

COMPETITION POLICIES IN THE EVFTA AND RECOMMENDATIONS FOR VIETNAM

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Abstract: Among the new-generation FTAs to which Vietnam is a party, the EU-Vietnam Free Trade Agreement (EVFTA) is of particular interest to businesses, as the EU is a strategic export market for many Vietnamese products. The EVFTA has brought significant opportunities for Vietnamese enterprises, but it also comes with challenges and pressures related to competition and the enforcement of competition laws. Therefore, understanding and mastering the competition policies in the EVFTA is essential. This article will first provide an overview of competition and the necessity of competition laws, then analyze the competition policies in the EVFTA, and finally offer some recommendations for Vietnam.

Keywords: commitments, competition, EVFTA, Vietnam, recommendations for Vietnam.

I. Problem statement

Competition has always been considered the driving force of development. Thanks to competition, along with the constant change in demand, the market economy has made new developments in human civilization. However, amplifying the promotion of such roles of competition, fostering an effective competitive environment, and overcoming the bad habits of people/businesses when competing for economic benefits requires the emergence of competition law.

EVFTA, which took effect in Vietnam from August 1, 2020, is considered a comprehensive agreement ensuring a balance of benefits for both Vietnam and the EU while complying with the regulations of the World Trade Organization (WTO). The

Agreement is one of the new-generation FTAs, which regulates many conventional issues such as tariff reduction, opening up the service and investment sectors, etc., but also includes many non-conventional areas such as sustainable development, government procurement, public enterprises, and competition (Trung tam WTO va hoi nhap, 2021). In this article, EVFTA is approached as one of the legal documents regulating competition policy in trade relations between Vietnam and the EU.

II. Theoretical basis

2.1. Overview of competition

Competition is the principle of the market economy. Competition can be viewed from many different perspectives, and it appears in all fields, depending on the intention and approach of scholars.

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However, in this article, competition is analyzed from the perspective of business and trade.

The Vietnamese General Knowledge Encyclopedia defines “competition” in the economic sense as the act of competing among producers of goods, traders, and businessmen in an economy to gain the most favorable conditions of production, consumption, and market (Tap chi Tai chinh, 2019). In another vein, according to the Black’s Law Dictionary, “competition” is described as “the effort or behavior of two or more traders to compete for the same benefits from a third party” (Garner, 1999).

Additionally, the “Reference documents on competition and anti-monopoly laws of several countries and territories in the world,” published by the Ministry of Commerce (now the Ministry of Industry and Trade) in 2001 to facilitate the development of the Competition Law of Vietnam, introduced the Article 3 of the Turkish Competition Law which stipulates: “Competition means rivalry between enterprises in the market of goods and services to address economic issues independently.” Meanwhile, from a different point of view, according to American economist Michael Porter, “competition” is gaining market share, and the nature of competition is to seek profit.

Despite the many different definitions of competition, in general, in commercial business, competition is understood as the rivalry between business entities in the market (manufacturers, distributors, retailers, consumers, traders, etc.) to compete for conditions of production and consumption of goods, services, or to beat the market or secure other economic benefits to generate the highest profits and interests for themselves. Competition enhances the ability to meet consumer demands, optimizes the use of economic resources effectively, and promotes the adoption of scientific and technological

advances in business. Most importantly, it fosters creativity, serving as a catalyst for continuous innovation in the socio-economic sphere.

2.2. The necessity of competition laws

Inherently, the market cannot overcome the “bad habits” of people/enterprises when competing for economic benefits, hence the essential involvement of the State, which regulates competition through competition laws. Competition laws play the following important roles:

Firstly, creating an equal, free, and legitimate business and competitive environment.

Secondly, protecting the interests of enterprises. The laws ensure the elimination of anti-competitive behaviors in the competition for profits in the market. Thereby, protecting the freedom of business of market members, the competitive environment, and the legitimacy of market relations.

