTAs.

3.2.2. Regarding the threshold for notification of economic concentration in the retail sector

Competition law regulates economic concentration by mandating the notification of such transactions when enterprises involved therein attain a specified threshold. This requisite notification is essential, as surpassing the designated threshold signals the completion of economic concentration, a juncture where potential market impacts, alterations to economic structures, and deleterious effects on competition may manifest. In the Vietnamese context, as delineated by the Competition Law 2018 and Decree 35/2020/ND-CP, the determination of the economic concentration notification threshold is contingent upon adherence to one of four specified criteria:

- “(1) The cumulative assets within the Vietnamese market of an enterprise or a conglomerate of affiliated enterprises, to which the said enterprise belongs, must amount to VND 3000 billion or more in the fiscal year immediately preceding the year in which the anticipated economic concentration is to be executed;*
- (2) The aggregate sales revenue or procurement revenue within the Vietnamese market, pertaining to an enterprise or a consortium of affiliated entities where said enterprise is a constituent, attains or surpasses VND 3000 billion during the fiscal year immediately antecedent to the year in which the proposed economic concentration is anticipated to transpire;*
- (3) Transaction value of economic concentration is from 1000 billion VND or more;*
- (4) The cumulative market share of enterprises intending to engage in economic concentration equals or exceeds 20% within the relevant market during the fiscal year directly antecedent to the year in which the envisaged economic concentration is anticipated to be effectuated.”*

The Competition Law 2004 mandates that enterprises engaging in economic concentration, possessing a cumulative market share ranging from 30% to 50% within the relevant market, are obligated to submit notification documents to the Competition Authority prior to effectuating said economic concentration. In contrast to the Competition Law 2004, which exclusively relied on the market share criterion, the Competition Law 2018 introduced three novel criteria in the trajectory of expansion (encompassing oversight of both vertical and mixed economic concentrations, as opposed to exclusively horizontal control in the preceding legislation) and calibrated market share thresholds. These criteria are specifically designed for enterprises endowed with financial robustness and substantial market influence, thereby supplementing the limitations associated with sole reliance on market share as the evaluative benchmark for economic concentration cases. The regulation centred on the

cumulative market share alone restricts the Competition Authority's capacity to comprehensively assess all significant transactions occurring during the period in which the Competition Law 2004 was in force.

3.2.3. Regarding the process of evaluating economic concentration according to regulations on appraisal of economic concentration

According to the provisions of Vietnam Competition Law, the procedure for reviewing an economic concentration case will include the four steps as follows:

Step 1—Enterprise submits notification dossier of economic concentration: Enterprises that fall within the purview of economic concentration notification, as delineated in Article 33 of the Competition Law, are required to submit documentation related to economic concentration to the Vietnam Competition Commission (VCC) prior to undertaking the economic concentration process. The requisite contents of the documentation dossier are stipulated in Clause 1 of Article 34 of the Competition Law.

Step 2—Preliminary appraisal of economic concentration: The VCC is tasked with the receipt of the economic concentration notification dossier, furnishing written notification to the submitting party regarding the completeness and validity of the dossier, and conducting a preliminary assessment of the economic concentration. The scope of the preliminary assessment encompasses the combined market share of enterprises involved in the economic concentration within the relevant market, the pre- and post-concentration levels of concentration within the relevant market, and the interrelationships among participating enterprises in the production, distribution, and supply of specific goods and services, or the synergistic nature of their business lines. Within a stipulated time frame of 30 days from the receipt of a comprehensive and valid economic concentration notification dossier, the VCC is obligated to issue a notice delineating the preliminary assessment results of the economic concentration, encompassing either the confirmation of the completion of the economic concentration or a directive for the formal appraisal of the economic concentration.

Step 3—Official appraisal of economic concentration: The VCC formally conducts an appraisal of economic concentration within a prescribed period of 90 days commencing from the date of notification of preliminary appraisal results. The appraisal encompasses a thorough evaluation, including an assessment of the potential to induce a substantial anti-competitive effect and the corresponding measures to mitigate such impact. Additionally, the evaluation incorporates an examination of the positive effects stemming from the economic concentration and the measures designed to amplify these positive outcomes. A comprehensive analysis is undertaken to gauge the consolidation's potential to curtail competition, juxtaposed with the prospect of positive impacts, serving as a foundational basis for the deliberation and determination of economic concentration.

