

VIETNAM'S STATE MONOPOLIES: EXPLANATIONS FOR COMPETITION LAW CONCERNS



Tran Thang Long¹

Ho Chi Minh City University of Law, Ho Chi Minh City, Vietnam
ttlong@hcmulaw.edu.vn

Abstract

This paper focuses on competition law issues arising from the existence of the state monopolies in Vietnam. The assertion “the leading role of the state economy” serves as the focal point of the Vietnam’s state monopolies’ formation and development , despite having a number of adjustments in the light of a market economy (with socialist orientation). There are significant concerns with respect to a state monopoly, including, but not limited to, the ‘monopoly existence in general and the close relationship between state monopolies and state management bodies. In this regard, Vietnam’s competition authority, additionally, lacks the independence and capacity of a deal with their anti-competitive practices. The last part of this paper seeks to find answers for the question what needs to be done to address these matters.

¹ **Author**

*PhD in Law (LTU, Australia), Deputy Head of Faculty of Legal Languages, Ho Chi Minh City University of Law
2-4 Nguyen Tat Thanh Street, District 4, Ho Chi Minh City, Vietnam*

Keywords

State monopolies, competition law, state-owned enterprises, state economic groups, Vietnam's anti-competitive practices, competition authority

DOI 10.17803/2313-5395.2018.1.9.270-288

TABLE OF CONTENTS

I. INTRODUCTION.....	271
II. CONCERNS REGARDING THE STATE MONOPOLY SITUATION.....	273
1. Concerns regarding “monopoly”	273
2. Concerns regarding the close relationship between state monopolies and state management bodies	277
3. Concerns regarding the limits of independence of Vietnam’s competition authority	280
III. CONCLUSION	283
References	286

I. INTRODUCTION

State monopolies in Vietnam were formed under the aegis of Vietnam’s Communist Party (CPV), in which the policy of the “leading role” of state economy has remained unchanged and unchangeable. The “leading role of the state economy” was clearly reaffirmed in Art. 51(1) of the 2013 Constitution that “The Vietnamese economy is a socialist-oriented market economy with varied forms of ownership and economic sectors; the state economy plays the leading role”. State monopolies in Vietnam have been developed in parallel with the state-owned enterprises SOE reform. During that process, the SOE reform on one hand, has brought about a considerable reduction in their number, a substantial limitation to their business scope and on the other hand, has created significant improvement in their competitive capacity. Besides this positive aspect, a number of powerful state enterprises, including state economic groups and numerous state corporations, have emerged, introducing competition law concerns into the economy, despite the fact that these large and powerful enterprises have been strongly confirming the decisive position of the state sector in Vietnam.

This paper discusses competition policy concerns² arising from the existence of state monopolies, whether administrative or state enterprise: how a fair and healthy competitive environment may be ensured and what the obstacles facing the competition authority in enforcing the competition law are. It hopes to contribute to the source of knowledge about the formation and work of state monopolies in transitional economies like Vietnam. In particular, it focuses on the close links between state monopolies and state management bodies paying special regard to the possibility of conflicts of interest.³ The

² Even “late development theory”, to use Krever’s term (Krever, T. (2011). *The legal Turn in Late Development Theory: the Rule of Law and the World Bank’s Development Model*. Harvard International Law Journal. 52. 287), pays little attention to competition policy as a concomitant to market liberalisation regimes. Frequently it is conflated with “neo-liberalism”; see, for example, Jayasuriya, K. (ed.). (1999). *Law, Capitalism, and Power in Asia: The Rule of Law and Legal Institutions*. Routledge. 118. Yet competition policy, especially in its wider meaning encompassing competition law, is as much about constraining competition as it is about creating it. The literature on this is vast, cited above is the seminal work of Bork. R. H. (1978). *The Antitrust Paradox*, Basic Books. Of course, there is a literature examining the role of competition policy in developing economies in general (e.g., Rodriguez, A. and Menon, A. (2010). *The Limits of Competition Policy: The Shortcomings of Antitrust in Developing and Reforming Economies*. Kluwer) and particular (e.g., Juwana, H. (2004). *Law and Development under Globalisation: The Introduction and Implementation of Competition Law in Indonesia*. Forum International Development Studies. 27. 6; Poapongsakorn, N. (2002). *The New Competition Law in Thailand: Lessons for Institution Building*. Review of Industrial Organisation. 21. 185). Indeed Asian countries that have recently or are contemplating competition laws include China, Hong Kong, India, Vietnam, Malaysia, Singapore, Indonesia, South Korea, Bangladesh, and Thailand. An excellent means of tracking this fast-moving field in the monthly e-newsletter *Competition Digest* published by the Asian Competition Law and Economics Centre at the Hong Kong Polytechnic University at http://www.af.polyu.edu.hk/aclec/aclec_newsletter.html.

