COMMENTS OF THE AMERICAN BAR ASSOCIATION SECTIONS OF ANTIMONopoly LAW AND INTERNATIONAL LAW ON THE DRAFT COMPETITION LAW OF THE SOCIALIST REPUBLIC OF VIETNAM

May 24, 2017

The views stated in this submission are presented on behalf of the Sections of Antitrust Law and International Law. They have not been approved by the House of Delegates or the Board of Governors of the American Bar Association and therefore should not be construed as representing the policy of the American Bar Association.

I. Introduction

The Sections of Antitrust Law and International Law of the American Bar Association (“Sections”) respectfully submit these comments to the Vietnam Competition Authority on the second draft of the Competition Law (the “Competition Law”), published for public consultation on April 5, 2017, in the hope that they will assist the Vietnam Competition Authority in further refining the draft Competition Law. The comments reflect the expertise and experience of their members with both antitrust and unfair competition laws around the world. The Sections are available to provide additional comments, or to participate in consultations with the Vietnam Competition Authority as it deems appropriate.

II. Executive Summary

The Sections commend the Vietnam Competition Authority for the advances in the draft Competition Law, including the implementation of a Leniency Program, as bringing Vietnam more in line with international competition law norms and best practices.

These comments focus on four aspects of the draft Competition Law:

1. The functioning of the proposed Leniency Program;
2. The criteria for assessing market dominance;
3. The criteria for assessing predatory pricing in cases of market dominance; and
4. The notification thresholds for proposed mergers.

The Sections respectfully make proposals in each of these areas. In summary these are:

(i) as contemplated by the draft Competition Law, the National Assembly should provide further guidance on the functioning of the Leniency Program to align the Vietnamese leniency program with international norms;

(ii) the requirements for the grant of leniency should be clarified to enhance the predictability and efficacy of the Leniency Program, and to ensure that Vietnam’s Leniency Program does not conflict with the enforcement activities of other authorities;
(iii) the market share threshold for the presumption of dominance should be raised from 30% to at least 50%;

(iv) the presumption of dominance should be rebuttable;

(v) the use of the concept of “collective dominance” should be reconsidered; and

(vi) the criteria for notification of mergers should not rely on a market share threshold and should require that the target have a Vietnamese nexus.

III. Specific Suggestions

Article 17 (Leniency)

Guidance on functioning of Leniency Program

Article 17 sets forth the conditions under which the National Competition Commission will grant immunity or a reduction in sanctions to “[e]nterprises that voluntarily inform to help the National Competition Commission detect and handle anti-competitive agreements prohibited at Article 14 . . . .”

The Sections commend the National Assembly for committing to the establishment of a Leniency Program. It is widely recognized that successful leniency programs assist enforcement authorities detect and investigate cartel conduct, saving administrative costs related to enforcement and protecting the interests of consumers.

Article 17 contemplates that the National Assembly will provide further guidance on the contours of the Leniency Program. The Sections encourage the National Assembly to provide such additional guidance in order to ensure transparency and certainty in the operation of the Leniency Program. Successful leniency policies provide guidance that is “clear, comprehensive, regularly updated, well publicized, coherently applied, and sufficiently attractive for the applicants in terms of the rewards that may be granted.” These attributes allow “[c]ompetition agencies [] to build the trust of leniency applicants and their attorneys.” An effective leniency policy will permit an applicant “to predict with a high degree of certainty how it will be treated if it reports anticompetitive conduct and what the consequences will be if it does not come forward.”

In formulating further guidance for the proposed Leniency Program, the Sections refer the National Assembly to the information available in the Anti-Cartel Enforcement Manual produced by the International Competition Network (“ICN”), of which the Vietnam Competition Authority and the Vietnam Competition Council are both members. The ICN’s Anti-Cartel Enforcement Manual has been developed over more than a decade by the Cartel Working Group

1 Article 17, ¶4.


3 Id.
and reflects the experience and lessons learned by numerous agencies around the world as well as experienced non-government advisors regarding the operation of leniency programs in diverse legal systems.