Step 4—Decision on economic concentration: Following the completion of the formal evaluation of the economic concentration, grounded in the substance of said appraisal, the VCC renders a decision on one of the ensuing outcomes: execution of the economic concentration; conditional endorsement of the economic concentration; or categorization of the economic concentration as a proscribed case. Enterprises are exclusively permitted to undertake economic concentration subsequent to the issuance of a decision by the VCC affirming the authorization for its execution, or following

the conclusion of the preliminary appraisal period in the absence of notification regarding preliminary appraisal results.

3.2.4. Regarding criteria for evaluating a case of economic concentration

In accordance with the stipulations set forth in the Competition Law 2018 and Decree 35/2020/ND-CP, the evaluation of the impact or potential to induce a substantial anti-competitive effect in an economic concentration case by the competition authority is predicated upon the consideration of the following factors:

First, combined market share and concentration level of enterprises participating in economic concentration in the relevant market. For the precise ascertainment of the cumulative market share and concentration level attributed to enterprises engaged in economic concentration, a preliminary imperative is the accurate delineation of the relevant market. The delineation of the relevant market is contingent upon the identification of both the relevant product market and the relevant geographical market.

Particularly, delineation of the relevant product market is contingent upon an assessment of the goods and services offered by the enterprise participating within the relevant market, concomitant with those of other enterprises that exhibit substitutability in terms of characteristics and objectives, encompassing usage and pricing (with a tolerance threshold not exceeding 5%). In addition to these considerations, the competition authority retains the prerogative to incorporate additional facets, such as evaluating the fluctuation in demand for a given good or service in response to alterations in the pricing of other goods or services. Furthermore, parameters like the cost and temporal requirements for customer acquisition, the product's lifespan, and consumption patterns are also admissible for scrutiny. It is noteworthy that these factors are inherently technical, rendering the determination thereof both intricate and resource-intensive. In instances within the retail industry necessitating control over the relevant market, manifestations may encompass general retail channels, such as stores, mini-supermarkets, or shopping centres, as well as the retail of specialised items (e.g., electronics, petroleum). Each of these manifestations necessitates the competition authority to adopt a judicious approach based on duly codified criteria.

In the determination of the relevant geographical market, the primary criterion is established as “a specific geographical area wherein interchangeable goods and services are supplied under analogous competitive conditions, while presenting marked distinctions from neighbouring geographical areas” (Article 9 of the Competition Law 2018). Within the retail industry, determination of the relevant geographical market is contingent upon factors such as the location of the business establishment engaged in the distribution of goods by the participating enterprise. Consideration is also given to the proximity of business establishments of other enterprises in adjacent geographical areas, transportation cost and time, prevailing consumption practices, and the temporal and cost-related aspects associated with customer goods acquisition. Given the inherent characteristics of the retail sector, wherein individual retail outlets typically serve specific geographical areas (e.g., communes or districts, rarely extending to provincial or national levels), the identification of the relevant geographical market in a retail-focused economic

concentration case should be confined to that specific area. In instances where an enterprise maintains numerous business establishments dispersed across diverse geographical regions, a prudential approach necessitates the segregation of these distinct geographical markets to preclude undue influence on the aggregated market share and concentration levels within the relevant market (CR, HHI).

Upon precise identification of risk concentration, enterprises and competition authority shall gather pertinent data for computing market share and concentration levels within the market. These metrics will constitute the primary foundation for evaluating the anticompetitive implications of the case.

Second, the interconnection of enterprises engaged in economic concentration within the production, distribution, and supply chain of specific goods or services, or within the business lines of entities participating in economic concentration, manifests through reciprocal inputs or complementary facets. In the computation of market share and market concentration levels pertaining to enterprises anticipated to engage in economic concentration, the evaluation of the competitive constraint imposed by such transactions horizontally (within the same industry) entails a quantitative analysis. Concurrently, the meaningful assessment of the anti-competitive impact arising from vertical and qualitative transactions necessitates an examination of the relationships among businesses within the production and distribution chain of goods and services. In the realm of the retail sector, the significance of this factor becomes pronounced when a retailer engages in economic concentration with its supplier or primary manufacturer of the products and goods marketed. Consequently, the competition authority is empowered to assess the transaction's ramifications on the broader market landscape, encompassing its effects on commodity prices (potentially prejudicial to consumers) and its implications for competitive dynamics within the market (potentially disadvantageous to other market participants).