³ It is at this point that the discursive differences between the approach taken in this article and those in prior literature become most apparent. There the black box of party or state interference in market operations is “corruption” or a milder “state or party influence” in organisations systems (which can be excoriated as “Leninist”). Here interest in such influences is accepted as a natural order, as conflicts of interest. Competition is the enemy of such matters in the current paper and hence the question is of the degree to which and manner by which monopoly and the use of its power is constrained. There the question is of description; here it is of how to fix it through competition mechanisms.

A related question at this point is as to the nature of the state in Vietnam. Here, due to Vietnam’s Leninist past, we combine state and party, as is common in

limits of independence of the competition authority in the application of competition law becomes apparent, suggesting that reform of the current competition authority and resolution of its complicated relationship with sectoral regulators is required.

The final section of this paper asks what is to be made of these matters. Are the issues confined to Vietnam's processes of change? How do the difficulties in implementing the expressed intentions of policies of reform reflect on the demands made by development authorities? What does the case study say about approaches to transition, in particular about the application of competition law? It concludes by criticising comprehensively in the consideration of changes in political economy and argues for greater recognition of ideas of the limits of law as an effective instrument of change at the same time as recognising the utility of competition policy and law.

II. CONCERNS REGARDING THE STATE MONOPOLY SITUATION

1. Concerns regarding “monopoly”

As highlighted in *Decision No.91/TTg*, the formation of state business groups was not intended to create monopolies.⁴ The threat to fair competition was, however, that they could actually strengthen

the literature. It is this which becomes problematic for the “Law Matters” approach prevalent in “late development theory” (see No. 1 above). Yet that literature fails to acknowledge that legal institutions can constrain market activity at the same time as promoting competition. In other words, markets are enabled by legal institutions of contract and property (Jayasuriya, K. (ed.). (1999). *Law, Capitalism, and Power in Asia: The Rule of Law and Legal Institutions*. Routledge. 121) and this the literature acknowledges, even feeds off, yet it does not pursue the issues of regulation of those markets, especially in the sense of regulating the processes of competition rather than the outcomes. Given that this is archetypical “government at a distance” and given also that all government activities within this analysis are the product of interest group pressure, it does not matter what is the source of that regulation. In other words, the Weberian type here is the regulation of competition. The questions are of the extent to which such regulation is enacted and the degree to which it is applied.

⁴ Decision No.91/TTg on 07/03/1994 on Pilot Establishment of Economic Groups, Art. 2.

their monopoly position, engage in anti-competitive behaviour, thus weakening competition.⁵

The concentration of the domestic market and/or the existence of trade barriers made it possible for General Corporations (GCs) and Economic Groups (EGs) to maintain their positions and benefit from them.⁶ In such specific sectors as telecommunications, the use of monopoly pricing remains common and is supported partly by state policy, as only a limited amount of competition in such sectors is allowed.⁷ In areas where administrative restrictions on international trade remain, such as the cement and steel sectors, only GCs enjoy access to external markets and benefit from the import regime.⁸

Second, the opaque division between the ownership and management functions is widely criticised as a problem leading to a monopoly situation. Some state corporations tend to perform their business functions while conducting state management functions, such as producing sectoral and regional development plans, carrying out international relations and deciding prices. By virtue of this ambiguity, some corporations are able to institutionalise such privileges, imposing disadvantages on their competitors, arranging market divisions among member companies or creating price discrimination against competitors and customers.⁹

⁵ See Central Institute for Economic Management (CIEM), *Mot so Van de Phap ly va The che ve Chinh sach Canh tranh va Kiem soat Doc quyen Kinh doanh* [Legal and Institutional Issues concerning Competition Policies and Control of Business Monopoly]. Transport Publishing House, 2002. See also World Bank. Vietnam: Economic Report on Industrialization and Industrial Policy. Report No. 14645-VN. 1995. 108.

⁶ Arkadie, B. Van and Mallon, R. (2003). Vietnam — A Transition Tiger? Asia Pacific Press. 132–135.

⁷ Ibid. UNDP and CIEM, above n 4, 75.

⁸ World Bank, above n 4; Arkadie and Mallon, above n 5, 135.

⁹ Dao Xuan Thuy, *Dieu kien va Giai phap Hinh thanh Cac Tap doan Kinh te Tu Cac Tong Cong ty 91* [Conditions and Solutions for the Establishment of Economic Groups on the Basis of the 91 State General Corporations]. National Political Publishing House, 2009. 82; UNDP and CIEM, above n 4, 72; Phan Thi Van Hong, *Doc quyen va Phap luat ve Kiem soat Doc quyen o Vietnam Hien nay* [Monopoly and Law Concerning Monopoly Control in Vietnam]. LLM Thesis. Hanoi Law University, 2005. 36.