In the Sections’ experience, leniency programs that do not guarantee that the benefits, e.g., the absence of any sanction, will accrue to leniency applicants who fulfill their cooperation obligations, are far less successful than those that do. Jurisdictions that have limited the discretion of their competition authorities in this regard find that their leniency programs are more effective.

“Arranging” agreements as a disqualifier from leniency

Article 17 conditions leniency on the applicant “[n]ot be[ing] the enterprise that played the role of forcing or arranging other enterprises to participate in agreements.” The Sections suggest that the phrase “or arranging” be removed, as it is often difficult for applicants to determine if they “arranged” the conduct; thus, including this term may lead to a high degree of uncertainty that discourages applications to the Leniency Program.

Predictability is a hallmark of effective leniency programs. For this reason, many jurisdictions have eliminated all eligibility disqualifiers based on the applicant’s role in the offense. Making an enterprise that “arranges” a cartel ineligible for leniency injects a high degree of uncertainty into the process. The term “arrange” is vague and subject to widely varying interpretations. The determination of which applicants meet this criterion is an inherently subjective and unpredictable exercise. Thus, the proposed change to remove “or arranging” should enhance the Leniency Program’s effectiveness as it will give prospective leniency applicants confidence that the National Competition Commission will not disqualify them by applying vague criteria.

Several jurisdictions that have adopted eligibility requirements frequently interpret terms such as “organize,” or “ringleader” narrowly to ensure, where possible, that potential applicants have the greatest incentive to apply for leniency. In the United States, the model corporate conditional leniency letter requires the applicant to represent that it “did not coerce any other party to participate in the anticompetitive activity being reported and was not the leader in, or the originator of, the activity.” However, in practice, the United States Department of Justice (“U.S. DOJ”) rarely disqualifies a leniency applicant for being a leader or originator, absent substantial and clear evidence of coercion.

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4 Despite the importance of certainty, the Sections agree that it is appropriate for the National Competition Commission to have the flexibility to deny leniency where there is clear evidence that a participant in a conspiracy has coerced others to join in a cartel. This approach is used in various other jurisdictions including the United States (see footnote 6 below).

5 Instead of addressing questions of instigation at the level of eligibility for immunity or leniency, many jurisdictions have made instigation a relevant factor for the purpose of establishing penalties for parties that do not receive full immunity. See, e.g., European Commission DG Competition, “Guidelines on the method of setting fines imposed pursuant to Article 23(2)(a) of Regulation No 1/2003” (Jan. 1, 2006), para. 28, available at http://ec.europa.eu/competition/antitrust/legislation/fines.html.

6 The U.S. DOJ has stated that:
**Exception to requirement to cease infringement where continued infringement is requested by another enforcer**

Article 17 conditions leniency on an applicant “stop[ping] or commit[ting] to immediately stop participation in the agreements after submitting [its] leniency application to the National Competition Commission.” The Sections suggest that this condition be clarified to provide that the Enforcement Authorities will not condition leniency on an enterprise ceasing the suspected illegal conduct where the enterprise is continuing the conduct at the request of an enforcer in another jurisdiction. Competition law enforcers in other jurisdictions in which an enterprise has requested leniency may have requested that the enterprise continue its participation in the conduct in order to facilitate the enforcer’s covert collection of evidence relating to the conduct.

**Article 18, Section 1 (Dominance)**

**Market share threshold for presumption of dominance**

Article 18, Section 1 establishes a presumption of dominance when any enterprise has a market share that exceeds 30 percent. The draft Competition Law’s use of market share thresholds is consistent with the practice of many other jurisdictions that use a market share test as the first step in evaluating whether an enterprise, in fact, holds a dominant position in a relevant market and, further, whether its particular course of unilateral conduct is anticompetitive.

