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Competition Law and Intellectual Property Rights in Vietnam

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Introduction

The interaction between competition law and intellectual property rights (IPRs) raises a vexed issue, which has received various legislative solutions and has been the subject of debate around the world. The World Trade Organisation (WTO) Agreement on Trade Related Aspects of Intellectual Property Rights (TRIPS) permits Member States to apply appropriately their national competition law to prevent (i) abuse of IPR by intellectual property (IP) holders, (ii) practices which unreasonably restrain trade, and (iii) practices which adversely affect international technology transfer, particularly the anti-competitive licensing practices (Art. 8(2) & Art. 40,TRIPS). However, rightly determining the balance and interaction between competition law and IPRs as well as formulating IPRs-related competition rules is still a highly complex and difficult task, not only for developing countries, but also for the more developed ones. Many different views, for example, were stated in a series of public hearings on Competition and Intellectual Property Law and Policy in the Knowledge-based Economy jointly organised by the US Department of Justice and the US Federal Trade Commission during 2002 and 2003 (http://www.ftc.gov/opp/intellect/). Whereas on the other side of the Atlantic Ocean, the judgement of the European Court of Justice in the *IMS Health* case (C-418/01, IMS Health, 29/4/2004, [2004] ECR I-5039) and the decision of the European Commission in the *Microsoft* case (Case COMP/C-3/37.792-Microsoft, 24/3/2004) are the subject of controversial literature.

The objective of this paper is to consider the relationship between competition and IPRs in general, then investigate the relevant rules on competition and IPRs in Vietnam, and propose some initial solutions that Vietnam could adopt to control IPRs-related anti-competitive practices.

Relationship Between Competition & IPRs

IP embodies information, which is similar to a public good, because it can be lead to non-rivalry in consumption and non-excludability in use. It is classed as non-rival, because one actor's use of IP does not in itself restrict the ability of another to benefit from [copy of] it as well, and it is non-excludable because its release into the public domain means unauthorised parties (free-riders) cannot be physically prevented from using it. In order to preserve the incentives for scientific and technological progress (innovation) and to prevent early copying of an innovation and free riding on an innovator's efforts, IP law grants the innovator IPRs, i.e. certain rights to exclude others and to help the holder profit from the use of his property.

However, IP law does not aim at promoting only the individual IP holder's welfare. Its aim is to promote the progress of science and the useful arts by securing to the inventor/creator for a limited time and scope (length and breadth) the exclusive rights to his respective creative or intellectual activities, which leads to the benefit of consumers through the development of new and improved goods and services, and spurs economic growth as a whole. As a result, the IP holder is granted, within the length and breadth of his rights, a legal monopoly to prevent and exclude unauthorised use of his IP and to exploit it, *inter alia*, by licensing it to third parties. This legal monopoly may, depending on the availability of substitutes in the relevant market, lead to market power and even monopoly as defined under competition law. This has raised the alleged source of conflict often mentioned between competition law and IP law, and the claim that competition law takes away what IP law provides.

Still, the fact that IP law grants exclusive rights of exploitation does not imply that IPRs are immune from the intervention of competition law. This principle has been clearly stated in most major competition jurisdictions the world over, for example in the Guidelines on the Application of Article 81 of the EC Treaty to Technology Transfer Agreements by the European Commission (OJ 2004 C 101/2 –EU TTBER 2004 Guidelines, para. 6-7). It means that the existence of the monopoly rights conferred by IP law does not infringe competition law, but