Third, competitive advantage brought by economic concentration in the relevant market. The evaluation of competitive advantages stemming from economic concentration within the relevant market is conducted comprehensively, taking into account advantages in product attributes, production chains, distribution networks, financial capacities, brand recognition, technological prowess, and proprietary rights. The intellectual and other advantages accruing to enterprises subsequent to economic concentration vis-à-vis competitors in the relevant market elevate the risk of engendering or reinforcing substantial market dominance by entities constituted post-concentration.

Fourth, the ability for businesses to increase prices or increase profit margins on revenue significantly after economic concentration. This factor undergoes assessment predicated upon: (i) anticipated shifts in supply and demand in reaction to potential alterations in pricing and output; (ii) projected modifications in prices, output, and commercial conditions of enterprises providing goods as input factors; and (iii) the susceptibility to collusion among competing entities with the aim of augmenting selling prices or overall revenue. In the retail sector, these criteria, by their nature, pose inherent challenges, rendering a comprehensive evaluation of economic concentration cases inherently intricate.

Fifth, the ability of enterprises after economic concentration to eliminate or prevent enterprises from entering or expanding the market. Primarily grounded in

competitive attributes and barriers to market entry and expansion, this factor is predominantly subjected to quantitative evaluation to assess the anti-competitive implications of the economic concentration case.

Sixth, specific factors in the industry and field in which businesses participate in economic concentration. In the context of the retail industry, examination of industry-specific factors involves consideration of parameters such as business location and retail store dimensions.

Within our jurisdiction, economic concentration is not categorically proscribed; rather, prohibition ensues solely when an enterprise's economic concentration transaction surpasses prescribed thresholds in terms of market share, revenue, or capital, thereby engendering, or potentially engendering, a substantial impediment to competition within the Vietnamese market. The proscription of an economic concentration act is contingent upon its demonstrable capacity to significantly curtail competition, as determined by the VCC. This assessment encompasses an evaluation of the impact or potential to cause a noteworthy anti-competitive effect resulting from economic concentration transactions, utilizing either individual factors or a composite of factors as delineated in Clause 1, Article 31 of the Competition Law 2018.

The aforementioned instances are exempted, provided they satisfy one of the stipulated conditions delineated in Article 32 of the Competition Law 2018. These conditions include: fostering a positive impact on the advancement of industries, sectors, and science and technology in alignment with the strategic objectives and planning of the Government; contributing positively to the development of small and medium enterprises; and bolstering the competitiveness of Vietnamese businesses on the global stage.

Vietnam's competition law meticulously regulates and proscribes economic concentration, aiming to mitigate the adverse effects of such concentration on the market. This is essential because, immediately following the implementation of economic concentration, the market undergoes structural changes, leaving only a fraction of businesses holding a modest market share within the relevant market segment.

3.2.5. Regarding sanctions against businesses that violate competition laws on economic concentration

Government Decree 75/2019/ND-CP, promulgated on 26 September 2019, intricately delineates comprehensive guidelines pertaining to the imposition of administrative sanctions within the realm of competition. These guidelines encompass, *inter alia*, infractions related to economic concentration as prescribed by the provisions set forth in the Competition Law 2018.

In scenarios wherein enterprises meet the criteria for the economic concentration notification threshold but neglect to furnish the requisite economic concentration notification documents to the competent competition authority, said entities are susceptible to monetary penalties ranging from 1% to 5% of the aggregate revenue within the relevant market for the fiscal year immediately antecedent to the year of transgressing the provisions. This fine is levied for each enterprise that partakes in the economic concentration.