However, the Sections urge careful consideration of whether the proposed threshold is appropriate and consistent with international best practices. Although U.S. statutes do not contain a specific market share threshold to establish a presumption of dominance, U.S. courts generally (with some variation) have required a market share above 70 percent to establish this presumption. Under U.S. law, dominance is rarely presumed, let alone found, where an entity’s

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7 The Corporate Leniency Policy refers to “the leader” and “the originator of the activity,” rather than “a” leader or “an” originator. Applicants are disqualified from obtaining leniency on this ground only if they were clearly the single organizer or single ringleader of a conspiracy. If, for example, there are two ringleaders in a five-firm conspiracy, then all of the firms, including the two leaders, are potentially eligible for leniency. Or, if in a two-firm conspiracy, each firm played a decisive role in the operation of the cartel, either firm is potentially eligible for leniency. In addition, an applicant will not be disqualified under this condition just because it is the largest company in the industry or has the greatest market share, if it was not clearly the single organizer or single ringleader of the conspiracy. Exclusion under the condition is rare and wherever possible, the Division has construed or interpreted its program in favor of accepting an applicant into the Leniency Program in order to provide the maximum amount of incentives and opportunities for companies to come forward and report their illegal activity.


7 See, e.g., United States v. Dentsply Int’l, 399 F.3d 181, 187 (3d Cir. 2005) (market share of 75-80% is adequate to establish a presumption of dominance); Conwood Co. v. U.S. Tobacco Co., 290 F.3d 768, 783 n.2 (6th Cir. 2002) (market share of 74-77% sufficient to infer dominance); PepsiCo, Inc. v. Coca-Cola Co., 315 F.3d 101, 109 (2d Cir. 2002) (64% market share, without more, insufficient to establish a presumption of dominance).
market share is less than 50 percent. In the experience of members of the Sections, drawing on current economic learning as well as international best practice, a 30 percent market share threshold is far too low to support a presumption of dominance and a threshold of 50% or more would be more appropriate. Absent horizontal coordination, it is difficult for a firm with only a 30% market share to unilaterally control prices or exclude competition. Accordingly, a presumption of dominance is not warranted at this level.

The Sections also recommend the definition of a market dominant position be clarified to state that an entity will be found to have a dominant market position only if it is able profitably to maintain market prices above or market output below competitive levels for a significant period of time. Firms may achieve a high market share at a particular point in time based on temporal market conditions, e.g., the introduction of new products, but that market share is often temporary and erodes over time such that a presumption of dominance is not merited. Indeed, this sort of market dynamism often enhances consumer welfare and ought not to be discouraged.

**Presumption of dominance**

The Sections encourage the Competition Law to clarify that a presumption of dominance based on a market share threshold remains rebuttable. The ICN’s *Recommended Practices for Dominance/Substantial Market Power Analysis* (“ICN Dominance Recommended Practices”) indicates:

A firm should not be found to possess dominance/substantial market power without a comprehensive consideration of factors affecting competitive conditions in the market under investigation. . . . The analysis of dominance/substantial market power includes but does not stop with the assessment of market shares. At a minimum, conditions of entry and expansion (affecting the durability of market power) should also be assessed. Agencies should, where appropriate, also take into account other criteria such as buyer power, economies of scale and scope/network effects, and access to upstream markets/vertical integration.

The Sections note that Article 18, Section 1 seems to automatically classify all enterprises with at least a 30% share of the relevant market presumptively to have a dominant market position and, therefore, prohibited from taking any of the actions listed in Article 20. In the experience of the Sections, depending on the particular circumstances, many enterprises holding more than a 30% share of a relevant market are not in fact dominant or do not in fact have substantial market power in that market. Under the draft Competition Law, such an enterprise

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8 See, e.g., AD/SAT v. Associated Press, 181 F.3d 216, 229 (2d Cir. 1999) (33% market share is too low to presume dominance); Blue Cross & Blue Shield United of Wis. v. Marshfield Clinic, 65 F.3d 1406, 1411 (7th Cir. 1995) (without more, 50% market share is insufficient for inferring dominance solely from market share).


10 See, e.g., Guy v. Comtec Indus., 2016 U.S. Dist. LEXIS 179317, at *17 (S.D.N.Y. 2016) (no market power despite 50% market share, based on other market characteristics); Safeway Inc. v. Abbott Labs., 761 F. Supp. 2d 874, 889 (N.D. Cal. 2011) (“A high market share, though it may ordinarily raise an inference of monopoly power,
(with more than 30% market share but not dominant) would be thus prohibited from taking actions that may be economically efficient and pro-competitive under the circumstances. Such restrictions could potentially harm consumers in Vietnam by discouraging these enterprises from competing fully.