Box 1: Competition Law Application to IPRs in the European Union

Under the European Union (EU) law, the balance between competition law and IPRs was established by the Treaty establishing the European Community (TEC), and the interpretation made by the European Court of Justice (ECJ), the European Court of First Instance (CFI) and the European Commission. The TEC ensures that the reconciliation between IP legislation, which is predominantly national, and EU competition law occurs within the framework of Article 81 and 82 of the TEC. Article 30 of TEC, in fact, excludes the protection of industrial property from the elimination of quantitative restrictions between Member States. The ECJ, on the other hand, has upheld that "in the absence of Community standardisation or harmonisation of laws, determination of the conditions and procedures for granting protection of an intellectual property right is a matter for national rules". The ECJ has regularly reaffirmed that the existence of IPR is not affected by the prohibitions contained in Articles 81 and 82 of the TEC, but the exercise of such rights may fall within the prohibitions laid down by these two articles. Nevertheless, the exercise of such rights cannot of itself fall either under Article 81(1), in the absence of any agreement, decision or concerted practice prohibited by that provision, or under Article 82 in the absence of any abuse of a dominant position, and the IPR holder does not occupy a dominant position within the meaning of Article 82, merely by exercising his exclusive rights.

Based on the view of the ECJ from its case law, the Commission enacted the patent licensing block exemption regulation in 1984 (Commission Regulation 2349/84/EEC on the application of Article 85(3) (now 81(3)) of Treaty to certain categories of patent licensing agreements, 23/7/1984) and know-how licensing block exemption regulation in 1988 (Commission Regulation 556/89/EEC on the application of Article 85(3) (now 81(3)) of the Treaty to certain categories of Know-how licensing agreements, 30/11/1988, OJ 1989 L61/1).

In the light of the need of increasing technological competitiveness of the EU in the world trade, and in response to the US Guidelines jointly enacted by the US Department of Justice and the US Federal Trade Commission in 1995 (which much more favours the IP licensing under US antitrust perspective), the Commission merged the two preceding block exemptions on know-how and patent licensing into a unified technology transfer block exemption regulation 240/96 (Commission Regulation (EC) No 240/96 of January 31, 1996 on the application of Article 85(1) (now 81(1)) of the Treaty to certain categories of technology transfer agreements, OJ 1996 L31/2), which aimed at striking a balance between three main objectives. The first was to simplify the rules governing licensing agreements by combining two above-mentioned block exemption regulation into one single regulation, so as to "encourage the dissemination of technical knowledge in the EU and to promote the manufacture of technically more sophisticated products". The second was to guarantee effective competition in technologically new or improved products. The third was to create a favourable legal environment for companies investing in the EU, by providing them with legal certainty and by reducing the administrative burden resulting from individual notifications under Article 81(3).

Although the 1996 Regulation played, more or less, a pivotal role in the development of innovation within the EU economy and in contributing to the competitiveness of business operating in the Communities, it had many concerns in relationship with the modernisation of European competition rules, as identified by the Commission in its Evaluation Report in December 2001 (European Commission, *Commission Evaluation Report on the Transfer of Technology Block Exemption Regulation No. 240/96).*

Therefore, the Commission enacted a new Regulation together with the Guidelines on April 27, 2004, aiming at ensuring effective competition and providing adequate legal securities for undertaking technology transfers. The 2004 EU Regulation signifies a shift from a legalistic and form-based approach to a more economic and effects-based approach, focusing more on inter-brand competition issues and on the analysis of possible efficiencies of certain restrictions, making a distinction between agreements between competitors and agreements between non-competitors. It, therefore, represents an important improvement, brings about an important degree of convergence between the EU and US competition policy towards licensing agreements.

that such rights could be exercised and exploited in the way and to the extent that competition law could be infringed.

Competition law would be applied to ensure that customers could benefit from the best quality products at the lowest prices. That is why, despite the fact that the exercise of IPRs is already extensively regulated by IP law through the scope, duration and exceptions in various fields, an extra tier (2nd tier) of regulation is added by competition law to ensure that the grant of exclusivity by IP law is not misused by anti-competitive licensing agreements, monopolistic practices or other anti-competitive conduct, which denies parties access to market and harms customer welfare. Shubha Ghosh (2005), for example, opined that the competitive baselines for IP systems could be developed in many ways; through competition law, through administrative agencies, through limits within IP law itself, or a combination of these and other means.