Thirdly, protecting consumer rights. Such a role can be expressed through: adjusting dishonest and unfair contracts between suppliers and consumers; establishing regulations on products, advertising and promotion activities and prohibiting illegal manifestations in these areas; proposing sanctions for violations that threaten consumer rights.

Fourthly, enhancing the efficiency of the economy. As competition is always considered the driving force of economic development of countries, being regulated by a legal framework will help competition promote its beneficial impacts while limiting behaviors that go against the goal of legitimate, fair and equal economic development of countries.

In general, Vietnam’s competition laws as well as those of many countries in the world include documents containing regulations to create and maintain an equal

business environment, which ensures that competition between business entities takes place in an orderly manner and consistent with the framework prescribed by the laws.

III. Methodology

The article uses the following methods: Analysis, acquisition and inheritance, and synthesis. Specifically:

3.1. Analysis method

Sources of documents used for analysis: EVFTA and legal documents regulating competition policies of Vietnam, EU; research papers and articles on competition policies. From these sources, the author has collected information and analyzed scientific information related to the research issue.

3.2. Acquisition and inheritance method

In the process of researching and analyzing legal documents and research papers and articles on competition policies, the author has selectively acquired, inherited and developed the contents suitable for the research issue of this article.

3.3. Synthesis method

The article uses a synthesis method to link aspects of the research issue: Based on the theoretical basis of competition policies, combining with the analysis of Vietnam's competition policies in EVFTA, to propose several recommendations for Vietnam when implementing competition policies in EVFTA.

IV. Results and Discussion

4.1. Vietnam's Competition Policies in EVFTA

The competition policies in EVFTA are stipulated in Chapter 10. Vietnam and the EU have made commitments and obligations towards ensuring a fair competitive framework in trade and

investment between the two parties, ensuring a legitimate competitive environment for businesses operating in the member states, preventing and eliminating anti-competitive business practices in the market, and promoting economic efficiency and consumer welfare. The specific contents of the commitments in EVFTA are as follows:

Firstly, regarding anti-competitive practices, the first clause of Chapter 10, the Agreement sets out the principle emphasizing the importance of a competitive environment that is not distorted or falsified in trade and investment relations between the Parties. Accordingly, it is stated that: The Parties recognise that anti-competitive conduct may potentially distort the proper functioning of markets and undermine the benefits of trade liberalization (Article 10.1). In this spirit, the Parties are required to adopt or maintain effective competition law enforcement, including proscription on anti-competitive conduct, with the aim of promoting economic efficiency and consumer welfare, while simultaneously taking appropriate and active enforcement actions with respect to such conduct (Article 10.2).

The Agreement provides a legal framework in which the following three acts will be considered anti-competitive acts: (i) Agreements between enterprises, decisions by associations of enterprises and concerted practices with the object or effect of preventing, restricting or distorting competition; (ii) Abuses of dominant position by one or more enterprises; and/or (iii) Concentrations between enterprises that would significantly impede effective competition. Nonetheless, the EVFTA also provides for exemptions from the application of competition law by a party. Competition law does not apply to tasks of public interest, proportionate with the desired and transparent public policy objective (Article 10.2, Clause 2 and Article 10.3, Clause 5) (Duy Hung, 2022).

In which, “public policy objective” is the general objective to achieve the overall public benefit, and “task of public interest” is a specific activity aimed at achieving an overall public benefit that the market cannot provide or can provide only under different conditions in terms of accessibility, quality, safety, affordability or equal treatment without public intervention (Article 10.11).

Secondly, regarding subsidies, the Parties recognize that subsidies have the potential to distort the proper functioning of markets, as well as undermine the benefits of trade liberalization. A Party should not grant subsidies to enterprises where these subsidies have, or are likely to have, an adverse effect on competition (Article 10.4, Clause 1). Subsidies should only be used where they are necessary to achieve a public policy objective. The EVFTA provides an illustrative list of public policy objectives that a Party may pursue: to remedy damage caused by natural disasters or other extraordinary occurrence; to promote economic development in areas with abnormally low living standards or where there is serious underemployment; to remedy serious economic disturbance; to facilitate the development of certain economic activities or economic sectors, such as for research, development and innovation purposes, subsidies for training or job creation, subsidies for environmental purposes, subsidies for small and medium-sized enterprises (Article 10.4, Clause 2).