Third, restrictions on competition between members of GCs and EGs and non-members exist as do restrictions on the competitive capacity of their member companies. This is because the business activities of member companies are carried out under their “parent” corporation’s guidance regarding development and investment directions, imposed targets and geographical arrangements. In some cases, they have to bear the losses of other inefficient members.¹⁰ Member companies seem to complement each other rather than compete.¹¹

Constraints to competition are apparent in infrastructure industries¹² and the exploitation of pricing policy. Numerous examples can be found in the cases of telecommunications, electricity, cement, steel, petroleum. Price discrimination was applied for numerous products and services and there were other practices abusing the monopoly position, such as constraints in business and refusal to deal, which were employed commonly in insurance, public transportation and the purchase of raw materials.¹³ The economics of natural monopoly¹⁴ in specific industries in which state monopolies exist restricts investment from both the non state sector and foreign investors. As the only providers of products and services in specific areas, GCs and EGs further eliminate competition by establishing a closed network covering all phases of business performance that exclude participation of other companies. With a monopoly position, they impose monopoly prices higher than those in neighbouring countries or even to the extent that people can readily afford. They can impose a low pricing scheme in purchasing of raw materials or impose a high pricing scheme or maintain sale prices, thus affecting both upstream and downstream markets.

¹⁰ UNDP and CIEM, above n 4, 72; Phan Thi Van Hong, *Doc quyen va Phap luat ve Kiem soat Doc quyen o Vietnam Hien nay* [Monopoly and Law Concerning Monopoly Control in Vietnam]. LLM Thesis. Hanoi Law University, 2005. 37.

¹¹ Thuy, above n 8, 86; Sjöholm, F. (2006). *State Owned Enterprises and Equitization in Vietnam*. Available at: <http://swopec.hhs.se/eijswp/papers/eijswp0228.pdf>.

¹² Examples of Vietnam Posts and Telecommunication; Vietnam Airlines or Vietnam Electricity Corporations are good demonstrations for this situation. See Hong, above n 9, 37.

¹³ UNDP and CIEM, above n 3, 72, 75.

¹⁴ See n 1 above.

Fourth and related to the above, there are major concerns about the abuse of their dominant position by the EGs. One of the reasons is that some EGs have attained a high degree of organisation, establishing a closed system of members to allocate and perform all phases of their productive process. In the case of Vietnam Electricity (EVN), there is close coordination among member companies in carrying out the three stages: production (implemented by power plants), transmission (by the National Transmission Company), and distribution (by local power companies). Similarly, Vietnam National Post and Telecommunication (VNPT) has attained a close link with its subsidiaries with regard to the operation of back-bone lines, information technology, communications, surveying, consultation and the installation and provision of telecom equipment.¹⁵ Their dominance in certain areas has originated from their previous status, when all of them were state firms operating in strategic and monopolistic areas.¹⁶ The wide-ranging coverage of these state groups causes difficulties for other enterprises which wish to compete with them in specific areas.¹⁷ Some facilities, mainly state-owned infrastructure, which the state monopolies (EGs) are assigned to manage and operate, other companies need to use in order to operate their business, exposing them to abuse of market power. In addition, EGs are not taking advantage of Vietnam's WTO membership to become internationally competitive in their core businesses or to compete effectively on foreign markets.¹⁸ This gives incentives for EGs attempt to form domestic monopolies and act as a barrier to foreign competition.

¹⁵ See Bui Van Huyen, *Xay dung va Phat trien Tap doan Kinh te o Viet Nam* [Building and Developing Economic Groups in Vietnam]. National Political Publishing House, 2008. 155.

¹⁶ For example, VNPT (Vietnam National Posts and Telecommunication) have a stronger position than others operating in the area of post and telecommunications, such as Viettel (the Military Telecom Corporation) and Saigon Postel SPT (Saigon Post and Telecommunications Services Corporation).

¹⁷ Huyen, above n 14, 170.

¹⁸ Harvard Vietnam Program, John F. Kennedy School of Government, *Choosing Success: The Lessons of East and Southeast Asia and Vietnam's Future* (2008). Available at: http://www.fetp.edu.vn/Research_casestudy/PolicyPapers/PP001_Choosing_Success_E.pdf.

There have been some recent improvements in market structure due to the presence of new competing enterprises, such as telecommunication and aviation since early 1990s.¹⁹ However, in general the monopoly situation has not improved much because of the inadequate scale of economies of new enterprises and the preference given to state monopolies.²⁰

2. Concerns regarding the close relationship between state monopolies and state management bodies

Vietnam's state monopolies, both GCs and EGs, can be characterised as interest groups, due to their possession of large amounts of capital and of assets in strategic sectors of the economy. These interest groups can act alone or in the form of trade associations organised or headed by foremost state firms. There is a consequent complicity in the relationship between state monopolies and state management agencies in Vietnam. This is demonstrated by the origin of state monopolies (previously SOEs belonging to industrial ministries), the assignment of staff to the managing boards of these monopolies and the lack of transparency in the policy making process. It is made more complicated by the organisation of competition authorities which consist of representatives of industries and their position in their relation with the Ministry of Trade. According to the *Decree No. 29/2004/ND-CP* of the Government on defining the functions, tasks, powers and organisational structure of the Ministry of Trade, Vietnam Competition Administration Department (VCAD) is established as one of the statutory bodies directly under Ministry of Trade of Vietnam.²¹ The application of competition rules to monopoly behaviour, for these reasons, will be influenced by the activities of such state monopolies or interest groups.