The relationship between IPR and competition law has been at the centre of debates for many years, at such forums as the WTO Working Group on the Interaction between Trade and Competition Policy, with various contradictory views communicated by different Member States. Simply put, the exclusive rights granted by IP law seek to protect IPRs and, in doing so, limit competition. IP protection under the competition perspective may thus be criticised for creating monopoly rights against customers' interests. In contrast, competition law generally reflects the premise that consumer welfare is best served by removing impediments to competition. From an IP perspective, competition law may be considered as an interventionist instrument that infringes upon the IP holder's entitlements and, thereby, affects the very foundations of IP law.

However, the older short-term approach of the competition authorities has been replaced by a longer-term view, which acknowledges that technological progress contributes at least as much to social welfare as does the elimination of allocative inefficiency caused by non-competitive prices. Joseph Brodley (1987), for example, thought that the antitrust/competition enforcement must concentrate not only on allocative efficiency, but also on production efficiency and innovation efficiency. The later two efficiencies lead to technological progress and contribute the most to the enhancement of social wealth, and as such, should be the main objectives of competition policy.

Thus, there is a tendency to allow some restrictions of competition today, in order to promote competition in the new products and processes tomorrow. It is now, therefore, generally recognised that the goals of competition law and IP law are rather complementary and mutually reinforcing. They share the common purpose of promoting innovation, enhancing and benefiting customer welfare as well as allocating efficient economic resources.

The US Antitrust Guidelines for the Licensing of Intellectual Property in 1995 (US Guidelines 1995) state: "The IP laws and the antitrust laws share the common purpose of promoting innovation and enhancing consumer welfare. The IP laws provide incentives for innovation and its dissemination and commercialisation by establishing enforceable property rights for the creators of new and useful products, more efficient processes, and original works of expression… The antitrust laws promote innovation and consumer welfare by prohibiting certain actions that may harm competition with respect to either existing or new ways of serving consumers".

The European Commission Guidelines on the application of Article 81 of the EC to technology transfer agreements (EU TTBER 2004 Guidelines) express themselves similarly: "Both bodies of law share the same basic objective of promoting consumer welfare and an efficient allocation of resources… IPRs promote dynamic competition by encouraging undertakings to invest in developing new or improved products and processes. So does competition by putting pressure on undertakings to innovate. Therefore, both IPRs and competition are necessary to promote innovation and ensure a competitive exploitation thereof".

Although both competition and IP policy/law aim to encourage innovation, both will discourage the same if pursued too strongly or too weakly. From the IP perspective, if it is too easy to obtain IPRs, patent for instance, potential inventors might be discouraged from innovating, because there are so many parties with so many patents that lead to a situation where it is too difficult and expensive to determine which licenses are needed and from whom. From the competition perspective, if competition law enforcement is pursued so strongly in which competitors are allowed to make unencumbered use of an undertaking's innovation, there will be little incentive to innovate.

At least three issues may be identified in which competition policy/law are rightly called upon to control IP protection, namely (i) anti-competitive licensing agreements, (ii) abuses of the dominant position of the IP holder due to monopoly rights, *i.e.* the IP holder's practices extend IP protection beyond its purpose, and the need for compulsory licensing to remedy such anti-competitive practices, and (iii) determining the scope of IP protection in order to avoid over or underprotection, one of the sub-issues here being the exhaustion of rights.

Competition Law and IPR in Vietnam

Vietnam's Competition Law 2004

The Vietnam Competition Law (Law No. 27/2004/QH11, hereinafter referred to as VCL) was promulgated on December 3, 2004 after a four-year long drafting process involving 15 drafts. Its scope is large and ambitious. It applies not only to anti-competitive practices which include: (i) anti-competitive agreements, (ii) abuse of dominant position and abuse of monopoly position, and (iii) economic concentration (merger and acquisition), but also to unfair competitive practices. The anti-competitive practices are further stipulated in detail by the Decree of Government setting forth detailed regulations for implementing the Competition Law (Decree No. 116/2005/ND-CP dated on September 15, 2005, hereinafter referred to as the Anti-competitive Practices Decree). The overall goal of the VCL is to protect the interests of the State, and of enterprises and consumers, and to promote socio-economic developments.