**Use of terms market power and dominance**

The Sections suggest additional clarification in the Competition Law as to the interchangeability of the terms “dominant market position” and “substantial market power.” The Sections note that the Competition Law use these terms interchangeably, which is consistent with international norms and practices of experienced practitioners. However, for those who are less familiar with the terminology of competition laws, seeing these terms used interchangeably without an explanation that they are equivalent concepts may be confusing. The Sections also encourage making clear that an entity’s unilateral conduct does not come within the ambit of the Competition Law, unless that entity holds a market position that enables it to profitably control pricing or exclude competition on a lasting basis. Doing so will benefit stakeholders by providing clarity to enforcement agencies and enterprises operating in Vietnam, as well as helping enforcement agencies focus on those enterprises and issues that potentially have the greatest impact on competition in Vietnam.

**Article 18, Section 2 (Collective Dominance)**

Article 18, Section 2 seems to establish the concept in the draft Competition Law of “collective dominance” (here called “groups of enterprises holding the dominant position on the market”). Article 20 prohibits certain acts by such groups as abuse of a dominant position. The Sections caution against establishing the concept of collective dominance that would permit remedies to be imposed based on this theory absent any links in law such as shared ownership, express agreements, or other links in law.

U.S. antitrust law has rejected the concept of joint dominance or shared monopoly. One principal reason that U.S. law rejects this concept is the difficulty in determining what collective action or “concerted action” (as described in Article 18, Section 2) will result in independent firms being found collectively dominant. Enterprises may act in parallel fashion simply without doing so in a market with low entry barriers or other evidence of a defendant’s inability to control prices or exclude competitors.”).

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1. See, e.g., ICN Dominance Recommended Practices, supra Note 9 at Opening Statement (“The concept of dominance pursuant to unilateral conduct laws is generally equivalent to the possession of substantial market power, and thus this document uses the terms “dominance” and “substantial market power” interchangeably.”).

2. See, e.g., Flash Elecs. v. Universal Music, 312 F. Supp. 2d 379, 396 (E.D.N.Y. 2004) (“The idea of ‘shared monopoly’ giving rise to Section 2 liability repeatedly has been received with skepticism by courts who have squarely addressed the issue.”); Sun Dun, Inc. v. Coca-Cola Co., 740 F. Supp. 381, 391 (D. Md. 1990) (“An examination of the history of the Sherman Act reveals that Congress’ concept of ‘monopoly’ did not include ‘shared monopolies’ or ‘oligopolies’ at all, but rather the complete domination of a market by a single economic entity.”); see also Phillip E. Areeda & Herbert Hovenkamp, ANTITRUST LAW, 810g (3d ed. 2008) (“Courts and the Federal Trade Commission have universally rejected claims that § 2 condemns ‘shared’ monopoly.”).

because economic logic dictates doing so given the marketplace circumstances or the enterprises’ own experience. Without links in law such as cross-ownership or express agreements, the Sections believe that individual enterprises that are not independently dominant in the relevant market may have no reasonable basis for determining or knowing that they are part of a “collectively dominant” group. In turn, such enterprises would have no reason to know that their conduct, which would not be prohibited for an individual, non-dominant enterprise, may still be subject to challenge under Article 20.

The Sections also observe that challenging alleged collective dominance may harm rather than promote competition. For example, treating the second and third largest firms in a market as dominant is likely to deter them from competing aggressively against the market leader, which is likely to harm competition given that they are often in the best position to compete most effectively against the market leader. As such, enforcement may produce unintended consequences that impede competition.

Second, and equally importantly, crafting appropriate and effective remedies for groups of collectively dominant enterprises may prove extremely difficult. For example, if enterprises are found to have behaved in a collectively dominant fashion, but in fact were merely responding logically to marketplace developments without any agreement or coordination between them, a behavioral remedy prohibiting such behavior may contradict economically logical behavior. Such orders, requiring enterprises to act against economically efficient behavior and as though they are a dominant enterprise despite not independently being so, are not likely to be an appropriate or effective remedy.

For these reasons the Sections believe that the concept of collective dominance among enterprises that do not have express legal or contractual links represents a significant practical difficulty.

