REPORT

Various aspects of Viet Nam Competition law

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1. Introduction

This report will touch upon three elements of Vietnamese competition policy against the backdrop of the experience of the Belgian and European Union competition policy. First of these elements is the question of the appeal against the decisions of the Viet Nam Competition Council (VCC). The second element concerns the broader question of redrafting the regulations on the organisation and procedures of the VCC. The third element is about the general question of independence for regulatory institutions, to which the VCC belongs.

2. Appeal against decisions by the VCC

First the Vietnamese appeal system will be sketched. Secondly the Belgian system is analysed and thirdly we focus on the European Union (EU) system. We will thus look at the Vietnamese appeal process through the lens of the systems of two competition law jurisdictions, namely the Belgium and European Union.

2.1. The features of the VCC appeals system

After the general provisions we focus on the details of the Vietnamese system of judicial review. We will thereby be following a fixed structure that will also be applied for the analysis of the Belgian and EU system of appeals.

2.1.1. Main provisions

Central in the appeal mechanism of Viet Nam Competition Law (VCL) are the provisions in section 7 of the VCL. They cover the first two steps of the possible appeal against decisions made by competition authorities. Crucial in this section of the law are articles 107 and 115, which contains the following provisions:

"Article 107. Complaining about competition case-handling decisions

1. If the involved parties disagree with part or the whole of the competition case-handling decisions issued by the Competition Case-Handling Council, they may lodge complaints with the Competition Council.

2. If the involved parties disagree with part or the whole of the competition case-handling decisions issued by the head of the competition-managing agency, they may lodge complaints with the Trade Minister."

…

"Article 115. Initiation of lawsuits against complaint-settling decisions

1. If the involved parties disagree with the decisions to settle complaints about competition case-handling decisions, they may initiate administrative lawsuits against part or the whole of the contents of such decisions at the competent provincial/municipal People's Courts.

2. Where the courts accept the written lawsuits against the decisions to settle complaints about competition case-handling decisions according to the provisions of Clause 1 of this Article, the Trade Minister and the Competition Council chairman shall have to direct the transfer of the competition case dossiers to the courts within ten working days after receiving the court's requests."

Crucial is article 115, since on the one hand there are 63 administrative provincial courts and on the other hand the capacity of the members of the VCC is limited, their number being limited to 15 and these members being active as commissioners only part-time, a bottleneck situation is created. Appeal procedures are thus time-consuming processes taking up to three years.

2.1.2. Number of appeal stages

Another aspect of the appeal system is that as many as four instances of appeal are provided for:

1. First stage: internal appeal to VCC against decisions of Competition Case-Handling Council.
2. Second stage: appeal to Provincial/Municipal Courts against VCC decisions.
3. Third stage: appeal to national court against Provincial/Municipal Courts decisions.
4. Fourth stage: appeal to Supreme Court against decisions of national court.

2.1.3. Who can appeal?

The right of appeal in the first stage of the procedure is covered by Article 57, Decree 120/2005/ND-CP. The article reads as follows
"Complaints and denunciations
1. Any organization or individual being dealt with for a breach of the laws on competition or the legal representative of such organization or individual shall have the right to lodge a complaint with the competent body about a decision dealing with a competition case or a decision dealing with a breach of other provisions of the laws on competition issued by a council dealing with a competition case or by the administrative body for competition where there are grounds for believing such decision is contrary to law or infringes the complainant's lawful rights and interests.
2. Any organization or individual being subject to an administrative preventive measure or the legal representative of such organization or individual shall have the right to lodge a complaint with the competent body about such measure applied by the chairman of the Competition Council or by the head of the administrative body for competition where there are grounds for believing such decision is contrary to law or infringes the complainant's lawful rights and interests.
3. All citizens shall have the right to make a denunciation with the competent body about a breach of the law during the process of dealing with breaches of the laws on competition where the breach causes loss or threatens to cause loss to the interests of the State or to the lawful rights and interests of a body, organization or individual.
4. Any organization or individual making a false complaint or denunciation which harms the reputation of the entity complained about or of the person denounced shall be dealt with in accordance with law."

2.1.4. Time limits for appeal

The Vietnamese competition rules do not specify a deadline for lodging an appeal against decisions of competition authorities. As a consequence no decision made is ever final since an appeal remains always possible.

2.1.5. Right to represent VCC before Courts

Article 19 of the Regulations on organization and operation of the VCC stipulates as follow:
1. In case the competent court decides to handle an appeal case against a VCC's Decision, the VCC's chairman shall delegate two commissioners and one hearing clerk to protect the view of VCC in the administrative litigation procedure.
2. VCC's Chairman shall sign an official note to the ministries from which the commissioners are appointed to ask leave permission for these commissioners during the appeal procedure.
3. During the administrative litigation procedure, VCC's secretariat shall attribute staff to support logistics for the commissioners and the hearing clerk.

2.1.6. Reach of appeal decisions

In article 112 of VCL the reach of appeal decisions in stage 1 of the appeal procedure is covered:
"Powers of the Competition Council when settling complaints about competition case-handling decisions of the Competition Case-Handling Council

When considering and settling complaints about competition case-handling decisions of the Competition Case-Handling Council, the Competition Council shall have the following powers:
1. To hold up the competition case-handling decisions if deeming that the complaints are not sufficiently grounded;
2. To amend part or whole of the competition case-handling decisions if such decisions are illegal;
3. To cancel the competition case-handling decisions and transfer the competition case dossiers to the Competition Case-Handling Council for resettlement in the following cases:

a/ Evidences have not yet been fully collected and verified;

b/ The composition of the Competition Case-Handling Council contravenes the provisions of this Law or other serious violations of competition procedures were committed."