¹⁹ For example, competition in telecommunication services was open with the participation of new companies such as Saigon Postel Corporation (1995); Viettel Telecom (2004). Similarly, the launch of Pacific Airlines in 1991 was a breakthrough for the removal of Vietnam Airlines' monopoly in aviation area.

²⁰ Vu Huy Tu et al, *Co cau Lai Doanh nghiep Nha nuoc Theo Luat Doanh nghiep Nam 2005* [Restructuring State Corporations according to the Enterprises Law 2005]. National Political Publishing House, 2007. 26.

²¹ Decree Decree No. 29/2004/ND-CP art 3.

GCs and EGs can benefit from a close connection with state management bodies (sectoral regulators), previously their line ministries, to lobby in the legislative process and gain advantages from the law and policies. For example, they can influence the government in making decisions which create barriers for market entry; delay opening up in monopolistic areas, make recommendations for the regulation of monopoly prices or provide more exclusivity such as proposals for granting exemption, etc. They may capture sector regulators to seek for explicit or implicit immunities from restraints created by sector regulation through administrative law.²² They can propose to the government the imposition of protective policies against imports or subsidies such as export subsidies and preferential loans for price stabilisation. They may also take advantage of the divergence between sectoral regulators and competition authority in terms of control over particular regulated industry to gain supports and protection from these regulators or to escape from the oversight of competition authority.²³

Industries and their sector regulators support state monopolies, considering them as important tools to achieve political and socioeconomic goals. Justified by the argument that state monopolies have contributed considerably to the state budget and implementation of state policies, ministries advocate the establishment of new state economic groups, mostly to be based on their industries. This is demonstrated by the fact that currently state economic groups are operating in particular industries.²⁴ The state may also rely on supporting state monopolies in order to create a domestic foundation in competing with foreign

²² Sokol, D. (2009). Limiting Anti-Competitive Government Intervention That Benefit Special Interests. 14. Available at: <http://www.coleurop.be/content/gclc/documents/GCLC%20Working%20Paper%2002-09%20-%20Daniel%20Sokol.pdf>.

²³ Ibid 14–15. See also Niskanen, W. A. (1971). Bureaucracy and Representative Government. Aldine. 195–223; Bendor, J., Taylor, S., and Gaalen, R. van (1985). Bureaucratic Expertise versus Legislative Authority: A Model of Deception and Monitoring in Budgeting. *American Political Sciences Review*. 79 (4). 1041–1060.

²⁴ Of the eight state economic groups, Vietnam Post and Telecommunications (VNPT) is operating mostly in the domain of the Ministry of Information and Communications. The others are operating in the domains of the Ministry of Industry and Trade, such as the Vietnam Coal and Mining Industries Group (Vinacomin), Vietnam National Oil and Gas Group (PetroVietnam), the Vietnam Shipbuilding Industry (Vinashin), Vietnam Textile and Garment (Vinatex), Vietnam Rubber Group (VRG), Electricity of Vietnam (EVN), etc.

and transnational firms in the context of economic integration. In this regard, interest groups represented by large domestic firms i.e. economic groups, may convince the government that their existence is important to react with the threat of foreign firms when the market is open. Thus, they can lobby government for the support of the establishment and maintenance of large-scale and powerful economic groups. The concept of “national champions” is defined by W Goode as “companies designated in some countries to act as promoters of new technologies or new processes from whom other companies will be able to learn. Often, they already enjoy a pre-eminent position in their sector when they are nominated,”²⁵ the creation of market entry barriers enabling them not to concern about competition from foreign firms and the grant of immunities from competition law. These immunities can be explicit or implicit, including the exclusion of competition law prohibitions to a specific group of firms or sectors, the prevalence in competition law given to a particular group or the keeping of old immunities gained during the legislative process. Immunities can also be gained through the judiciary; in particular, they can be created and developed through case law.²⁶