EVFTA uses the specific definition and scope of subsidies provided for in the WTO Agreement on Subsidies and Countervailing Measures (SCM). Accordingly, subsidies are specific to an enterprise or industry or group of enterprises or industries under the authority to grant subsidies. Subsidies in EVFTA apply to all enterprises, including public enterprises and private enterprises (Article 10.5, Clause

1,3). Exemptions from the scope of EVFTA subsidies include 06 subsidized cases: Personal or consumer or general measures not considered specific; Non-economic activities; Fisheries and subsidies related to trade in goods listed in Annex 1 of the Agreement on Agriculture; Subsidies of which the amount for each beneficiary over a three-year period is more than 300,000 special drawing rights (SDR); Sectors or sub-sectors not listed in Chapter 8 of EVFTA (Investment Liberalization, Trade in Services and Electronic Commerce); and Formally agreed or granted before or within 05 years after the EVFTA comes into effect (Article 10.5., Clauses 2,5,6,7,8,9,10).

In order to ensure transparency, each Party shall notify the other Party every four years of the legal basis, form, amount, or budget and recipients of specific subsidies (if applicable) (Article 10.7, Clause 1). If a Party considers that a specific subsidy granted by the other Party has adverse effects on trade or investment, it may express its concerns in writing to the other Party and request consultations on the matter. The requested Party shall provide information or take action to eliminate or mitigate such adverse effects caused by the subsidy (Article 10.8).

Thirdly, Principles of implementing competition policies:

Some principles in implementing competition policies are stipulated in Article 10.3., Clause 4 of the Agreement (Trung tam WTO va hoi nhap, 2022):

Regarding the principle of non-discrimination, EVFTA member states must treat enterprises, organizations, and individuals of member states fairly when applying national competition laws.

Member states must uphold the principle of neutrality on competition in the treatment of public enterprises, enterprises with dominant market positions, state monopoly positions,

and enterprises with non-state capital. Regarding competition law and policies, this principle can be understood in a narrow sense that competition principles must be applied equally to both private and public enterprises, with very few exceptions. (This spirit is also partly reflected in Article 10.2., Clause 2, Point b of the Agreement).

Regarding the principle of transparency, an important principle in FTAs in general and EVFTA in particular, member states have the right to request other member states to provide information such as: (i) Competition law enforcement policies and activities; (ii) cases of exemptions and exclusions under national competition laws, provided that the request clearly states the market and goods with relevant services and information showing how such exemptions and exclusions affect investment and trade between the parties.

Regarding the principle of fair application in competition proceedings, currently, Vietnam's Competition Law (according to Article 2 of the 2018 Competition Law) has fully met the requirements of the principle, with regulated transparency to a certain extent, and no unfair treatment between enterprises of different nationalities or forms of ownership of enterprises in litigation proceedings.

Fourthly, regarding the issue of enforcement and cooperation in implementing competition policies, the EVFTA grants autonomy to each Party in developing and implementing its own competition law. Accordingly, each Party must ensure the maintenance of responsible and competent agencies to fully apply and effectively enforce competition law, and ensure that these agencies are appropriately equipped and have the necessary authorities to perform their functions and tasks. All

enterprises, private or public, are subject to competition law in the EVFTA (Article 10.3, Clauses 1, 2, 3).

The Agreement does not specifically mention the mechanism, method and content of cooperation in implementing competition commitments, but only provides a general policy to enhance effective enforcement of competition law (Article 10.14).

Fifthly, regarding information confidentiality, in the process of exchanging information under the Competition Agreement, the Parties shall take into account the restrictions prescribed by the relevant laws relating to professional and business secrets and shall ensure the protection of business secrets and other confidential information. Accordingly, the receiving Party shall keep confidential any information exchanged under this Agreement unless the other Party authorizes its disclosure or publication (Article 10.12). The EVFTA has provided for information confidentiality in a separate provision, demonstrating the importance of the issue.