Regarding anti-competitive agreements, eight (08) types of anti-competitive agreements are listed in Article 8 VCL, namely (1) price fixing, (2) market division, (3) quantity restrictions, (4) restriction on technological development and investment, (5) agreements to force other undertakings to accept conditions or obligations which do not directly relate to the agreement subject-matter, (6) restriction of market entry or business development of other undertakings, (7) agreements to foreclose competitors, who are not participating parties in agreements, and (8) bid rigging. Agreements which prevent other undertakings' market entry or business development, or exclude competitors who are not participating parties in agreements, and bid rigging (type 6 to 8) are *per se* illegal. (Art. 9.1, VCL) Other anti-competitive agreements (type 1 to 5) are only illegal if the combined market share of the participating parties in the relevant market is 30 percent or more. (Art. 9.2, VCL) They can still be exempted for a fixed period if they satisfy one of the listed conditions in order to reduce price and benefit customers. (Art. 10, VCL)

However, such a list of anti-competitive agreements and conditions for exemption is neither exhaustive nor entirely consistent. There is some overlap between some types of anti-competitive agreements such as between type (6) and type (7). For example, in the detailed explanation, in Article 19 and 20 of the Anti-competitive Practices Decree, of the anti-competitive agreements stipulated respectively in Article 8(6) and 8(7) VCL, agreements to foreclose non-party competitors (type 8) contain certain agreements restricting market entry or business development of other undertakings (type 7). Furthermore, there is no clear distinction between horizontal and vertical agreements. This, in particular, can reduce the effectiveness and fairness of the law, since the anti-competitive effect of horizontal agreements is usually more severe than that of vertical agreements, and therefore should be treated differently.

Regarding the abuse of dominant position, an undertaking shall be considered to hold a dominant position if it has a market share of 30 percent or more in the relevant market or is capable of restricting competition considerably (appreciable restriction of competition). According to Article 22 of the Anti-competitive Practices Decree, the "ability to restrict competition considerably" is based on certain criteria, such as the financial ability of the undertaking, or of the organisations and individuals who establish or control that undertaking, including parent undertaking, technological capability, possession and rights to use of industrial properties, and the extent and size of the distribution network. Besides, VCL also states that two, three, and four undertakings have a collective dominant position if their combined market share in the relevant market is respectively 50 percent, 65 percent and 75 percent or more. (Art. 11, VCL)

Abuses of market dominant position are also listed in Article 13 VCL; namely (1) predatory pricing, (2) unreasonable price fixing or price minimum maintenance, (3) restriction on production, distribution, territories, and

Box 2: How Other Countries Deal with IPRs-related Anti-competitive Conduct

The India Competition Act of 2002 (No. 12 of 2003, January 13, 2003), Article 3(5)(i) has stated that "nothing contained in this section (*anti-competitive agreements*) shall restrict the right of any person to restrain any infringement of, or to impose reasonable conditions, as may be necessary for protecting any of his rights which have been or may be conferred upon him under (a) the Copyright Act, 1957 (14 of 1957); (b) the Patents Act, 1970 (39 of 1970); (c) the Trade and Merchandise Marks Act, 1958 (43 of 1958) or the Trade Marks Act, 1999 (47 of 1999); (d) the Geographical Indications of Goods (Registration and Protection) Act, 1999 (48 of 1999); (e) the Designs Act, 2000 (16 of 2000); (f) the Semi-conductor Integrated Circuits Layout-Design Act, 2000 (37 of 2000)".