2.1.7. Legal counsel

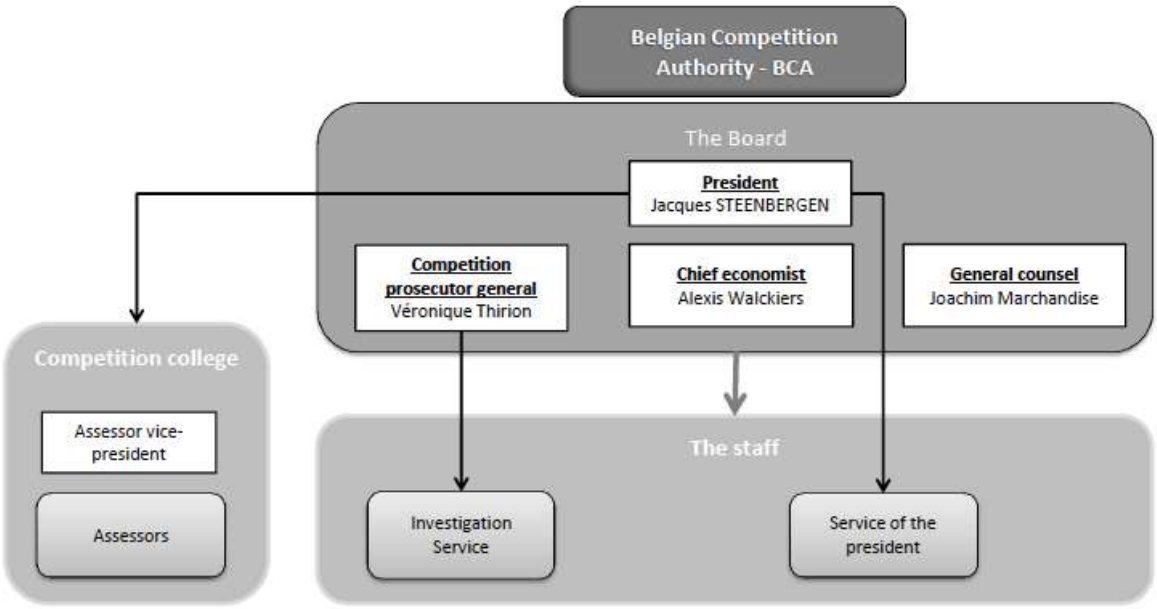
As far as the information received is correctly interpreted a problem rises in terms of the representation of the VCC in the second (and later) stage of appeal procedure. There is no provision for the VCC to be represented by legal counsel, making it difficult for the competition authorities to defend its position in the courts.

2.2. Features of the Belgian appeals system

2.2.1. Introduction

Before focusing on the Belgian appeals system the larger context of the structure of the Belgian competition authority is sketched. The Belgian competition policy system has evolved during the last 20 years from a dualistic system into a monistic system, with a strict division between investigation and judgment however (see chart 1). Until 2013 the system was very similar to the Vietnamese system with an investigation body belonging to the ministry of economic affairs and a separate decision-making body. From September 2013 onwards the structure is as shown in chart 1.

Chart 1: Organisational structure of the Belgian Competition Authority



Source: Federal Public Service Economic Affairs

Although there is now a single competition authority (the Belgian Competition Authority, BCA), there is still a strict division between the investigative part and the decision-making part. This strict division is safeguarded by the establishment of the function of competition prosecutor general, whose task it is to supervise the case handlers. The competition prosecutor general and her team are insulated from the rest of the BMA. The president of the BMA is responsible for the general management of the BMA and also presides over the Competition College, which is the body that decides cases.

2.2.2. Belgian appeal system

2.2.2.1. General provisions

Against most of the decisions of the Competition College (CC) further appeal is only possible before the Court of Appeal in Brussels. These decisions mainly concern restrictive practices and concentrations. Regarding restrictive practices CC decisions are involved stating that anti-competitive practices do or do not exist. Regarding concentrations the CC decisions that can be appealed state either that the concentration at stake falls within or does not fall within the scope of application of the law. If the concentration then falls within the scope of the competition act, one of the following reasoned decisions can afterwards be appealed: the

decision that the concentration is permissible; the decision that the concentration is declared permissible when the undertakings concerned do not control together more than 25% of any relevant market for the transaction; or the decision that there are serious doubts about the permissibility of the concentration and that it is necessary to initiate a supplementary investigation procedure (the so-called second stage investigation).

To the end of appeal in competition cases, two Chambers (one Flemish and one French Chamber) of the Brussels Court of Appeals have been exclusively appointed to rule on competition law cases. Both Chambers exclusively deal with competition law cases. Each Chamber consists of three judges.

In some cases appeal is possible against decisions made by other bodies than the Competition College.
In the case of anti-competitive practice there is also a possibility to appeal decisions made by the College of Competition Prosecutors to drop complaints by reasoned decision. The College of Competition Prosecutors can also drop a complaint by reasoned decision in view of the available resources and the priorities which are set. In all these cases the complainant can appeal to the president who then composes the Competition College that will handle the appeal. Only in the case of dismissal in view of the available resources and the priorities, the president of the Competition College may at the request of the appealing party, provided that there are serious grounds, decide that the Investigation Service must clarify its reasons before the Competition College rules on the appeal.
In the case of a simplified concentration procedure (i.e. when the concentration has limited effect on the market) the competition prosecutor can reach the conclusion that the conditions for the application of the simplified procedure are satisfied and that there are no objections to the notified concentration. This decision can be appealed before the Competition College. The competition prosecutor can also reach the conclusion that the conditions for the application of the simplified procedure are not satisfied or that there are doubts as to the permissibility of the concentration. In that case the normal procedure for mergers is to be followed. There is no right of appeal against this decision.
The decisions of the College of Competition Prosecutors concerning the use of data in an investigation obtained by an inspection can be subject of appeal at the Brussels' Court of Appeal.