Although U.S. law does not recognize the concept of collective dominance, the Sections are aware that other legal systems recognize it, including, for example, the Canadian Competition Act.¹⁴ But no contested case in Canada has ever defined the concept of collective dominance or what is required to establish firms’ collective dominance. Further, collective dominance cases under the Canadian Competition Act have all been dealt with through consent agreements between the agency and the firms, and all but one involved situations where there were express links between the parties. Similarly, theories of collective or joint dominance have been recognized in the case law of the European Courts under Article 102 (formerly Article 82 of the Treaty Establishing the European Community) of the Treaty on the Functioning of the

Wholesale, Inc. v. Alcon Labs., Inc., 661 F. Supp. 2d 218, 228 (E.D.N.Y. 2009) (holding that collectively dominant defendant manufacturers’ refusal to deal with plaintiff not in direct competition with defendants did not constitute anticompetitive conduct under Section 2); Harkins Amusement Enters., Inc. v. Gen. Cinema Corp., 850 F.2d 477, 490 (9th Cir. 1988) (rejecting plaintiff’s shared monopoly theory under Section 2 of the Sherman Act where motion picture distributors and exhibitors allegedly adopted concerted preferences including bid-rigging, circuit-wide deals, illusory guarantees, and blind bidding).

European Union (‘Article 102’). However, a finding of collective dominance under Article 102 requires that the enterprises “from an economic point of view, present themselves or act together on a particular market as a collective entity.”

Although enterprises may be found legally independent but collectively dominant under Article 102, generally, such a finding is dependent on more than merely concerted action; the enterprises must in fact act on the market as a single collective entity generally due to the existence of structural links between them.

Finally, the Sections reiterate the concerns expressed with respect to Article 18, Section 1 regarding the proposed thresholds at which a presumption of dominance should arise. The Sections encourage careful consideration of the percentage threshold for the reasons previously outlined, as well as whether it is appropriate to set such a threshold at the same level in a collective dominance case.

**Article 20, Section 1 (Predatory Pricing)**

*Circumstances in which below-cost pricing is considered anti-competitive*

Article 20, Section 1 proposes a rule prohibiting certain below-cost pricing by dominant firms (“predatory pricing”). It adopts a threshold requirement that dominant enterprises must sell goods or services above “aggregate costs” or have plausible or legitimate reasons for not doing so.

The Sections encourage further elaboration and clear articulation of the circumstances under which predatory pricing will be considered anticompetitive, as doing so will provide greater guidance to enterprises, consistent with the objectives of sound competition policy and without discouraging discounting and other low pricing practices that generally are beneficial to consumers. Although U.S. law may consider predatory pricing anticompetitive if certain conditions are met, these circumstances are quite limited. This is because competition on price remains “the very essence of competition,” and so “[e]ven if the ultimate effect of the [price] cut is to induce or reestablish supracompetitive pricing, discouraging a price cut and forcing firms to maintain supracompetitive prices, thus depriving consumers of the benefits of lower prices in the interim, does not constitute sound antitrust policy.” In other words, low prices generally

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17 *Id.*

benefit consumers, even when they result in losses by another individual competitor, provided that they do not result in long-term harm to the competitive process or consumers.\(^{19}\)

Article 20, Section 1 establishes a test of whether prices are below “aggregate costs.” The Sections encourage further clarification of this cost-based test for predatory pricing. Various such tests have been suggested by courts and enforcement authorities. For example, one set of thresholds suggested by various U.S. courts is a sliding-scale approach that turns on the relationship of price to the seller’s average total costs (“ATC”) and average variable costs (“AVC”): (1) prices at or above ATC fall clearly outside the domain of problematic “below-cost pricing,”\(^{20}\) (2) prices at or above AVC but below ATC are presumptively legitimate and (3) prices below AVC are presumptively illegitimate – with the burden of proof being on the party challenging either presumption.\(^{21}\)

The Sections also encourage further clarification that the costs in question should be the seller’s own costs, rather than the average cost of all companies in the market or some other measure of cost. Regulating pricing below general average market cost, or below some other measure different from a seller’s own costs, would make it extremely difficult for businesses to determine the boundaries of lawful prices because businesses often cannot confidently measure costs other than their own and could penalize businesses for being more efficient than their competitors.