In instances where an enterprise, having duly submitted notification,

subsequently commits additional infractions, such as (i) effectuating economic concentration without notifying the competition authority of the preliminary appraisal results; or (ii) proceeding with economic concentration prior to a decision being rendered by the Competition Agency, the enterprise is exposed to potential fines ranging from 0.5% to 1% of its total revenue within the relevant market for the fiscal year immediately preceding the year of the transgression, should the economic concentration necessitate formal appraisal. Alternatively, should the enterprise fail to adhere, or not fully adhere, to the conditions delineated in the decision pertaining to economic concentration, thus constituting a case of conditional economic concentration, it may incur fines ranging from 1% to 3%.

3.3. Assessing the current legal status on economic concentration control in the retail sector

3.3.1. Advantages and results achieved

The current legal framework for economic concentration in Vietnam has a solid foundation, including comprehensive provisions regarding legal aspects, supervisory structures, and the management of inspection and examination. These regulations are constructed following the principles of modern legal systems, ensuring the completeness and effectiveness of the overall system.

The Competition Law 2018 has introduced positive adjustments to the economic concentration notification process for participating undertakings. These changes have aligned the method of economic concentration notification with international standards, eliminating rigid constraints present in the Competition Law 2004. In adhering to the stipulations of the Competition Law regarding economic concentration notification, the competent authority has played an active role, and participating enterprises in economic concentration have proactively fulfilled their notification responsibilities. Only when enterprises engaging in economic concentration actively comply with legal provisions and collaborate effectively with the competent authority can these regulations truly be applied in practice. In comparison to the Competition Law 2004, the Competition Law 2018 has undergone a comprehensive revision, prohibiting economic concentration practices while demonstrating progress by consistently respecting and permitting enterprises the right to engage in economic concentration activities for business development. The Government's intervention will only occur if economic concentration activities pose a potential threat to competition in the market.

In addition, the Competition Law 2018 has integrated international best practices by supplementing the Herfindahl-Hirschman Index (HHI), a widely used and effective tool for measuring market concentration. This represents a significant advancement compared to the Competition Law 2004. Moreover, during the M&A phase, evaluation standards are comprehensively and diversely applied, encompassing impacts on market competition, the accumulation of market power, business scale, market entry barriers, and competitive advantages. In addition to the combined market share, the Competition Law 2018 also establishes notification thresholds based on "quantitative" criteria, incorporating four key indicators: total assets, total revenue, transaction value, and the combined market share in the relevant market of enterprises participating in

economic concentration. The changes brought about by the Competition Law 2018 not only extend regulatory control over various forms of economic concentration, such as horizontal, vertical, and mixed economic concentration, but also address the limitations of the Competition Law 2004, which only regulated horizontal economic concentration.

The significance of the Competition Law 2018 is evident in its substantial contribution to fostering positive outcomes in the management and oversight of economic concentration in Vietnam. One of the most notable achievements is the marked increase in the number of economic concentration notifications submitted to the competition authority. From 2013 to 2017, only four notifications of economic concentration were received annually. However, in 2021, according to data from the report of the Vietnam Competition and Consumer Authority (VCCA), the competition authority received 130 economic concentration notification files, reflecting a notable 94% increase compared to 2020 (63 notifications) (VCCA, 2021). By the end of 2022, the total number of economic concentration notification files submitted to the competition authority reached 154, marking an 18.46% increase from 2021 and a remarkable 148% increase from 2020.

Several economically significant notifications of concentration, particularly in the retail sector, have been successfully resolved and assessed since the enactment of the Competition Law 2018. Notable cases include:

- The merger deal between the Masan Group and Vincommerce, VinEco of the Vingroup Corporation in 2019, with an estimated value of 3 billion USD. According to the merger agreement, a new company would be established with Masan holding ownership rights, allowing Masan to gain an additional 3072 retail points nationwide. Masan's products would significantly benefit from the expanded retail network, while Vingroup could reallocate resources to focus on the Technology and Industrial sectors.
- Central Group's acquisition of the Nguyen Kim electronics store chain from the Technology Investment and New Solution Development Corporation in 2019. The Thailand-based Central Group, a retail conglomerate, acquired the remaining 51% stake of NKT, the company operating the Nguyen Kim electronics store chain, after previously holding 49%. The estimated value of the transaction was 113 million USD.
- SK Group's (South Korea) acquisition of Masan's stake in VinCommerce in 2021. SK Group (South Korea) acquired a 16.26% stake in VinCommerce from Masan for a total cash value of 410 million USD. With this transaction, VinCommerce was valued at 2.5 billion USD for 100% ownership.