2.2.2.2. Appeal stages

It is possible to appeal the ruling of the Brussels Court of Appeals to the Court of Cassation on matter of law only, not on the facts. The Court of Cassation has national as well as EU competence.
This means that in general there is a two-stage appeal system for competition cases in Belgium. This should be sufficient. Discussions held in recent years on systems with an extra appeal stage were concluded in favour of two stages. More stages would render the appeal system still more complicated and time consuming than it is at present.

2.2.2.3. Who can appeal?

Appeals may be lodged by the interested parties, as well as by any other person demonstrating a valid interest and having asked the Competition College to be heard. The appeal may also

be lodged by the minister. The minister however does not have to justify an interest or having had to be represented before the Competition College.

2.2.2.4. Time limits for appeal

Appeals must be lodged, under penalty of being automatically void, in the form of a signed application lodged with the registry of the Brussels Court of Appeal within 30 days after notification of the contested decision.

2.2.2.5. How is competition authority represented in appeal cases?

The judicial review is adversarial (i.e. the BCA, through its President, is the defending party in the proceedings before the Court of Appeal). This is a novelty as this possibility was not included in the previous act. This was criticised by the European Court of Justice in Case C-439/08 (*VEBIC VZW*).
The Brussels Court of Appeal may at any time at its own initiative call to the case the persons that were parties before the Competition College when there is a risk that the appeal may affect their rights or obligations. The Court may ask the Belgian Competition Authority to communicate the procedural file and other documents which were deposited at the Competition College.
The minister may file his written observations to the registry of the Brussels Court of Appeal and consult the file there.

2.2.2.6. Reach of appeal decisions

The Court of Appeal decides on both points of law and fact, on the case such as submitted by the parties. The Court of Appeal decides with full jurisdiction including the power to substitute the contested decision by its own decision. In cases regarding the admissibility of concentrations or in the case of conditions or obligations imposed by the Competition College, and in cases in which the Court, contrary to the contested decision, finds an infringement of articles 101 or 102 TFEU, the Court will only rule on the contested decision, with the power of annulment.
The appeal does not suspend the contested decisions. The Court of Appeal may, on request of the interested party, suspend entirely or partially the execution of the court decision to the day judgment is rendered. The suspension of the execution can only be ordered when serious means are called upon, which can justify the annulment of the contested decision and on condition that the immediate execution of the decision could have serious consequences for the party concerned.
The Court of Appeal may, when the occasion arises, order that the paid amount of the fines is reimbursed to the party concerned.
In short the Brussels Court of Appeals rules with full jurisdiction of powers. Hence, it can replace the decision of the BCA. The Brussels Court of Appeals has national as well as EU competence.

2.2.2.7. Legal counsel

Each party can call in its own legal counsel (or other expert advice) for which it has to bear the fees paid.

2.2.2.8. Evaluation of the Belgian appeal system in competition cases

The system is generally perceived as creating serious bottlenecks. As a rule appeal proceedings last for many years. It is fair to state that, per instance, several years will easily pass between the enrolment of the case and the decision of the tribunal or court on the merits of the case.

2.3. Features of the EU appeals system

2.3.1. Introduction

The European Commission is the body primarily responsible for the enforcement of the competition law provisions in the Treaty on the Functioning of the EU (TFEU), which are mainly articles 101 and 102 of TFEU and the merger regulation 139/2004. Member state courts and competition authorities may also enforce these rules.
The European Commission is composed of twenty-eight commissioners, each appointed by a member country. One commissioner holds the portfolio for competition. Competition matters reside in the Competition Directorate (DG Comp), which is headed by the Director General of Competition.
DG Comp is subject to the oversight of the European Commission. Case teams in DG Comp investigate potential violations and review mergers. The European Commission, through the initiation of the DG Comp, investigates, enforces and adjudicates all issues relating to competition law within its jurisdiction. It has hence the features of an integrated, monistic agency model. The case team writes the draft of the decision, usually after a hearing.

2.3.2. EU appeal system

2.3.2.1. Main provisions

The EU Courts' jurisdiction to review the decisions of the Commission in the field of EU competition law derives from the TFEU. Specifically, Article 263 TFEU provides that the European Court of Justice has jurisdiction over actions brought against Commission decisions: "on grounds of lack of competence, infringement of an essential procedural requirement, infringement of the Treaties or of any rule of law relating to their application, or misuse of powers."
As such the EU Courts enjoy restricted rather than unlimited jurisdiction over Commission decisions (with the exception of the EU Courts' unlimited jurisdiction to review fines). This means that the EU Courts are only entitled to review the legality of such decisions and when these decisions are illegal to annul them (in full or in part), rather than re-examine the case on the merits. In practice, this means that the EU Courts may not – as in a classic appeals procedure – substitute their point of view for that of the Commission and adopt a new decision. When the EU Courts find a decision illegal, they must strike it down.
The Treaty provisions on the scope of appeal are limited and thus provide little guidance. It is the EU Courts' case law that casts more light on the judicial review in competition law

matters.
Starting point is the assertion that it is the role of the EU Courts to interpret the law and verify whether the Commission has complied with their interpretation of the law when enforcing EU competition rules. Thus, appeals provide only limited ability to challenge substantive and technical aspects of Commission decisions, since fact-finding is not the primary objective of the Courts. Fact-finding can be set aside however if it is manifestly erroneous and in some cases the General Court does appear to give a more thorough review of factual issues, but this is not mandated.