In addition to the above parameters, the Sections recommend that below-cost pricing alone should not be sufficient to establish liability and that, to give rise to liability, it should present a significant long-run threat to competition in the market where this pricing occurs, and not only a threat to individual competitors. In other words, the enterprise’s below-cost pricing must be likely to achieve or to maintain monopoly power by deterring or eliminating competition. The Sections therefore believe that to be actionable, the likelihood of later recoupment of the losses from pricing below cost should be a requirement for predatory pricing. Indeed for the investment in predation to be rational there must be an expectation of recoupment. This is an important element because higher prices resulting from recoupment by the predating

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\(^{19}\) Brooke Grp., 509 U.S. at 225 (“That below-cost pricing may impose painful losses on its target is of no moment to the antitrust laws if competition is not injured: It is axiomatic that the antitrust laws were passed for ‘the protection of competition, not competitors.’”) (citing Brown Shoe Co. v. United States, 370 U.S. 294, 320 (1962)); see also Atl. Richfield Co. v. USA Petroleum Co., 495 U.S. 328, 337-38 (1990) (“[C]utting prices to get more business is the essence of competition.”).

\(^{20}\) See, e.g., United States v. AMR Corp., 335 F.3d 1109, 1117 (10th Cir. 2003) (pricing above total costs has been “implicitly ruled out” by the Supreme Court as a basis for predatory pricing liability); McGahee v. Northern Propane Gas, 858 F.2d 1487, 1496 (11th Cir. 1988) (recognizing “average total cost as the cost above which no inference of predatory intent can be made”); Henry v. Chloride, Inc., 809 F.2d 1334, 1346 (8th Cir. 1987) (“[A]t some point, competitors should know for certain they are pricing legally, and … this point should be average total cost” (citation omitted).); Arthur S. Langenderfer, Inc. v. S.E. Johnson Co., 729 F.2d 1050, 1056 (6th Cir. 1984) (same standard).

\(^{21}\) See, e.g., Tri-State Rubbish v. Waste Mgmt., 998 F.2d 1073, 1080 (1st Cir. 1993) (observing that pricing below variable cost is the “normal test of predation”); Kelco Disposal v. Browning Ferris Indus., 845 F.2d 404, 407 (2d Cir. 1988) (noting that prices below “reasonably anticipated average variable cost[] are presumed predatory’’); Henry, 809 F.2d at 1346 (holding AVC “to be a marker of rebuttable presumptions’’); William Inglis & Sons Baking Co. v. ITT Continental Baking Co., 668 F.2d 1014, 1035-36 (9th Cir. 1981) (holding that the plaintiff bears the burden of showing that prices above AVC but below ATC are “predatory,’’ and that the plaintiff establishes a prima facie case of predatory pricing by proving that the defendant’s prices were below AVC).
firm (after it has eliminated competition) is what causes consumer harm, not the below-cost pricing itself.\textsuperscript{22} Unsuccessful predation (below-cost pricing that does not result in recoupment of the losses), no matter how malicious, is “in general a boon to consumers.”\textsuperscript{23}

Article 25 (Notification)

International best practices

The Sections have concerns that the current merger notification provisions contained in Chapter 5 of the draft Competition Law are inconsistent with international best practices in the field of merger control, particularly those of \textit{Recommended Practices for Merger Notification and Review Procedures} of the ICN,\textsuperscript{24} of which the Vietnam Competition Authority and the Vietnam Competition Council are both members. In particular, the Sections understand that Article 25(1) provides that the parties to a proposed transaction must pre-notify the transaction in any of the following circumstances:

a) One of the parties to the transaction has a market share of 20\% or more on the relevant market;

b) The transaction value of the economic concentration is 300 billion VND or above; or

c) One of the parties to the transaction has revenue of 1000 billion VND or above in the fiscal year preceding the year of implementing the economic concentration.

In the Sections’ view, Article 25(1)(a) raises concerns through its use of market share-based notification thresholds, and criteria 25(1)(b) and (c) raise concerns due to their lack of a material local nexus with Vietnam. Both of these concerns are addressed in greater detail below.