Sixthly, regarding dispute resolution, Article 10.13 of Chapter 10 only states the exception of the EVFTA dispute resolution mechanism for anti-competitive conduct (as provided for in Section A of the Chapter) and Article 10.8 (Consultations on subsidies). This means that, in addition to anti-competitive practices, competition disputes between the Parties are handled under Chapter 15 (EVFTA's dispute resolution provisions). Accordingly, these disputes can be resolved by the following methods: consultation, arbitration, and conciliation.

4.2. Several recommendations for Vietnam in implementing competition policies in EVFTA

To ensure effective operation in a competitive environment, prevent anti-

competitive behaviors that can distort the proper operation of the market or reduce benefits in trade and investment activities between Vietnam and the EU, Vietnamese enterprises should note the following points:

**** Proactively review the competition policies in EVFTA***

Vietnamese enterprises need to be proactive and deepen their understanding of the competition policies under EVFTA through channels including information available on the electronic information portal <https://fta.moit.gov.vn/>, as well as participation in seminars, conferences, training sessions, and state-led guidance programs. Strengthening their knowledge of EVFTA's competition regulations will enable businesses to effectively grasp key provisions, ensure compliance, and fulfill their commitments under the Agreement. Moreover, a solid understanding of the competition law regulations and policies empowers enterprises to promptly identify and report potential anti-competitive conduct to the relevant authorities while leveraging legal mechanisms to safeguard their rights and interests.

**** Vietnam's competition law in the process of implementing EVFTA***

In Vietnam, the 2018 Competition Law is currently in effect. The subject of regulation applies to all organizations, individuals, businesses, associations, and professions operating in Vietnam, as well as the conduct of relevant state agencies and management agencies. Article 1 of Chapter 1 of the law clearly states the scope of regulation: "This Law sets forth anti-competitive practices, economic concentration that causes or may cause anti-competitive effects on the market of Vietnam; unfair competition practices; competition legal proceedings; sanctions against violations of competition law; state management of competition."

In particular, the Competition Law is issued to: Control acts that restrict competition or may lead to restricted

competition, especially when opening the market and integrating into the international economy; Control acts of economic concentration; Protect legitimate business rights of enterprises, against acts of unfair competition; These acts are specified in detail in Decree No. 35/2020/ND detailing a number of articles of the Competition Law. When trade activities between Vietnam and the EU increase, it will lead to mergers and acquisitions between EVFTA member states. Enterprises need to pay attention to the threshold for notifying economic concentration specified in Article 13 of Decree No. 35/2020/ND-CP.

Violations of the provisions of the Competition Law can be fined up to 10% of the total revenue of the enterprise in the previous fiscal year (Article 111 of the 2018 Competition Law). Fines for violations of competition law are also specified in Decree No. 75/2019/ND-CP dated September 26, 2019, detailing administrative sanctions in the field of competition. In general, Vietnam's competition law is relatively comprehensive, complete, and consistent with the development trend of current competition law in the world.

**** Recognizing EU competition law while implementing EVFTA***

EVFTA grants autonomy to each Party in developing and implementing its own competition law, so in addition to understanding their commitments in EVFTA, Vietnamese enterprises need to have a firm grasp of EU competition law, which is also very necessary when "doing business" with the EU;

Competition Law promotes the maintenance of competition in the EU through regulations on anti-competitive conduct of companies to ensure that they do not create anti-competitive agreements and monopolies that will damage the interests of society. First recorded in the Treaty of Rome, competition regulations

continue to be regulated and developed in subsequent treaties as well as in the European legal system.