For antitrust activities, the Court of Justice deals only with appeals from the General Court and questions referred to it by a national court. All other antitrust litigation is under the jurisdiction of the General Court. Judgments of the General Court can be appealed to the Court of Justice as of right.

2.3.2.2. Number of appeal stages

There are two possible stages in the judicial review. First stage concerns the appeal before the General Court. The second stage contains the possibility to appeal a General Court decision before the Court of Justice.

2.3.2.3. Who can appeal?

In Article 263 TFEU is stated who can appeal before the European courts. It concerns ‘any natural or legal person may, under the conditions laid down in the first and second paragraphs, institute proceedings against an act addressed to that person or which is of direct and individual concern to them, and against a regulatory act which is of direct concern to them and does not entail implementing measures.’

2.3.2.4. Time limits for appeal

In the same article 263 TFEU the time limit for appeal is set at two months of the publication of the measure, or of its notification to the plaintiff, or, in the absence thereof, of the day on which it came to the knowledge of the latter, as the case may be.

2.3.2.5. How is competition authority represented in appeal cases?

Cases submitted to the General Court as well as to the Court of Justice are processed in two stages: a written stage and an oral stage. In the written stage, all the parties involved, including the European Commission, hand in a written statement to the judge responsible for the case. The judge then writes a summary of these statements and the case's legal background.
The second stage is the public hearing. At the hearing, lawyers from both sides put their case to the judges and the advocate general, who can question them.
The advocate-general then gives his or her opinion. After this, the judges discuss the case together and give their judgement.
The Court's judgements are majority decisions and are read out at public hearings.

2.3.2.6. Reach of appeal decisions

Bringing an action for annulment does not automatically suspend the operation and enforceability of the contested decision. However, if the immediate enforceability of the decision would cause serious and irreparable harm to the company concerned, an application for an interim measure seeking to suspend the operation and/or enforcement of the contested decision might be possible.

2.3.2.7. Legal counsel

The statute of the European courts lays down a principle of obligatory representation of the applicant by a qualified lawyer in proceedings before courts of the European Union. Companies may choose their legal representatives from lawyers authorized to appear before a national court of an EU member state or any other state which is a party to the Agreement on the European Economic Area.
Regarding the representation of the European Commission itself the Legal Service of the European Commission is empowered to represent the Commission in the Court of Justice and the General Court. Apart from its own agents, the Legal Service calls on the services of outside lawyers where specific expertise or legal knowledge is considered necessary to represent the Commission in the Community context or in cases in the national courts.

2.3.2.8. Evaluation of the EU's appeal system in competition cases

The time lag on appeals to the General Court following a Commission decision is generally around 5 years and the average duration of competition proceedings before the General Court is 45 months.
For onward appeals to the European Court of Justice, the time lag is approximately a further 2 years.
Between 2000 and 2011, the European Commission has adopted 74 cartel decisions, involving a total of 442 parties. 272 of the parties appealed, whether individually or in joint proceedings, against the Commission's decision on the basis of liability, magnitude of the fine, or both.

2.4. Towards benchmarking on best practices

On the basis of the appeals systems of Vietnam, Belgium and the European Union we collect a series of elements that make the difference between an effective and an ineffective appeals system.

- It will be clear from the previous sections that a timely appeal system is of utmost importance. As such the Belgian and EU examples do not constitute good practice. A timely process depends on the presence of sufficient resources with the appeal court. If these are not available in terms of people (judges, supporting staff) and financial resources the court constitutes a bottleneck in the appeal process.

- In most jurisdictions, the Belgian and EU included, the number of courts of appeal is limited. Since competition cases are usually complicated legal cases it is better to have a specialized appeal court. In Belgium there has been established a specialized chamber in the Brussels' Court of Appeal. In the EU it is the General Court that deals with competition litigation.
- It should be clear that only parties that can show an interest should be allowed to lodge an appeal complaint.
- A standard practice should be that there is put a time limit for lodging an appeal. This period should be kept rather short, f.e. one or two months after the appealed decision.
- It has also been seen that the number of stages of the appeal can best be limited to two, or maximum three. The more stages the longer the process takes, which is not conducive for legal certainty.
- It is good practice to have only legal specialists in the appeal procedures. Legal counsel is therefore a necessary component of the procedure for all parties, the competition authority included.
- A point of discussion about appeal procedures is the exact competence of the appeal court. Is this court allowed to go farther than mere checking the legality of decisions or is it competent to go further and also can it also consider the facts of the case? If it is allowed to do so can it take a new decision replacing the one from the lower decision making body or can it just annul this decision and send it back to the lower stage? Belgian experience teaches that full competence is to be preferred. If appeal cases can only be send back this only complicates the process and lengthens the whole procedure. A swift new decision, fact finding included, is to be preferred.
- An appeal should not automatically hold up the decision of the lower stage. Only if there are strong grounds to do so the appeal court should be competent to hold up the decision.

3. Improving organisation and procedures of VCC

Since the Vietnamese government is considering amending the rules on the organisation and procedures in competition law it is a good idea to look for good practices at other jurisdictions.
In this section we will limit ourselves to discussing how the Belgian competition authority is organized because the structure of the Belgian authority resembles closely the Vietnamese structure and as such makes a good base for comparison. The European competition authority to the contrary is not a very good example to compare with because the supranational element makes it a sui generis construction. Regarding some procedural aspects however the EU example can be useful.