Similarly, Section 21 of the Act Concerning Prohibition of Private Monopolisation and Maintenance of Fair Trade of Japan (Act no. 54 of April 14, 1947, revised in 2005) has stated: "The provisions of this act shall not apply to such acts recognisable as the exercise of rights under the copyright act, the patent act, the utility model act, the design act, or the trademark act".

technological development, (4) different treatments for similar transactions, (5) forcing other undertakings to accept conditions or obligations which do not directly relate to the agreement subject-matter, and (6) foreclosure of market entry to new competitors. VCL also forbids abuses of a monopoly position, which include activities that are the same as the above-mentioned abuses of dominant position, together with activities forcing clients of the monopoly undertaking to accept unfavourable conditions and obligations, or abusing a monopoly position by changing or cancelling agreements without reasonable justifications. (Art. 14, VCL)

After the VCL came into effect, anti-competitive practices relating to IPR in general and licensing agreements in particular are governed by it. However, in spite of a long process of drafting, and benefiting from the learning experiences of other countries, there is no specific provision governing the relationship between the completion law and IPRs.

In theory, anti-competitive practices relating to IPRs are to be governed by the VCL. Nonetheless, some issues will eventually emerge, which could have been provided for from the inception:

Firstly, all kind of non-competition clauses (exclusive dealings or non-compete obligations) and exclusive licensing agreements, even between non-competitors, may fall into Article 8.6 and/or Article 8.7 VCL, because such clauses/agreements have the possibility of excluding potential licensors, in the case of non-competition clauses, or potential licensees, in the case of exclusive agreements, from penetrating into the market. They are, therefore, *per se* illegal according to Article 9.1 and cannot be exempted under Article 10 even though both parties have a low market share in the relevant market.

However, in practice, such clauses/agreements may, especially in a vertical relationship, have certain pro-competitive effects. Both obligations may promote dissemination of technology by reducing the risk of misappropriation of the licensed technology. They ensure that the licensed technology will be exploited, invested, and protected. Thus, such anti-competitive practices are often considered under the rule of reason in many jurisdictions. In the US, in determining whether an exclusive dealing is likely to reduce competition in a relevant market, the US Department of Justice and Federal Trade Commission will take into account the extent to which such a clause (1) promotes the exploitation and development of the licensor's technology and (2) anti-competitively forecloses the exploitation and development of, or otherwise constrains competition among competing technologies. Besides, the US Agencies will not challenge a restraint in an IP licensing agreement in absent extraordinary circumstances, if (1) the restraint is not on its face anti-competitive, and if, (2) the combined market share of the licensor and its licensees is not more than 20 percent of the affected relevant market – in order to create an antitrust 'safe zone'. In the EU, market share thresholds are used (20 percent or 30 percent for an agreement between competitors or non-competitors respectively), and pro- and anti-competitive effects are analysed on a case-by-case basis, only if the thresholds are exceeded. In this case, many factors are taken into account, such as the nature of the agreement, market position of the parties, market position of competitors, entry barriers, maturity of the market, etc. Therefore, the strict application of the VCL to exclusive licenses and exclusive dealings bites deeply into rights granted by IP law, and may hinder technology transfer in Vietnam.

Secondly, anti-competitive licensing agreements other than the market entry foreclosure agreements, which fall under Article 8.6 and/or Article 8.7 VCL, may not be prohibited by the VCL at all. Such agreements may fall under Article 8.1 to 8.5, but if the combined market share of participating parties (in case of agreements between competitors), or the market share of the licensor or the licensee (in case of agreements between non-competitors) is under 30 percent in the relevant market, they do not infringe the VCL (Article 9). If the market ceiling is exceeded, the parties can still invoke Article 10.1(b) VCL to get an exemption, because they can argue that licensing agreements encourage the dissemination of technology or technical and technological improvement, and enhance quality of products. Therefore, licensors and/or licensees may legally incorporate into licensing agreements such hardcore restrictions as price fixing, limitation of output, allocation of market, etc. (which are forbidden under Article 4 of the EU Regulation No 772/2004 on the application of Article 81(3) of the Treaty to categories of technology transfer agreements), provided that such practices do not constitute abuse of a dominant position under Article 11 and 13 VCL. However, if such agreements are agreements between two, three or four competitors, they are still legal if the combined market share of participating parties does not exceed 50 percent, 65 percent, or 75 percent respectively, of the relevant market. (Art. 11, VCL)