²⁵ See Goode, W. (2003). *Dictionary of Trade Policy Terms*. 4th ed. Cambridge University Press. 251. National champions are known as large firms in strategic sectors which they are expected not only to seek profit but also to advance the interests of the nation. The concept of “national champion” is said to be developed by the Russian President Vladimir Putin in 1997 when he got this idea from a textbook of University of Pittsburgh’s professors William King and David Clelan. The concept was also similarly presented by Charles De Gaulle when he was president in France in the 1950s while it was proposed in 17th century by another French politician Jean-Baptiste Colbert. See Marshall I Goldman (2008). *The New Imperial Russia*. Available at: <http://www.demokratizatsiya.org/bin/pdf/DEM%2016-1%20Goldman.pdf>. “National Champions” is mentioned in a number of OECD Policy Roundtables. See, for example, OECD. Competition Policy, Industrial Policy and National Champions. Competition Policy Roundtable. DAF/COMP/GF (2009) 9. 2009. Available at: <http://www.oecd.org/dataoecd/12/50/44548025.pdf>; OECD. State-Owned Enterprises and the Principle of Competitive Neutrality. Policy Roundtable. DAF/COMP(2009)37. 2009. Available at: <http://www.oecd.org/dataoecd/43/52/46734249.pdf>.

²⁶ For example, in the US, the recognition of state exemptions under the state action doctrine was marked by the case of *Parker v. Brown*. See Sokol, above n 99, 9–15. See also Vietnam Net, Building Powerful Domestic Economic Groups. Available at: <http://english.vietnamnet.vn/biz/2008/05/780953/>; MUTRAP, Hoi Nghi So ket Thi diem Mo hinh Tap doan Kinh te Thuoc Bo Cong thuong [Meeting

In short, the use of competition rules in regulating anti-competitive conduct may be manipulated by interest groups. These activities also limit the independence of competition authority. This brings about the concern that a fair competitive environment is hindered and the effectiveness of the application is also limited because of the immunities from competition law that interest group may bargain. Like GCs, state economic groups have incentives to seek support from management bodies to enjoy benefits from policies and laws, to consolidate their existing position, enhance their monopoly advantage and prevent rivals from participating in the monopoly areas. This is illustrated by the Korean *chaebols*. At the beginning, *Chaebols* colluded and had close ties with the state management bodies. When *Chaebols* had developed to a degree that exceeded the control of state management bodies, they transformed into bodies which influenced and compelled these bodies to follow their wishes, thus distorting fair competition and entailing harmful to normal activities of enterprises and the economy.²⁷

3. Concerns regarding the limits of independence of Vietnam's competition authority

While state monopolies still maintain strong links with state management bodies, the independence of the competition authority is limited. One of the reasons is due to a reciprocal relationship between state monopolies and their sectoral regulators. Sectoral regulators are often involved in the competition process and the settlement of competition cases by the competition authority, particularly in the

on the Preliminary Wrap-up Report of the Model of Economic Groups belonging to the Ministry of Industry and Trade] (2008). Available at: <http://www.mutrap.org.vn/Lists/Posts/Post.aspx?List=5276b79d-4e3a-4c5b-a2ad-c903807cc7ea&ID=40>; Tuan Vietnam, Dieuhanh Tap doanKinhhte o Vietnam [Regulating Economic Groups in Vietnam]. Available at: <http://www.tuanvietnam.net/news/InTin.aspx?alias=tulieusuyngam&msgid=4089>; Tran Tien Cuong, Viet Nam Se Co Nhung Tap doanKinhhteManh? [Will Vietnam Have Powerful Economic Groups?] Available at: <http://www.mof.gov.vn/Default.aspx?tabid=612&ItemID=20841>.

²⁷ See Dang Vu Huan (2002). *Phap luat Ve Kiem soat Doc quyen va Chong Canh tranh Khong Lanh manh o Vietnam* [Law concerning Monopoly Control and Anti-Unfair Competition in Vietnam]. PhD in Law Thesis. Hanoi Law University. 33–34.

investigation process. This places obstacles on the competition authority in enforcing the competition law.

Due to their special position in the economy, state monopolies tend to receive support from the state and they are often managed by ministries (sectoral regulators). Anti-competitive behaviour can be committed under the guidance or in the form of a “green light” of approval from ministries. For example, there was a commitment given by the representative of Ministry of Finance at a conference on insurance activities in 2010 that the Ministry would consider imposing a minimum rate of insurance fees. This commitment was given on the grounds that competition in the insurance sector was mostly related to the reduction of insurance fees. Such an imposing of a minimum rate would prevent insurance companies from lowering their insurance fee. However, this may be a good reason for insurance companies and their association (known as the Association of Insurance Companies) to set minimum fees, which may constitute a breach of competition law (fixing prices). To perform the function of providing technical and economic regulations, these regulators often have a unit designated to be responsible for managing and monitoring the activities of state monopolies operating in their field. These units may interfere in the conduct of tasks of the competition authority. Conversely, state monopolies may take advantage of regulations issued by their sectoral regulators,²⁸ through either lobbying or corruption.²⁹ Finally, a state monopoly often seeks