3.1. Criteria for appointing and dismissing of members of the Competition Council

In general it is good practice to have a procedure for appointing the president and other members of competition authorities. It is advisable that in order to be appointed to president or member of the competition authority the candidates must pass an exam regarding professional skills intended to assess the maturity as well as the ability, which is essential for the performance of their duties. In addition they have to prove a useful experience for the exercise of his duties. Holding a masters' degree can be seen as a minimum requirement.

In this section we look at how people are appointed to the different functions inside the Belgian Competition Authority (BCA).

The president

The president of the BCA is appointed by the King (in practice this means by the Council of Ministers) by a decree deliberated by the Council of Ministers for a mandate of six years, which can be renewed once.
In order to be appointed to president the candidate must pass the exam regarding professional skills intended to assess the maturity as well as the ability, which is essential for the performance of his duties. In addition he has to prove a useful experience for the exercise of his duties. He must hold a masters' degree and have a working knowledge of Dutch, French and English.

The Competition College

The Competition College is the decision-making college of the BCA and is made up by the president per case to take decisions on competition matters.
The Competition College is composed of:
1° the president or the assessor vice-president;
2° two assessors, chosen out of an alphabetic list of assessors.
To be appointed as assessor vice-president, or as assessor, the candidate must comply with the selection conditions for president, as laid out in the previous paragraph.

The Board

The Board runs the BCA. It is composed of:
1° the president;
2° the competition prosecutor general;
3° the chief economist;
4° the general counsel.
In case of equality of votes the president has the casting vote.

The chief economist and the general counsel are appointed for a renewable mandate of six years by decree deliberated in the Council of Ministers, after an exam of professional skills.

The competition prosecutor general

The Council of ministers appoints the competition prosecutor general for a renewable mandate of six years. To be appointed as competition prosecutor general, the candidate must comply with the selection conditions for president.

Investigation service

An Investigation Service is organized in the BCA. The Investigation Service is composed of the officials of the Belgian Competition Authority who are assigned to that service by the Board, provided that the president can require their assistance for a percentage of their time determined by the Board.
The competition prosecutor general assigns for each case which the BCA decides to deal with and for each notification of a concentration, a member of the Investigation Service who is as competition prosecutor in charge of the daily management of the investigation. This competition prosecutor may only receive orders from the competition prosecutor general regarding this investigation.
The competition prosecutor general designates, for each case, a team of members of the Investigation Service who are under his supervision in charge of the investigation and under the guidance of the competition prosecutor who is in charge of the daily management of the investigation.
The members of the Investigation Service who are part of an investigation team, can only receive orders from the competition prosecutor general or the competition prosecutor in charge of the daily management regarding this investigation.

3.2. Powers of the President, Deputy Chairman and other members of the Competition Council

It is important to have strict rules on the competences of the different persons and bodies within a competition authority as well as rules on aspects such as conflicts of interests, professional secrecy and incompatibilities. We will do this for the various constituting bodies of the BCA.

President BCA

The president is responsible among other things:
1° for representing Belgium in the European and international competition organisations for all discussions related to the powers of the BCA; he takes part in other discussions in European and international institutions about legislation and regulations related to competition policy;
2° for contributing, for the benefit of Federal Public Service Economy, the parliament, the government or other agencies, in the preparation and evaluation of competition policy in Belgium;
3° for contributing to a better understanding of that policy, to conduct studies and to resolve informally questions and disputes about the application of competition rules in cases in which no formal inquiry is conducted;
4° for preparing Belgian legislation and regulations regarding competition rules and competition policy;
5° for representing the BCA in procedures of preliminary rulings and interventions as amicus curiae.

The president must not accept any instructions, neither while taking decisions in the execution of duties assigned to him by the competition act, nor by determining his position in competition matters of the European Commission.

The Competition College

The assessor vice-president and the assessors hearing the case may not accept any instruction regarding this case, when taking decisions in the execution of their duties assigned to them.

The Board

The board is in charge among other things of:

- the organization and the composition of the service of the president and the Investigation Service;
- the determination of guidelines regarding competition law enforcement;
- the drawing up of an annual memorandum in which its policy priorities are laid down and communicated to the minister;
- the drawing up of internal rules for the Investigation service.

The competition prosecutor general

His duties are inter alia :
1° the management of the Investigation Service and the coordination and the lead of the investigations ;
2° to receive complaints and injunctions concerning anti-restrictive practices ;
3° to open an investigation and to determine the order in which these cases will be dealt with after advice from the chief economist;
4° to receive notifications of concentrations;
5° to issue instructions, when officials of the BCA assist officials of the European Commission during an inspection,which is ordered by the European Commission;
6° to monitor the implementation of decisions concerning rules of competition taken by the Competition College and the Court of Appeal.

Investigation service

The Investigation Service is in charge of eventually dismissing a complaint. Furthermore the competition prosecutors are in charge of :
1° heading and organizing the investigation;
2° at the request of interested natural or legal persons, or on their own initiative, ruling on the confidential nature of data provided to the BCA or to the College of Competition Prosecutors during the procedure;
3° drawing up and submitting the reasoned draft decision to the Competition College;
4° issuing instructions;
5° applying the simplified procedure for measures.
The competition prosecutors may accomplish all actions related to the accomplishment of their mission, except those which are reserved for the College of Competition Prosecutors.