\textsuperscript{22} Brooke Grp., 509 U.S. at 224 (“Recoupment is the ultimate object of an unlawful predatory pricing scheme; it is the means by which a predator profits from predation.”). Of course, if a firm’s predatory pricing strategy is supported by its government, such that it can incur losses that its government subsidizes, then recoupment may not be as important; ICN Predatory Pricing Analysis, supra note 18, at ¶ 3 (“The predator expects not only to recoup the losses it sustained during the predatory period but also to enhance profits by holding prices above what they otherwise would have been.”).

\textsuperscript{23} Id.; \textit{see also} Phillip Areeda & Donald Turner, \textit{Predatory Pricing and Related Practices Under Section 2 of the Sherman Act}, 88 Harv. L. Rev. 697, 699 (1975) (arguing that where barriers to entry are low, it is costly to lower prices to predatory level because new entrants can correct the market).

Market share-based thresholds

The *ICN Merger Recommended Practices* stipulate that merger notification thresholds “should be clear and understandable” and further elaborate that:

Clarity and simplicity should be essential features of notification thresholds so as to permit parties to readily determine whether a transaction is notifiable. Given the increasing incidence of multi-jurisdictional transactions and the growing number of jurisdictions in which notification thresholds must be evaluated, the business community, competition agencies and the efficient operation of capital markets are best served by clear, understandable, easily administrable, bright-line tests.

In many, perhaps most, transactions the merging parties are unable to readily determine their market shares in the various potentially affected markets. Third-party industry reports and analyses providing market share estimates are not available in many industries or for many geographies, and it is frequently the case that parties are unable to estimate their own shares of affected markets as they lack essential information required for doing so (for example, the total market size or demand in a particular market).

Moreover, delineating the outer boundaries of a particular market can be a difficult and fact-intensive exercise. In many instances, competition law agencies devote significant time and resources when reviewing mergers on precisely this question of how to define the relevant antitrust product and geographic markets. Following a practice established by the European Commission, which is required to publish its decisions in merger control matters, competition law regulators often leave the relevant market definition “open” in recognition of the difficulties of market definition. In contested cases, competition law agencies and merging parties frequently disagree on the precise scope of the relevant markets.

For these reasons, the *ICN Merger Recommended Practices* recommends against the use of market shares as an element in notification thresholds. In particular, they note that notification thresholds “should be based exclusively on objectively quantifiable criteria” and specifically note that “examples of criteria that are not objectively quantifiable are market share and potential transaction-related effects.”

It would be timely, costly, and difficult for merging parties (and for the competition authority) to determine in every transaction, *ex ante*, the precise scope of the relevant market(s) at issue, and then calculate their respective market shares, in order to determine whether their transaction requires pre-notification in Vietnam. As a result, the *ICN Merger Recommended Practices* indicate that the use of “market share-based tests and other criteria that are more judgmental” is something that a competition agency may employ during the substantive review.

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25 *ICN Merger Recommended Practices* II.A.
26 Comment 1 to *ICN Merger Recommended Practices* II.A.
27 Comment 1 to *ICN Merger Recommended Practices* II.B.
28 Comment 2 to *ICN Merger Recommended Practices* II.B.
of a transaction, but that “such tests are not appropriate for use in making the initial determination as to whether a transaction is notifiable.”  

Given these inconsistencies with the *ICN Merger Recommended Practices*, the Sections respectfully recommend that Vietnam instead base its merger control pre-notification thresholds on “clear, understandable, easily administrable, bright-line tests” such as asset values and/or revenues generated by both parties to the proposed transaction within Vietnam.  

**Meaningful local nexus to Vietnam**

*ICN Merger Recommended Practice* I-C describes the nature of the local nexus that should be required of notifiable transactions. As noted in the Commentary to *ICN Merger Recommended Practice* I-C, requiring significant local activities by each of at least two parties to the transaction “represents an appropriate ‘local nexus’ screen since the likelihood of adverse effects from transactions in which only one party has the requisite nexus is sufficiently remote that the burdens associated with a notification requirement are normally not warranted.”