²⁸ For example, the Decree No. 58/2005/QĐ-BNN dated 03/10/2005 of Vietnam's Ministry of Agriculture and Rural Development on the enactment of the Statute for coordination in producing and distributing sugar and sugar-cane can be used as a ground for the fixing of buying prices or allocation of the market. According to Article 4, the Vietnam Sugar and Sugar Cane Association is responsible for holding meetings with sugar producers, negotiating to fix minimum/maximum prices and figuring out methods for buying sugar from farmers. Article 6 also stipulates that the Association may organize regular or unscheduled meetings with sugar producers in the case of fluctuations in the sugar market in order to design mutual plans for distributing sugar and fixing minimum/maximum selling prices to guarantee the interests of sugar producers and customers.

²⁹ Le Dang Doanh (2008). *Các Tập đoàn Kinh tế Lũng đoạn Nền Kinh tế Việt Nam* [State Economic Groups Are Cornering Vietnam's Economy]. Available at: http://www.rfi.fr/actue/articles/104/article_753.asp.

help from its regulator in the cases it is involved in, thereby ignoring the role and competence of the competition authority.³⁰

It can be concluded from the above that the handling of competition cases may lead to conflicts of interest between common interests (the demand to ensure compliance with competition law) and private interests (the interests of the industries). The benefits of particular industries can be justified by the necessity of giving the common interests of the country priority. For example, when an economic concentration entailing a breach of a prohibited threshold is about to be conducted, it may be justified by the need to create stronger and more capable firms in the international sphere (national champions) etc. Another example appears in cases involving competition between state monopolies and foreign business partners, where excessive advocacy for the state-owned firms can limit the objectives of competition law enforcement. Further, the intervention of the competition authority in such cases is difficult. Thus, for example, the conclusion of that there has been a violation of competition by the authority may contradict regulations issued by sectoral regulators: those provisions may create the prerequisites for the conduct of anti-competitive behaviour of state monopolies. Moreover, a declaration of violation may even conflict with the common interests as justified by regulators and state monopolies. As result, the effectiveness of the Vietnamese competition authorities³¹ is a concern. The Vietnam Competition Council, as well as other relevant bodies, has not been active in undertaking investigations and the settling of monopolistic practices.³² This means that the operation of competition bodies does not fulfil expected requirements. The VCC was formed in 2005, but no monopoly cases had been tried by this body until April 2009. The first anti-monopoly case handled by VCC was about the dispute between VINAPCO, a subsidiary company of Vietnam Airlines providing aviation oil, and Jetstar Pacific Airlines, a joint-venture airliner.³³

³⁰ This is illustrated by the dispute between Viettel and VNPT in Vietnam.

³¹ Vietnam competition authorities include Vietnam Competition Administration Department – VCAD and Vietnam Competition Council – VCC.

³² Huyen, above n 14, 178.

³³ See: Vietnam Competition Council. Available at: <http://www.hoidongcanhtranh.vn/Tin-Tuc-Chi-Tiet&action=viewNews&id=967>.

III. CONCLUSION

First, the formation of state monopolies in Vietnam has been a long-term process which has gone hand in hand with SOE reform. During that process, SOEs have been re-organised to bring about a considerable reduction in their number, a substantial limitation to their business scope and improvement in their competitive capacity. Nevertheless, a number of powerful state enterprises, including state economic groups and numerous state corporations, have emerged, strongly confirming the decisive position of the state sector in Vietnam. State monopolies may be either “state general corporations” (CGs) or “state economic groups” (EGs). Some GCs are state monopolies in specific domains while some of them are considered to be upgraded into new EGs. In other words, the transfer from “state monopoly” to “enterprise monopoly” has enabled state general corporations and economic groups to turn into state monopolies. For example, the production, transmission and distribution of power were previously in the hands of the state and were operated by power companies set up by the state. When the Vietnam Electricity Group was established, it became a state economic enterprise holding a monopoly position in this area. In this case, there was a transformation of monopoly from the state to a specific state enterprise.³⁴

Second, the existence of state monopolies in Vietnam is strongly influenced by political thinking and determined by its socio-economic context. It is here argued that the deep-rooted reason for the monopoly situation in Vietnam is “the leading role of the state economic sector” concept. This is reflected in the transition of state monopolies in Vietnam from the initial form (union of state-run enterprises) to the current forms, of which “state economic group” is the most important. Even though Vietnam’s state monopolies have experienced a series of renewals and adjustments, their nature as state-owned enterprises remains unchanged. After the Doi Moi Program (Renewal, a market-oriented economic reform begun in the year of 1986), Vietnam’s

³⁴ Tran Thi Thu Hang (2004). Vietnam’s Experience in Formulating Regulations of Abuse of Dominant Position. Available at: www.jftc.go.jp/eacpf/05/APECTrainingProgramAugust2004/vietnam.hang.pdf.

state monopolies developed in a different way from the traditional understanding of the nature of a monopoly. They were merely established by administrative decisions, not through free competition. As GCs and EGs currently control crucial areas of Vietnam's economy, all natural monopoly industries are in the hands of the state. There is almost no difference between a state monopoly and a natural monopoly. It can be concluded that the question of monopolies in Vietnam is principally and simply a matter of state monopolies.