3.3.2. Existing limitations

Firstly, there is a limitation in the concept of economic concentration. The Competition Law 2004 and the Competition Law 2018 lack a unified definition for the term "economic concentration"; instead, it is delineated through the enumeration of forms considered economic concentration. Although legislators have established a "sweeping" provision aimed at anticipating the capacity to regulate and supplement new forms of behaviour in the law, this approach may introduce arbitrariness and lack uniformity among legal provisions. The concept of economic concentration demands

an accurate reflection of the essence of economic concentration behaviour and requires comprehensiveness to encompass all potential forms of economic concentration behaviour that may arise in the general market.

Secondly, there are limitations in determining the Relevant Market in economic concentration transactions. In Decree 35/2020/ND-CP, factors for identifying the relevant product and geographical markets have been enumerated for application in diverse cases. However, compared to the approaches of preceding jurisdictions, the method of determining the relevant market under Vietnam's Competition Law still exhibits certain shortcomings.

For instance, the conditional merger between Ahold (AHLN.AS) from the Netherlands and Delhaize (DELB.BR) from Belgium, with a total value reaching 25 billion EUR (about 28 billion USD). Pursuant to this agreement, Delhaize ceased to exist, and Ahold continued its existence under the name Ahold Delhaize, becoming one of the major food retailers in Europe. According to the EC regulations, this case falls within the category of economic concentration subject to mandatory notification. During the assessment and review process, the EC identified the Relevant Market based on the retail model of the parties involved and the characteristics of the supermarkets. Consequently, the relevant product market for this case was determined to be convenience stores and mini-supermarkets with an area exceeding 400 square metres. Concerning the relevant geographical market, the EC determined it based on the radius of access to customers' business establishments. This approach results in multiple relevant geographical markets, not confined to a specific region or country. The subdivision of the relevant geographical market enables the competent authority to assess the market power of the parties more comprehensively in each area and facilitates the formulation of specific conditions/solutions to restrict market power in each region.

In Vietnam, the determination of the market within the retail sector has been carried out in various related transactions. Specifically, in the case of Central Group's acquisition of the Big C supermarket chain and the transaction between the Masan Group and Vincommerce mentioned above, the relevant market is identified as the retail market within supermarkets in the provinces and cities where the supermarkets/convenience stores of the parties involved in the economic concentration are operating.

Therefore, compared to approaches in other countries, the determination of the relevant market in Vietnam's retail sector remains relatively simplistic and lacks specificity. The relevant product market is only identified based on the business scope of the parties, without considering additional factors such as area size, purchasing power, primary supplied products, customer surveys, and other relevant aspects. Concerning the relevant geographical market, the determination is limited to provincial, city, or national scales rather than being based on the radius of access to customers' business establishments. The simplistic determination of the product market and the lack of specific limitations on the geographical scope in economic concentration cases may lead to the risk of inaccurately assessing market share and the competitive capacity of businesses participating in economic concentration.

Thirdly, there are limitations in the conditional approval provisions for economic concentration cases. For economic concentration transactions within the retail sector

subject to assessment in Vietnam, these transactions are unconditionally approved, even in cases where the participating entities are businesses holding a significant market share.

An exemplary case is the acquisition of 100% of shares in Tran Anh Digital World JSC by The Gioi Di Dong JSC in 2017. In this transaction, the VCCA assessed the case and provided the following comments: The business acquisition between two undertakings has an impact on the retail market structure specialising in the sale of electronic and information technology products by reducing the number of competitive market players, as the two companies were previously competitors. Additionally, The Gioi Di Dong JSC holds a dominant position in the retail market, specialising in information technology products. The VCCA concluded that the parties are permitted to proceed with the economic concentration, and the VCCA will continue monitoring The Gioi Di Dong JSC's competitive activities to promptly detect and address any abusive behaviour leveraging its dominant market position.