As a result, most modern merger control regimes require that each of at least two parties to a transaction generate material revenues in the local jurisdiction, and/or that the acquired party have material revenues or assets in the local jurisdiction before pre-merger notification is mandated. Similarly, the *ICN Merger Recommended Practices* caution that “worldwide revenues or assets should not be sufficient to trigger a merger notification requirement in the absence of a local nexus (e.g., revenues or assets in the jurisdiction concerned) exceeding appropriate materiality thresholds.”

The Sections are concerned that the proposed notification thresholds in Articles 25(1)(b) and (c) do not impose any meaningful local nexus connection to Vietnam. Article 25(1)(b) appears to be based solely on a worldwide transaction value in excess of 300 billion VND (approximately US$13.2 million at current rates of exchange), and thereby lacks any material nexus to Vietnam. Article 25(1)(c) appears to be based solely on one party’s revenues exceeding 1000 billion VND (approximately US$44 million at current rates of exchange); such a threshold could be triggered by an acquiror alone, even where the target company had no activities in Vietnam. In either of these instances, it is difficult to see how such transactions are likely to have a significant, direct and immediate economic impact within Vietnam such as to warrant mandatory pre-merger notification or take up the Vietnamese Competition Authorities’ time and resources.

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29 Comment 2 to *ICN Merger Recommended Practices* II.B.

30 If Vietnam does decide to include a market share threshold, we respectfully suggest that it should raise the threshold over 20% and require an overlap, so that a market share held by only one party would not be sufficient to trigger a filing. It is difficult to posit mergers with market shares in this range and without an overlap posing significant competitive issues warranting investigation.

31 *ICN Merger Recommended Practices* I-C.

32 Comment 2 to *ICN Merger Recommended Practices* I-C.

33 Comment 2 to *ICN Merger Recommended Practices* I-B.
The Sections therefore respectfully recommend that Vietnam base its notification thresholds on each of the parties having material revenues or assets in Vietnam. The transaction parties’ activities abroad should not be considered for the purposes of determining whether a notification is required. As the *ICN Merger Recommended Practices* note, transactions that do not have a “material” local nexus (in the form of local assets or revenues) to the reviewing jurisdiction are “unlikely to result in appreciable competitive effects within its territory.”

Moreover, and again consistent with the *ICN Merger Recommended Practices* (which state that notification thresholds should “be confined to the relevant entities or businesses that will be combined in the proposed transaction”), the Sections recommend that only those assets being acquired in a transaction — rather than all activities of the seller’s corporate group — be considered within Vietnam’s revised notification thresholds.

Adopting a meaningful jurisdictional nexus to Vietnam will produce benefits for all stakeholders. It will not only reduce unwarranted regulatory burdens on merging parties, but also has the significant benefit of allowing Vietnam’s competition enforcers to allocate their enforcement resources efficiently and effectively, by focusing their time and efforts on those transactions that are likely to have significant effects in the jurisdiction.

**Conclusion**

The Sections very much appreciate the opportunity to comment on the draft Competition Law and hope that the Vietnam Competition Authority finds these comments useful in further refining the Competition Law. The Sections would be pleased to respond to any questions that the Vietnam Competition Authority may have and to provide any further assistance that may be appropriate.

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34 The Sections appreciate that where the target of a transaction has substantial operations in Vietnam, the government may have legitimate concerns about the effect of this transaction on the Vietnamese economy. However, where the buyer is not active in Vietnam, there is no market concentration within the jurisdiction and competition within Vietnamese markets would remain unaffected by the transaction.

35 *Id.*, at Comment 1 to *ICN Merger Recommended Practices* I.B.

36 *See ICN Merger Recommended Practices* I.B, Comment 3 (emphasis added).

37 In this respect, the Commentary to *ICN Merger Recommended Practices* I.B elaborates that “the relevant sales and/or assets of the acquired party should generally be limited to the sales and/or assets of the business(es) being acquired,” rather than the entire corporate group of the target.

38 As noted in Comment 1 to *ICN Merger Recommended Practices* I-B, the use of thresholds that require the notification of transactions that are “unlikely to result in appreciable competitive effects within [a country’s] territory […] imposes unnecessary transaction costs and commitment of competition agency resources without any corresponding enforcement benefit.”