Third, state monopolies in Vietnam maintain a close link with the state management bodies. Vietnam's state monopolies have been firmly supported by former ministries. They benefit from barriers to market entry in such forms as license regulations and price mechanisms in certain areas (electricity, telecommunication, airlines). The intervention of state authorities in the form of guidance and directions with regard to tendering, quota allocation, etc. is still common. Further, local monopolies also exist, due to the support of local authorities through barriers for market access, facilitation of local industries or special trading rights.

Fourth, the assertion of "leading role of state sector" concept facilitates state monopolies in engaging in anti-competitive behaviour. State monopolies are criticised for abusing their monopoly positions and conducting restrictive competition practices. As remnants of the previous economic mechanism have not been completely eradicated, the monopoly situation has become a worrying issue. It is a fact that some EGs have recently been investing in other than their major areas. For example, EVN is developing their business to provide mobile services with the introduction of its mobile services in 2006, offered by its subsidiary EVN Telecom or PetroVietnam is investing in stock markets, real estate through its subsidiary PetroVietnam Finance Corporation, starting since 2000. State conglomerates are expanding rapidly into a wide range of sectors, including real estate, financial services, tourism and even mobile phone distribution. This is far from the desire of the Vietnamese Communist Party (CPV) that the conglomerates should focus on strategic sectors only. EGs argue that, as enterprises, they can invest in whatever areas that can return them a profit. Their investment in these areas, it is argued, could secure them from collapse. On the

ground that efficiency in doing business is the foremost concern, EGs argue that if the investment in their major areas is not efficient it should be possible for them to invest in other areas, as long as they are not prohibited by law. Besides, they argue that the state management bodies should focus on their functions as the owners, rather than intervening so strongly in the business activities of EGs.³⁵ Supervision by the state, as the owner and investor, is required. According to Vietnamese scholars, EGs must firstly invest in their major areas.³⁶ In addition, by their nature EGs, should act as SOEs and operate in their assigned tasks and within the framework of the law. If EGs expand their business scope they become difficult for the state to control.

Fifth, there is the need to elucidate the tasks of sectoral regulators involving competition law issues and to clarify the coordination between these regulators and any competition authority. Furthermore, the independence of competition authority is important to limit the effects of rent seeking activities, for example, in detecting and suggesting the removal of restraints caused by the capture of regulation by interest groups which may impede competition. This should be associated with the ensuring of transparency and accessibility in decision making of the government and its bodies and the oversight of lobbying activities. A specific law governing the operation of EGs and state monopolies and ensuring the compliance with other specific laws is required.³⁷

³⁵ See Harvard Vietnam Program, above n 77. See Perkins, D. H. and Vu ThanhTu Anh (2008). Vietnam's Industrial Policy. Designing Policies for Sustainable Development. Available at: www.vdf.org.vn/Doc/2008/VDFConf_Presentation3_PaperEng.pdf. See also Viet Nam Net. Tap Doan Kinh te Phan doiSietDacquyen [Economic Groups Object to Tightening Their Exclusive Rights]. Available at: <http://vietnamnet.vn/chinhtri/2008/08/798487/>.

³⁶ Doanh, above. 28; Pham Chi Lan (2008). Tap doan Kinh te: Da Dac quyen Khong the Doi hoi Them Quyen [Economic Groups Cannot Ask for More than Their Current Privileges]. Available at: <http://tuanvietnam.vietnamnet.vn/tap-doa-kinh-te-da-dac-quyen-khong-the-doi-them-quyen>.

³⁷ There is currently no mechanism to supervise their operation and to such as the Competition Law 2004, Law on Natural Resources and Minerals 2005 or Law on the Protection of Environment 2005. See Doanh, above n 107. A draft of the Decree on Establishment, Organisation, Operation and Supervision of Economic Groups is being drawn up. However, there has been no proper definition of "economic group" or what the criteria are to define an "economic group".

In addition, Vietnam's government should take into account the development of private groups; a legal foundation for the establishment and operation of private economic groups and competition between state monopolies and private groups should be laid.

REFERENCES

Bendor, J., Taylor, S., and Gaalen, R. van (1985). Bureaucratic Expertise versus Legislative Authority: A Model of Deception and Monitoring in Budgeting. *American Political Sciences Review*. 79 (4). 1041–1060.

Bork, R. H. (1978). *The Antitrust Paradox*. Basic Books.