However, the economic concentration mentioned above took place before the effective date of the Competition Law 2018. At that time, the Competition Law 2004 did not have provisions regarding conditional economic concentration. Therefore, transactions with potential risks of limiting competition did not require the implementation of measures, conditions, or commitments to address adverse impacts.

The fourth limitation pertains to the form of economic concentration transactions. In addition to economic concentration forms such as corporate mergers, business consolidations, acquisitions, and joint ventures among enterprises, the Competition Law 2018 does not explicitly address the control of economic concentration through linkage via shared leadership or management teams. While this form of economic concentration is not currently prevalent, it remains a potential occurrence in the future, given the diverse business activities of enterprises in the market. Economic concentration through such linkages can also impose certain competition constraints or increase the risk of collusion between enterprises following the completion of economic concentration.

Additionally, various forms of economic concentration transactions are currently occurring in practice but have not yet been regulated by the law, such as acquiring ownership shares of minority shareholders and purchasing independent assets like technology or customer lists. These transactions are often challenging to classify as prohibited economic concentration behaviours or agreements restricting competition or abusing dominant positions. Therefore, these transactions may be subject to scrutiny and adjustment according to regulations on economic concentration control to prevent oversights of any violations.

The form of economic concentration through governance board linkages will likely evolve alongside the individual-focused economic concentration through stock market share acquisitions. Individuals with sufficient financial capability can simultaneously become leaders or managers of multiple enterprises. Both of these forms carry a high risk of fostering behaviours that restrict competition in the market.

4. Proposed solutions to improve the effectiveness of competition law in the retail sector in Vietnam

While the legal framework for economic concentration in Vietnam has been established as a relatively comprehensive system with provisions covering legal aspects, supervisory structures, and economic concentration control, as analysed in the preceding section, there are still limitations in the legal system. These limitations contribute to the evaluation and examination process of economic concentration cases by the competent authority, which may not be stringent enough, aligned with reality, and capable of precisely assessing the market impact of businesses after economic concentration. Therefore, in order to enhance the effectiveness of economic concentration control laws, several solutions may be considered, as follows:

4.1. Finalizing the legal framework for centralized economic control in the retail sector in Vietnam

Firstly, establish a more flexible control mechanism for specific cases with unique characteristics. The Competition Law 2018 outlines forms of economic concentration, including mergers, consolidations, acquisitions, joint ventures, and other forms as regulated by law. According to this, all cases of economic concentration falling under the notification threshold in Article 13 of Decree 35/2020/NĐ-CP are required to submit notification dossiers to the competition authority. However, for business restructuring scenarios, the competition authority needs a more nuanced approach to economic concentration control to facilitate businesses. Cases of economic concentration involving internal restructuring (transactions between companies within the same group or parent-subsidiary relationships) under the economic concentration control threshold still need to comply with the notification requirements to the Ministry of Industry and Trade (MOIT), VCC, and the VCCA. However, there should be more flexibility in assessing the dossiers for these transactions. Even though the Competition Law 2018 and Decree 35/2022 stipulate that market share should be determined as the combined market share of the affiliated group, for businesses with organisational and financial affiliations undergoing economic concentration, there will be no change in market share or market concentration before and after the economic concentration. The average time for the VCCA to preliminarily assess a case of economic concentration after receiving a complete and valid dossier is 20 days (VCCA, 2022). For such cases involving internal restructuring, this timeframe should be shortened to expedite subsequent procedures for businesses.

Secondly, the competent state authority should consider, review, and issue-specific guidelines instructing businesses on the conditions under which transactions need to be notified for economic concentration in accordance with the provisions of the Competition Law. The issuance of detailed guidelines and explanatory notes by the competent state authority has the potential to enhance transparency. This, in turn, enables businesses engaging in economic concentration to present and explain the economic concentration case in a more detailed and transparent manner in the notification dossier submitted to the competent state authority. Simultaneously, the competition authority will have the capability to evaluate the case more profoundly

and comprehensively, aiding in expediting the timeline of the economic concentration assessment process.