3.3. Challenges and incompatibilities

Challenges

The President, the assessor vice-president or assessors assigned to a case, the competition prosecutor general and the competition prosecutors assigned by him can be challenged for the reasons stipulated in article 828 of the Judicial code, which reads:
"Any judge may be challenged for the following causes:
1° if there is a legitimate suspicion;
2° if he/she or his/her spouse has a personal interest in the dispute;
3° if he/she or his/her spouse is related to or related by marriage to the parties or one of the parties by direct line, (...); or in indirect line up to the fourth degree; or if the judge is related at the abovementioned degree to the spouse of one of the parties;
4° if the judge, his/her spouse, their ancestors and descendents or relatives in the same line, has/have a difference over a question similar to that between the parties;
5° if they have a legal proceeding in their name before a court where one of the parties is a judge; if they are creditors or debtors of one of the parties;
6° if there has been a penal legal proceeding between them and one of the parties or their spouses, relatives or relatives by marriage in direct line;
7° if there is a civil procedure between the judge, his/her spouse, their ancestors and descendents or relatives by marriage in the same line, and one of the parties, and that this legal procedure, if it was brought by the party, had been so prior to the proceeding in which the challenge is proposed; if, this legal proceeding being completed, it was completed within only six months prior to the challenge;
8° if the judge is guardian, deputy guardian or trustee, administrator or legal counsel, presumptive heir or donee, master or partner of one of the parties; if he/she is administrator or commissioner of any institution, company or association, that is party to the case; if one of the parties is his/her presumptive heir or donee;
9° if the judge gave advice pleaded or wrote about the controversy; if he/she previously as a judge or arbitrator had competency regarding it, except if, at the same level of jurisdiction:
- he/she took part in a court decision or a sentence before provisional judgment;
- having adjudicated in default, he/she had jurisdiction on the case on opposition;
- having adjudicated on an appeal, he/she later has jurisdiction on the same case, chambers united;
10° if the judge took part in a court decision in the first degree, and he/she is referred to on appeal on the controversy;
11° if he/she testified as a witness; if, since the beginning of the legal proceeding, he/she has been received by a party at the party's expense or accepted presents from this party;
12° if there is a major enmity between him/her and one of the parties; if there has been, on his/her part, abuse, insults or threats, verbally or in writing, since the proceeding or within six months prior to the proposed challenge.".
Any person who is aware of grounds to be challenged, shall abstain.
The application to challenge must be submitted by means of a reasoned appeal to the secretariat of the Investigation Service. It sets out the grounds and must be signed by the party or the party's representative holding a special power of attorney, which shall be annexed to the application. The application shall be submitted within 24 hours by the secretary to the person challenged.

Incompatibilities

The functions of president, the competition prosecutor general, the chief economist, the general counsel and a member of staff of the BCA are incompatible with judicial functions, the exercising of an elected public mandate at a different level than the local or provincial

level, any remunerated political or administrative public function, with the responsibilities of a notary or bailiff, with the profession of a lawyer, with the military status and with the function of a minister of a recognized cult.
The function of assessor vice-president or assessor is incompatible with the exercising of an elected public mandate at a different level than the local or provincial level, any remunerated political or administrative public function with the exception of functions in institutes of higher education, with the responsibilities of a notary or bailiff, with the military status and with the function of a minister of a recognized cult.

Derogations to the foregoing may be granted
1° only in the case of professor, teachers, junior lecturers, or lecturers in institutes of higher education, provided that such functions are not exercised more than two half days a week;
2° only in the case of functions exercised as a member of a panel of examiners;
3° only in the case of participation in a commission, a consultative committee, provided that the number of missions or functions is limited to two and that such missions or functions are not remunerated.
These derogations are granted by the president, and if it concerns himself by the president of the Court of Appeal of Brussels.

3.4. Procedures for resolving complaints by the Competition Council

See paragraph 2

3.5. Relationships of the Competition Council with other relevant agencies

A difficult situation is posed by the parallel existence of a competition authority and other, mostly sectoral regulators, mostly in network industries such as telecommunications and energy.

It is clear that there is an overlap between the activities of the general competition authority and those of the sector regulators. Both address competition. Both are supposed to supply markets that work efficiently. Both are concerned with the correction of market failures that arise from dominant positions in the market, externalities and asymmetric information. Both can use more or less similar behavioural or structural remedies in correcting these failures.
The grey area between the two contains considerable material for potential conflict. Countries all over the world are trying to deal with the relationship between the two types of institutions, each in their own fashion, taking into account their own institutional and historical circumstances.
The overlap is situated at several levels. There is firstly the overlap between general competition rules and sector specific rules. Many issues situated in the nucleus of sector regulation can be translated towards competition law (cf. access to markets). Access in network industries can also be handled by competition policy using the doctrine of the ‘essential facilities’. The same applies in broad lines to issues such as cross subsidization and the non-discrimination between affiliates and other clients.
Another overlap is between jurisdictions. Competition authorities as well as sector regulators can offer remedies, while sector regulators sometimes have dispute settlement procedures to offer to operators. Furthermore several countries have given sanctioning powers to sector regulators.

Finally there can exist regulatory inconsistencies and jurisdictional confusion when there are different options available for plaintiffs. This can lead to contradictory decisions. The need for a system of case allocation is thereby put to the question.