Thirdly, as mentioned above, there is no clear distinction between horizontal and vertical restrictions in the VCL and even in the Anti-competitive Practices Decree. Therefore, anti-competitive licensing agreements both between competitors and between non-competitors are subject to the same scrutiny, despite the fact that agreements between competitors are more likely to cause competitive problems. Furthermore, the term 'combined' market share of participating parties in Article 9.2 VCL may lead to the understanding that the provisions relating to anti-competitive agreements in VCL (Article 8-10) are just applied to horizontal agreements. This would mean that all vertical anti-competitive agreements could only be investigated under provisions relating to abuse of dominant/monopoly position, because the term 'market share of a participating party' has to be applied as a precondition when considering vertical agreements. However, when explaining anti-competitive agreements, the Anti-competitive Practices Decree lists certain vertical agreements. This may lead to the emergence of anti-competitive licensing agreements between competitors, which harm customer welfare and hinder technology transfer in Vietnam.

Fourthly, as stipulated in Article 11 VCL, and Article 22.5 and 22.6 of the Anti-competitive Practice Decree, technological ability and industrial property rights (or IPR in general) are factors to be considered in determining the "ability to restrict competition considerably", which can lead to a dominant position. This means that, according to VCL and its subordinate regulations, IPRs can give the IP holder a dominant position in the competition context.

Nevertheless, it should not be presumed that IPRs create or increase market power or dominant position. Although IPRs confer the power to exclude with respect to the specific product, process, or work in question, there will often be sufficient actual or potential close substitutes to prevent the exercise of market power. If IPRs confer market power (or even a monopoly) that market power does not itself offend the competition law, because it is just "a consequence of a superior product, business acumen, or historic accident". The European Court of Justice, for example, has stated time and again that possession and normal exercise of lawfully acquired IPRs were not automatically an abuse.

Consequently, the Vietnam competition authorities may not take into account the special characteristics of IP. They may limit and infringe IP law. This runs contrary to the current best-accepted principles worldwide.

In brief, it can be said that, under the VCL and the Anti-competitive Practices Decree, IPRs and technology transfer are subject to rules, which are rigid and severe in some cases, but lax, liberal in the others.

Vietnam's IP Law

Before promulgation of the Vietnam Civil Code of October 28, 1995 (VCC 1995), IPRs had been stipulated separately in several subordinate ordinances, namely the Ordinance on foreign technology transfer to Vietnam in 1988, the Ordinance on the industrial property in 1989, and the Ordinance on protection of copyrights in 1994. Out of the eight parts of the VCC 1995, Part 6 (Article 745 to 825) covered IPRs and technology transfer, but no specific provision governed the relationship between IPRs and competition. However, in the Decree No. 45/1998/ND-CP dated July 1, 1998 governing the details of technology transfer (TT Decree 1998), some anti-competitive clauses were listed that could not be incorporated into technology transfer agreements, objecting to those that tend:

(i) to force the licensee to buy or receive from the licensor, or a third party stipulated by the licensor raw materials, parts, manufacturing equipment, means of transportation, intermediate products, the industrial property right, and employees with low level of technical skills. In case of the requirement of technology with reasonable and mutually agreed justification, such stipulation may be incorporated;
(ii) to force the licensee to accept some limitations relating to quantity of products, price fixing, buyers, and agent of licensee;
(iii) to restrict the local market, export market, quantity, and types of exported products of the licensee;
(iv) to force the licensee not to develop the transferred technology or deal in competitive technologies;
(v) to force the licensee to grant back improvements unconditionally;
(vi) to give the licensor immunity from faults and mistakes in technology transfer, and unqualified machines deliveries; and
(vii) to prohibit the licensee from using the transferred technology after the end of IPR. (Art. 13, TT Decree 1998)

However, it must be admitted that the provisions were not exhaustive, and did not cover all anti-competitive practices in technology transfer. Furthermore, most of them were rigid and in favour of licensees, while there was no provision to protect the rights of licensors. This meant that such stipulations did not consider the rights of IP holders (licensors) and the pro-competitive effects of technology transfer. It mainly applied the *per se* approach to most of the anti-competitive clauses. Therefore, if intent on complying with TT Decree 1998, few IP holders would want to license their IPR in Vietnam.