Thirdly, in order to refine the legal framework for economic concentration control, the state authority should consider promoting collaboration between the competition authority and sector-specific regulatory bodies. This collaboration aims to ensure a unified and streamlined approach to economic concentration control provisions within the Competition Law. Furthermore, the relevant state authorities should undertake a study, drawing insights from international practices in assessing cases of economic concentration. This effort is directed towards constructing more rigorous criteria and conducting detailed, specific, and in-depth analyses. Through this, the aim is to provide assessments that closely align with the actual market strength of the entities involved in economic concentration. During this process, the competent state authority may contemplate organising periodic evaluation sessions with the participation of relevant stakeholders through community consultations. This initiative serves to reinforce the legal framework, enhance transparency, and improve the effectiveness of laws governing economic concentration control.

4.2. Enhancing the effectiveness of enforcing economic concentration control

In addition to enhancing the effectiveness of the legal framework for competition control, the enforcement activities related to economic concentration control also reveal lingering issues that need resolution. Several potential solutions may be considered, as outlined below:

Firstly, it is essential to integrate with other provisions of competition law to ensure post-concentration control. Economic concentration control aims to assess the potential negative impacts of a transaction on the future competition landscape in the Vietnamese market. However, for a comprehensive evaluation, the competition authority must also consider assessing the competitive landscape in the relevant market after the businesses have undergone economic concentration. In cases where post-concentration businesses form a dominant enterprise or a group of enterprises dominating the market (as stipulated in Article 24 of the Competition Law 2018) and engage in abusive practices of market dominance or exclusive position abuse, the competition authority needs to undertake appropriate control measures in accordance with the provisions of competition law.

Secondly, it is crucial to enhance coordination between state management agencies and international cooperation to improve the effectiveness of the competition authority's economic concentration control activities. For accurate and efficient assessments while saving time, the competition authority needs to collaborate with other specialised state management agencies. Coordination helps the competition authority gain a precise understanding of specialised fields, enabling accurate assessments of the anti-competitive impacts of economic concentration transactions within those sectors. In the retail sector, when reviewing an economic concentration transaction, the competition authority can also utilise data from specialised agencies such as the General Statistics Office, the General Department of Customs, and data from the Domestic Market Department (MOIT).

Regarding international cooperation, the OECD's consultation on Vietnam's competition law in 2018 suggested that Vietnam may consider establishing an abbreviated notification for cross-border economic concentration cases. In this context, businesses would follow these steps: (1) Identify the competition authority of another country to which they have notified the transaction; (2) Provide an explanation of why the impacts generated in Vietnam would not differ from the actual situation in other countries; (3) Negotiate an expedited procedural agreement meeting the standards that allow the competition authority of Vietnam to discuss with the competition authority of the other countries; and (4) Do not complete the economic concentration transaction without the approval of foreign competition authorities and provide a copy of the approval to the competition authority of Vietnam. The OECD assessed that this approach could help reduce the resources faced by the competition authority of Vietnam. Additionally, it provides an opportunity for cooperation and learning from the experiences of larger or better-funded countries. However, this mechanism is not stipulated in the Competition Law 2018 or related guiding decrees. The National Competition Commission (officially established in early 2023) is expected to make more decisions related to international cooperation. Vietnam's competition agency actively engages in international collaboration. This could involve establishing formal agreements with counterpart agencies in countries with significant trade and investment ties, facilitating information exchange, joint investigations, and capacity-building initiatives. Additionally, active participation in international networks and organizations focused on competition law enforcement, such as the International Competition Network (ICN) or the OECD Competition Committee, would foster knowledge exchange and cooperation on cross-border cases. Furthermore, seeking technical support and training programs from international organizations or experienced competition agencies could bolster the expertise of Vietnamese officials in handling complex cross-border cases and implementing international best practices.

In conclusion, legal regulations play a significant role in the Vietnamese Government's authority over economic concentration control to promote the development of an equitable and healthy business environment for domestic and international enterprises, especially in the context of international integration and market opening, leading to increased competition among businesses. However, in order to achieve high efficiency in this legal system, provisions related to the definition, policies, criteria, and conditions for economic concentration activities need to be concentrated, unified, and clear. This article offers a current and comprehensive legal analysis, specifically focusing on the retail sector. It utilizes practical case studies to assess the current situation and propose actionable solutions. The research's unique value stems from its compelling blend of theoretical frameworks and real-world applications, making it a substantial contribution to the study of economic concentration control in Vietnam.

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