Several designs exist for the relationship between competition authorities and sector regulators. In most of these types problems of coordination exist. Hewitt (OECD 2003) identifies four prototypes of institutional relationships.
The first type is a full division of labour with a separation of regulatory and competition protection functions. In this situation the economic and access regulation are taken up by the sector regulator (including also the technical regulation), while the competition authority takes up the protection of competition. Because, as was pointed out above, the delineation between economic and access aspects on the one hand and pure competition law aspects on the other hand is not perfect, coordination problems are not entirely solved. This is the situation in Vietnam as well as in Belgium.
In a second type the sector regulator takes up all three tasks. Even in this situation it is hard to accept that the competition authority should not have a role to play where competition law is involved. Again there is a potential coordination problem.
In type 3 the general competition authority exclusively performs the three functions. Eventually technical regulation can be taken up by a sector regulator which in this case has severely restricted powers. This kind of integration within the general competition authority (the Dutch type) internalises the possible coordination problems.
In type 4 the general competition authority and the sector regulator have concurrent powers. In this situation the competition authority as well as the sector regulator have powers in the field of competition law. This can lead to a certain degree of institutional competition. The scarce examples of this system (cf. UK) show that various kinds of mechanisms are set up to guide the coordination between the two. Again there is a coordination problem.

3.6. Hearings

Under Belgian comptetition law the Competition College hearing the case hears each case in court. It hears the competition prosecutor, as well as the undertakings and natural persons whose activity has been investigated, as well as the complainant, at the latter's request. When the Competition College considers it necessary, it shall hear any natural or legal person. The request of any natural or legal person, who can demonstrate a sufficient interest, to be heard, shall be accepted.

Under EU competition law the following provisions concerning hearings are in force.
1. The Commission gives the undertakings or associations of undertakings which are the subject of the proceedings conducted by the Commission the opportunity of being heard on the matters to which the Commission has taken objection. The Commission bases its decisions only on objections on which the parties concerned have been able to comment. Complainants shall be associated closely with the proceedings.
2. The rights of defense of the parties concerned are fully respected in the proceedings. They are entitled to have access to the Commission's file, subject to the legitimate interest of undertakings in the protection of their business secrets. The right of access to the file does not extend to confidential information and internal documents of the Commission or the competition authorities of the Member States. In particular, the right of access does not extend to correspondence between the Commission and the competition authorities of the Member States, or between the latter.

3. If the Commission considers it necessary, it may also hear other natural or legal persons. Applications to be heard on the part of such persons shall, where they show a sufficient interest, be granted. The competition authorities of the Member States may also ask the Commission to hear other natural or legal persons.

3.7. Notification and publication of decisions

The decisions of the Competition College and its president are notified by the secretariat of the BCA by recorded delivery letter to the parties, the complainants and the minister, as well as to any person who can demonstrate an interest and who has requested to be heard by the Competition College.
In notifying the legitimate interests of the undertakings have to be taken into account. It has to be ensured that their business secrets and other confidential information are not disclosed. Under penalty of invalidity, the notification letter must indicate the period within which an appeal must be lodged as well as the procedure for lodging an appeal. The letter must show in annex the names, capacities and addresses of the parties to which the decision has been notified.
The decisions of the Competition College or of its president, of the College of Competition Prosecutors and of the competition prosecutor are also published in the Belgian Official Gazette and on the website of the Belgian Competition Authority. Confidential information is filtered out.

In the EU the notification process takes place in two rounds:
– in a first stage, immediately after the decision has been adopted by the College, the Secretariat General (SG) notifies by fax the operative part of the decision ("dispositif") to the parties (not to their external legal counsel, except if parties waived the notification rights to their empowered attorney); the SG also notifies the operative part of the decision to the National Competition Authorities;
– in a second stage, the SG notifies a certified copy of the decision to the parties as well as a copy of the final report of the Hearing Officer by express courier service (DHL or the like).
In the European Union it is required that the Commission publishes the main content of the subsequent decisions in the EU Official Journal: finding and termination of an infringement, interim measures, commitments, finding of inapplicability, fines and periodic penalty payments. The Commission has a long established practice to publish its final antitrust decisions on DG Competition's website in order to ensure transparency, predictability and legal certainty, even though the Commission is under no legal obligation to do so. These publications are filtered from confidential information.

3.8. Payment of fines

Fines in Belgian competition cases have to be paid within a period of 30 days starting the day of sending the notification of the decision to the party concerned.
If the undertaking is in default in the payment of the fine or penalty, the decision of the Competition College or of its president or the decision of the Brussels Court of Appeal is transmitted to the Federal Public Service of Finance in order to recover the administrative fine. The time-limits and arrangements for the payment of the fines and penalties are determined in a separate decision.

In the EU the fines have to be paid within three months of the date of notification of the

decision. After the expiry of that period, interest are automatically be payable at the interest rate applied by the European Central Bank to its main refinancing operations on the first day of the month in which this decision is adopted, plus 3.5 percentage points.
Decisions on fines can be appealed before the European Courts.

4. The problem of independence of competition authorities

Crucial for a good functioning credible competition authority is that it can act sufficiently independent from political interference and from business interests. Features of how to attain independence are put forward.