On February 2, 2005, the Government of Vietnam enacted Decree No. 11/2005/ND-CP (TT Decree 2005) to replace TT Decree 1998. In TT Decree 2005, there is no provision similar to Article 13 TT Decree 1998 relating to anti-competitive clauses, which may not be incorporated into technology transfer agreements. This is a drawback of the TT Decree 2005, even if such a provision is problematic as analysed above.

On June 14, 2005, the new Civil Code of Vietnam was promulgated by the National Assembly (VCC 2005) to replace VCC 1995. Relating to provisions of IPR and technology transfer, VCC 2005 (Article 736-757) differs from VCC 1995 in that VCC 2005 governs a wide range of IPRs, some of which did not exist in VCC 1995, for example, the protection of encrypted programme-carrying satellite signals, plant breeders' rights, the layout designs (topographies) of integrated circuits. However, such 'new' IPRs in VCC 2005 had already been covered in the Vietnam-US Bilateral Trade Agreements (BTA) signed on July 13, 2000, which came into effect on December 11, 2001. Therefore, to implement BTA, the Standing Committee of National Assembly and the Government of Vietnam had enacted many ordinances and decrees relating to these IPRs before they were incorporated into VCC 2005. Besides, VCC 2005 just stipulates principles of IPRs and technology transfer, because the National Assembly of Vietnam intends to promulgate the Law on IPRs at the end of 2005 and the Law on Technology Transfer at the end of 2006.

In the latest draft of the Law on IPRs on September 8, 2005 (IPRs Draft), some provisions indirectly mention the relationship between IPRs and competition. While the IPRs Draft recognised that the IP holder has a monopoly and the rights to exclude the other from exploiting the IP, it also stipulates that the IPRs exercise shall not violate the interests of both the State and the public, the legitimate rights and interests of organisations and other individuals, and shall not violate related laws and regulations (VCL for instance). (Art. 7.2, IPRs Draft) In the classification of the industrial property licensing agreements, the IPRs Draft recognises exclusive agreements.

Besides, the IPRs Draft states that industrial property licensing agreements shall not unreasonably restrict the licensee's rights. In particular, they shall not contain clauses that do not derive from the licensor's rights such as (a) restrictions on the licensee's improvement of the licensed industrial property, compulsory transfer or assignment of licensee's improvements of licensed industrial property to the licensor (grant back), without reimbursement, (b) restrictions on the licensee's right to export goods produced or supplied in accordance with the industrial property licensing agreements to territories where the licensor has no industrial property rights or no importation monopoly, (c) forcing the licensee to buy a whole or a part of raw materials, parts, manufacturing equipment from the licensor or third parties determined by the licensor without the purpose of assuring the quality of goods/service supplied by the licensee, and (d) prohibiting the licensee from challenging the validity of industrial property or transfer rights of the licensor (no-challenge clause). (Art. 146.2, IPR Draft) However, similar to the above analysed anti-competitive clauses stipulated in the TT Decree 1998, the list of unreasonable restrictions is again not exhaustive, because it does not mention horizontal restraints, resale price maintenance, etc. and they just protect the rights of the licensee.