Among the EU competition law policies, antitrust is considered the most important content. Accordingly, Article 81 of the Treaty of Rome strictly prohibits all agreements between enterprises, all decisions to associate enterprises, and all types of agreements that are likely to affect trade between member states and have the purpose or effect of preventing, restricting, or distorting the rules of competition in the common market. The European Commission has great powers in conducting antitrust investigations, including entering the premises of enterprises without prior notice to review their internal documents, the right to prosecute any enterprise that violates the law, and impose fines of up to 10% of the total turnover of such an enterprise.

In addition, Article 82 of the Competition Law of the EU stipulates the prohibition of abuse of dominant market position and provides a list of acts potentially considered as abuse of dominant market position, such as imposing unfair purchase prices, selling prices or trading conditions, restricting production... From the standpoint of the EU, abuse of dominant position can be acts of selling below cost to weaken competitors, or exclusive supply and distribution agreements to eliminate competitors... The issue of business mergers can lead to the birth of a new business with a dominant position, which may distort the market and disrupt fair competition. Therefore, business mergers or consolidations are also a subject of special concern in the EU's competition policy. Large businesses, especially those with a total revenue of over 5 billion euros, can only merge with the approval of the Commission.

Regarding the control of state subsidies to enterprises, it is regulated in Articles 87 and 88 of the Treaty of Rome

that specifically, any subsidies granted by member states or financed through national resources in any form that distort or risk distorting competition – by favoring a group of enterprises or industries – are considered incompatible with the common market. These state subsidies can take various forms, including tax exemptions or reductions. In such cases, the European Commission has the authority to prevent or require their withdrawal.

Another crucial aspect Vietnamese enterprises must consider (An Nhien, 2023) is the extraterritorial application of competition law by EU member states. Accordingly, the EU and its member states exercise their jurisdiction, that is, the right to investigate and address anti-competitive practices occurring outside their borders if such actions are carried out by foreign individuals or legal entities (enterprises) and have a direct impact or potential impact on competition or consumers within the EU market. Consequently, the EU and its member states can enforce their competition laws on Vietnamese individuals and businesses acting on behalf of foreign enterprises if their activities affect the competitive environment or consumers in the EU.

V. Conclusion

With its comprehensive competition policies, the EVFTA has established a legal framework enabling businesses to expand their trade, investment, and commercial activities in member states within a legitimate and fair business environment. However, when implementing competition policies under EVFTA, Vietnamese businesses must consider key principles such as non-discrimination, the equal application of competition laws to both private and public enterprises, transparency, and fairness in competition proceedings. In addition, businesses should take a proactive approach in deepening their understanding of EVFTA's competition policies in EVFTA,

seizing opportunities, and enhancing their competitiveness in production, trade, and investment. Most importantly, they must have a clear grasp of both Vietnamese and EU competition laws to ensure compliance and strategic decision-making in their trade and investment activities within the framework of the Agreement.

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CAM KẾT VỀ CHÍNH SÁCH CẠNH TRANH TRONG EVFTA VÀ MỘT SỐ KHUYẾN NGHỊ CHO VIỆT NAM

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Tóm tắt: Trong số các FTA thế hệ mới mà Việt Nam đang thực thi, thì Hiệp định Thương mại tự do Việt Nam - EU (EVFTA) luôn được các doanh nghiệp đặc biệt quan tâm, vì EU là thị trường xuất khẩu chiến lược của nhiều mặt hàng xuất khẩu Việt Nam. EVFTA đã mang đến nhiều cơ hội lớn cho doanh nghiệp Việt Nam, tuy nhiên kèm với nó là những thách thức và áp lực liên quan tới cạnh tranh và thực thi chính sách về cạnh tranh, do đó việc hiểu biết và nắm vững những cam kết về chính sách cạnh tranh trong EVFTA là điều cần thiết. Bài viết trước tiên sẽ khái quát về cạnh tranh, sự cần thiết phải có pháp luật về cạnh tranh, tiếp đó phân tích các cam kết về chính sách cạnh tranh trong EVFTA, cuối cùng đưa ra một số khuyến nghị cho Việt Nam.

Từ khóa: cam kết, cạnh tranh, EVFTA, Việt Nam, khuyến nghị cho Việt Nam.

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