The decision made by governments to delegate authority has to do with the time-inconsistency problem that is connected to credible policy making. Often policy makers need to credibly bind themselves to a fixed and pre-announced course of action. Otherwise the danger exists that policy is altered because of changes in preferences of policy makers. a time consistent policy is a policy that will be sustained as circumstances change over time. Adhering to a policy rule may require pursuing a policy at a particular point in time that is not optimal at that time. In contrast, policy that is time inconsistent will be reversed in the future due to predictable developments over time.
A device to guarantee a time consistent policy is to create a commitment mechanism for removing the risk of opportunistic policy in particular contingencies. Independence for regulators can act as such a commitment mechanism. In this way, governments prohibit themselves and future policy makers from taking these short-sighted decisions. They 'tie their hands', so it will be politically more costly to overrule a decision made by an agency. Thus policy makers cannot use discretionary policy as a mechanism to favour a particular interest group.
The more independent an agency is, the more credible the policy is for stakeholders, potential investors, consumers, etc. Policymakers delegate to increase the credibility of their policy commitments.
Independence has four dimensions:

- Independence from government
- Independence from stakeholders
- Independence in taking decisions
- Autonomy of the organisation

Independence from government

Here the formal independence of regulators from the government and the parliament is involved. Concrete indications for this kind of independence are the length of the term of appointment, the quality of the appointing body, the provisions for dismissal, the possibility to combine the appointment with other public mandates, the possible renewal of the appointment and independence as a formal condition for the appointment.
With regard to the term of appointment the hypothesis is that the longer the term the more independent the appointee will be vis-à-vis the appointing body. The longer the appointment term the better the appointee can put his stamp on the activities of the regulatory body.
The quality of the appointing body can also play a role. It is generally accepted that the higher the status of the body that appoints the regulator the more independent the appointees will be. Independence seems to be least guaranteed when the appointment is made by a minister. It

would be better for independence if the cabinet and the parliament were involved in the appointing procedure.
The harder it is to dismiss regulators the more independent they are. Answers to questions such as who is in a position to fire and in which circumstances supply relevant information to get an idea of how firmly regulators are in the saddle.
Another factor is the easiness to get permission to combine the appointment with other public mandates. An absolute interdiction of such a combination is supposed to enforce the independence of regulators, the idea being that a potential conflict of interest coming out of such a combination is not good for the independence of the regulators.
An important question is the possibility for a renewal of the term of appointment. The existence of this chance can put regulators in a weak position vis-à-vis the appointing body, if they consider pursuing such a renewal. There is a risk that the regulators adapt policy to the wishes of the appointing body, affecting the regulators' independence. The impossibility of a renewal, well communicated beforehand, fences off the regulators from the possible misuse of the renewal for exerting influence.
Sometimes the condition of independence is formally stated in the regulatory statutes. It should be clear that the presence of such a clause can effectively enhance independence.

Independence from stakeholders

The basic idea underlying this form of independence is the fear for the so called 'capture' of the regulators by the regulated industries, as was first put forward in the 'theory of regulation' of George Stigler in the seventies. A too close involvement of regulators and the stakeholders creates the danger that the regulators' policy serves the interests of those stakeholders rather than the general interest. The stakeholders can be a diverse group. The immediate thought goes to the regulated companies themselves, but the category is not limited to them. Industrial organisations and trade unions act as stakeholders and the involvement of regulators with these organisations can influence the regulators' decision making. To a lesser degree this also applies to links with consumer organisations, the media, European and other international organisations.
Henceforth we restrict ourselves to the regulated industries.
The links between regulated industries and regulators can take different forms.
A newly appointed regulator leaving a job in a regulated company or a regulator leaving for a regulated company are the best well known examples here. In general such moves are not regarded as being beneficial to the regulator's independence. Limits to these kinds of transfers are often imposed. The rigour of these limits should then correlate positively with independence.
Another aspect is the confidentiality that regulators keep in mind in discussions of pending cases with stakeholders. As far as such discussion is not allowed, the independence of regulators is safeguarded.
Still another kind are personal or financial ties with supervised companies. Here again the same assumption applies: the absence of such ties, guaranteed by statutory or legal rule, benefits independence.

Independence in decision-making

The basic idea here is that the regulator must be in a position to take policy decisions independent from politics. The delegation of powers from politics to the regulator can be

narrowly or broadly defined. The broader the definition the more independent the regulator is supposed to be.
Other aspects are the way in which the regulator has to account for its decision making towards government and the ways open to the government to eventually contest the decisions of the regulator.

Organisational autonomy

Besides formal and policy independence a regulator should also have some degree of material independence. In the absence of material independence the former two types of independence are endangered.
Material independence materializes in matters such as the sources of budgetary means, the control over the budget, autonomy in using financial means, the autonomy to decide on internal organisation, human resources management and other management aspects such as IT and real estate.

5. Conclusions

From the previous it should be clear that a number of conditions have to be met in order to install an efficient competition policy that adds to the general economic policy goal of improving productivity and economic growth. These conditions can be summed up under three categories: well written rules, well designed institutions and sufficient resources.
Regarding the legislation the Vietnamese competition law and executing decrees are generally well written and comparable to western types of legislation. On some aspects minor improvements can be suggested. It could be considered to have a limitation on the period that an appeal can be lodged against decisions of the competition authority. It could also be considered to diminish the number of appeal stages from four to three or even two. It is also worth considering introducing the possibility to let the competition authority assist itself by legal counsel in appeal procedures. It is also suggested that an appeal does not automatically suspends a decision from coming into effect.
The design of the institutional system of the Vietnamese competition authority fits very well the preferred dualistic structure with a clear separation between the investigative and the adjudicating part. Care should be taken of how persons taking up the functions within the institutions are selected. An impartial selection mechanism decided on high level in the government is a suggestion to be considered. Consideration should be given on the issue of the removal of persons nominated in the competition authority. This issue should be spelled out in the law in a detailed manner as to avoid breaches into the independence of the authority. Consideration should also go to the incompatibilities of the functions of the persons in the competition authorities with other functions in the political, administrative and economic society.
The third aspect of a good competition system is the availability of sufficient resources. A good legal and institutional system that is starved from resources will not be very performing. It will also not be very independent from the political sphere since the authority will always be at its mercy.

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