Furthermore, in the current IP law as well as in the IPRs Draft, there is no specific provision relating to compulsory licensing to remedy any practice of IP holders held by judicial or administrative process to be anti-competitive. Such compulsory licensing is permitted not only in TRIPS, of which Vietnam will soon be a member, but also in the Vietnam-US Bilateral Trade Agreements (BTA). (Art. 31(c) and 31(k), TRIPS; Article 7.8.K, Chapter II, BTA)

Consequently, neither current competition law nor current and draft IPRs law of Vietnam can solve reasonably the relationship between competition and IPRs. In some cases, the competition law of Vietnam may be used to restrict IPRs under the *per se* approach. In other cases, it permits anti-competitive practices, even hardcore restrictions and abuses of a dominant position of IP holders. Present IPRs legislation and the IPRs Draft just list non-exhaustively certain anti-competitive restrictions unreasonably imposed by the licensor on the licensee's rights, so as to protect the licensee in a one-sided manner, but they do not govern anti-competitive practices limiting the competitiveness of the licensor.

Conclusion

Competition law and IP law, especially the enforcement of these laws, are quite new to the Vietnamese jurisdiction. Therefore, though building the IPRs-oriented competition policy/law and determining a reasonable balance and relationship between competition policy/law and IPRs in the context of a developing country like Vietnam can help attract and encourage technology transfer (especially modern technology transfers from developed countries), and also to establish a competitive business environment protecting both customer welfare and social benefits – it remains a difficult task for legislators. How Vietnam can use the competition provisions in TRIPS after becoming a WTO member and other IPRs-related competition provisions in BTA, as well as other international commitments in which it participates in building and applying competition law of Vietnam towards IPRs is not only a legal matter, but also an economic and political one.

In order to solve IPRs-related anti-competitive practices, particularly anti-competitive licensing agreements, the following solutions could be considered:

- Generally, the strengthening of IPRs in Vietnam should run parallel to the development of competition law. However, Vietnamese competition policy and law should acknowledge and respect basic rights granted under IP law. Competition policy/law in Vietnam should not aim to control the functioning of IP law, but rather to safeguard its proper functioning. The task of the competition authority is to minimise the anti-competitive effects of IPRs when IP holders exercise their state-granted rights while always respecting IPRs existence.

- The government should enact a decree on the application of VCL to categories of technology transfer agreements. Such a decree would affirm the pro-competitive effects of technology transfer and scrutinise most of the anti-competitive restrictions contained in technology transfer agreements under the rule of reason. Especially, it must recognise that exclusive licensing and exclusive dealing do not infringe VCL. It also should make a distinction between horizontal and vertical restraints; horizontal restraints in technology transfer agreements should be subject to stricter scrutiny by competition authorities.

- Compulsory licensing due to anti-competitive practices of IP holders should be regulated. It could be a good way to threaten and prevent anti-competitive practices relating to IPRs in the Vietnamese context.

- The above-analysed shortcomings in IPRs Draft should be revised to protect both the authority issuing the licence and the licensee in technology transfers. The IPRs Draft should recognise that the exercise of IPRs of IP holders within the scope and breadth granted by the Law on IPR does not violate VCL, and IPRs are not presumed to create a market dominant position in the VCL context. These issues must be addressed by the Draft of Law on Technology Transfer, which will be presented to the National Assembly in 2006. However, stipulations should not be too specific in view of the fast paced change of a market economy in a transition period and the long time needed to amend or revise any law adopted by the National Assembly. Detailed regulations will be made by guiding decrees of government, which can be amended from time to time and more easily under the principles of legal certainty, transparency and predictability in drafting, enacting, and enforcing legislations.

Finally, the competition authorities must proactively co-operate with IP authorities to foster greater mutual understanding of each other's fields and to improve IP authorities' awareness of competition issues. According to the current IP law as well as the IPRs Draft of Vietnam, there are three agencies responsible for IPR, namely the Ministry of Science and Technology (National Office for Intellectual Property, in charge of industrial property), the Ministry of Culture and Information (Copyrights Office, in charge of copyrights), and the Ministry of Agriculture and Rural Development (in charge of plant breeders' rights). Co-operation with foreign competition and IP authorities and effective training of personnel for the competition authorities of Vietnam is also necessary.

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