Bui Van Huyen (2008). *Xay dung va Phat trien Tap doan Kinh te o Viet Nam* [Building and Developing Economic Groups in Vietnam]. National Political Publishing House.

Central Institute for Economic Management (CIEM) (2002). *Mot so Van de Phap ly va The che ve Chinh sach Canh tranh va Kiem soat Doc quyen Kinh doanh* [Legal and Institutional Issues concerning Competition Policies and Control of Business Monopoly]. Transport Publishing House.

Central Institute for Economic Management (CIEM) and Swedish International Development Agency (SIDA) (2006). *Tiep tuc Xay dung va Hoan thien The che Kinh te thi truong Dinh huong XHCN o Vietnam* [Continuous Building and Perfecting Institutional Framework for Market Economy with Socialist Orientation in Vietnam]. Science and Technology Publishing House.

Dang Vu Huan (2002). *Phap luat Ve Kiem soat Doc quyen va Chong Canh tranh Khong Lanh manh o Vietnam* [Law concerning Monopoly Control and Anti-Unfair Competition in Vietnam]. PhD in Law Thesis. Hanoi Law University.

Dao Xuan Thuy (2009). *Dieu kien va Giai phap Hinh thanh Cac Tap doan Kinh te Tu Cac Tong Cong ty 91* [Conditions and Solutions for the Establishment of Economic Groups on the Basis of the 91 State General Corporations]. National Political Publishing House.

Goode, W. (2003). *Dictionary of Trade Policy Terms*. 4th ed. Cambridge University Press.

Hikmahanto Juwana (2004). Law and Development under Globalisation: The Introduction and Implementation of Competition Law in Indonesia. *Forum International Development Studies*. 27. 6.

Jayasuriya, K. (ed.) (1999). *Law, Capitalism, and Power in Asia: The Rule of Law and Legal Institutions*. Routledge.

Krever, T. (2011). The legal Turn in Late Development Theory: the Rule of Law and the World Bank's Development Model. *Harvard International Law Journal*. 52. 287.

Marshall I Goldman (2008). *The New Imperial Russia*. Available at: <http://www.demokratizatsiya.org/bin/pdf/DEM%2016-1%20Goldman.pdf>.

Mekong Economics (2002). *SOE Reform in Vietnam*. Available at: <http://www.mekongecomics.com/Document/Publications/2002/MKE%20SOE%20Reform%20in%20Vietnam.pdf>.

Nipon Poapongsakorn (2002). The New Competition Law in Thailand: Lessons for Institution Building. *Review of Industrial Organisation*. 21. 185.

Niskanen, W. A. (1971). *Bureaucracy and Representative Government*. Aldine.

Organisation for Economic Co-operation and Development (OECD) (2005). *Corporate Governance of State-Owned Enterprises: A Survey of OECD Countries*. OECD Publishing.

Perkins, D. H. and Vu ThanhTuAnh (2008). *Vietnam's Industrial Policy. Designing Policies for Sustainable Development*. Available at: www.vdf.org.vn/Doc/2008/VDFConf_Presentation3_PaperEng.pdf.

Pham Chi Lan (2008). *Tap doanKinhhte: Da DacquyenKhong the Doi hoi Them Quyen* [Economic Groups Cannot Ask for More than Their Current Privileges]. Available at: <http://tuanvietnam.vietnamnet.vn/tap-doan-kinh-te-da-dac-quyen-khong-the-doi-them-quyen>.

Phan Thi Van Hong (2005). *Doc quyenvaPhapluatvieKiemsoat Doc quyen o Vietnam Hien nay* [Monopoly and Law Concerning Monopoly Control in Vietnam]. LLM Thesis. Hanoi Law University.

Rodriguez, A. and Menon, A. (2010). *The Limits of Competition Policy: The Shortcomings of Antitrust in Developing and Reforming Economies*. Kluwer.

Sokol, D. (2009). *Limiting Anti-Competitive Government Intervention That Benefit Special Interests*. 14. Available at: <http://www.coleurop.be/content/gclc/documents/GCLC%20Working%20Paper%2002-09%20-%20Daniel%20Sokol.pdf>.

Tran Thi Thu Hang (2004). *Vietnam's Experience in Formulating Regulations of Abuse of Dominant Position*. Available at: www.jftc.go.jp/eacpf/05/APECTrainingProgramAugust2004/vietnam.hang.pdf.

Tran Tien Cuong. *Viet Nam Se Co Nhung Tap doanKinhteManh?* [Will Vietnam Have Powerful Economic Groups?] Available at: <http://www.mof.gov.vn/Default.aspx?tabid=612&ItemID=20841>.

Vu Huy Tu et al (2007). *Co cau Lai DoanhnghiepNhanuoct-heoLuatDoanhnghiep Nam 2005* [Restructuring State Corporations according to the *Enterprises Law 2005*]. National Political Publishing House.