



Improving Vietnamese legislation on anti-unfair competitive behavior from the experience of China, United States and Germany

Pham Thi Thanh Tuyen*

Master of Law, Lecturers, Hoa Sen University, Vietnam

Abstract

In the development of the socialist market economy, competition is regarded as one of the objective economic laws, which has a strong impact on the survival and development of domestic and foreign enterprises. With a view to opening up and international economic integration, the Socialist Republic of Vietnam has actively created conditions for economic components as well as economic sectors to develop through the enactment of policies and laws on competition, including unfair competition. The introduction of unfair competition regulations not only contributes to protecting business competitors, in the market from business disadvantages caused by unfair behavior competition, but also helps to protect the rights and other interests of consumers. Besides, the sanctions will be both dissuasive and educate traders and in the market, thus creating a healthy business environment, the parties will compete fairly based on the very strength of the enterprise. Although certain achievements have been achieved, the process of applying anti-unfair competition legislation has also experienced many challenges, difficulties, needs to be supplemented, perfected. This article will focus on the following issues: *i)* The current status of policy and laws of Vietnam on unfair competitive behavior; *ii)* Experience against unfair competitive behavior in China, the United States and Germany and lessons for Vietnam; *iii)* Some proposals aimed at improving Vietnamese law on unfair competition.

Keywords: Improving legislation, anti-unfair competition, China, United States, Germany, Vietnam

Introduction

“Competition” in general and “unhealthy competition” specifically are commonly used terms in the economic and social life of countries around the world. Nowadays, there are many different interpretations of these terms, such as: From a business perspective, the UK Business Dictionary of 1992 defined competition as “the competition, the enmity between traders in the market to win the same kind of productive resource or the same type of customer on their side” [11]. According to the Black Law Dictionary, competition “is a form of open, fair and fair competition between competitors in business” [4]. So, to put it simply, competition is competing between two or more traders to gain certain advantages in the market of goods and services. Since the transition to a market economy, especially as competitive pressure on the markets increased, competitive behavior that was considered unhealthy has emerged. Explaining the concept of unfair competition, article 10 of the Paris Convention for the Protection of Industrial Property 1883 states that: “Any behavior of competition contrary to fair, goodwill systems in industry or in commerce is unfair” [20]. On the basis of this treaty, countries like Vietnam [18], Laos [2], and China [5] also define unfair competition. Although there are different approaches, different definitions, but all indicate that unfair competition is competitive behavior between enterprises in the business process that for the purpose of profit to carry out conduct contrary to business principles, commercial practices to infringe or may infringe on the legitimate rights and interests of other enterprises and if these conduct occur, continue to occur will have no minor impact on the development of the market, the rights and the interest of the State, consumers.

The peculiarities of unfair competitive behavior are: Directly or indirectly carried out by the enterprise; is unlawful or contrary to the principles, norms, and commercial practices; causes damage or may cause damage to the rights and legitimate interests of other enterprises. Unfair competitive behavior not only distorts, disrupts the transparency, fairness, equality of the business market, but also seriously infringes the rights and legitimate interests of business, of the state, of your consumer. Aware of this, countries, including Vietnam, have enacted policies and laws that regulate unfair competitive behavior. During the era of international economic integration as it is now, international business relations have undergone major changes, especially the advent of the digital economy and the achievements of the industrial revolution. 4.0. In order to be able to respond to this situation, Vietnamese law needs to be supplemented and perfected. However, with a younger level, Vietnam needs to actively study and learn the experiences of developed economies, especially China, the United States and Germany.

Method

The paper uses a combination of different methods of research, such as table study method, summary analysis method, logic method, historical method, normative method, comparative legal method. In this, the research methods at the table are used to clarify the views, assessments of experts, researchers on the theoretical issues related to unfair competition, logical methods, analysis and comparison of law to clarify the content of the legal regulations of Vietnam, China, the United States and Germany on unfair Competition; experiences of countries and lessons related to this issue. In addition, the essay also uses historical methods to clarify the process of formation

and development of the law of Vietnam on unfair competition; methods of analysis and evaluation to clarify the practice of applying the law on unlawful competition behavior in Vietnam.

In addition, the study of the subject is based on the combination of theory and practice in the process of analysis, evaluation and drawing conclusions. The research methods in the paper are based on historical material, dialectical material; on the political, economic, cultural and social perspectives of the Communist Party of Vietnam.

Results

The current status of policy and laws of Vietnam on unfair competitive behavior

Economic reforms in Vietnam began with policies that expanded the freedom of production and business of enterprises (including production, circulation and prices) and followed by measures to diversify the forms of ownership of the economy. Through the enactment of the Foreign Investment Act, the Corporate Law and the Private Enterprise Law of 1990 and subsequently the Enterprise Act of 1999, the multi-component economy was officially recognized and protected in Vietnam. Particularly important, the protection of the rights of producers and consumers has been affirmed by the Constitution.

Resolution of the 8th National Congress of the Communist Party of Vietnam has set out the mission: "Create a fair environment for cooperation and competition in production and business. Implementation of state monopoly in certain sectors, certain areas in the interests of the country; restriction of business monopolies, not to exploit monopolistic status in order to maintain privileges, privilege, market valley"^[19]. Subsequently, the issue of encouraging competition and monopoly control was further emphasized in the documents of the Party's IX Congress: "The State creates a favorable legal environment, equality for competing enterprises and cooperation for development..."^[6]. "Synchronously forming all types of markets goes hand in hand with the establishment of the legal and institutional framework necessary for markets to operate dynamically, efficiently and orderly in a healthy competitive environment, with restrictions and exclusive control in business. There are effective solutions to combat smuggling and trade fraud"^[6].

The new legal framework relating to commercial transactions in the market economy has been gradually formed with laws, decrees, ordinances, etc. such as: Civil Code, Criminal Code, Labor Code, Tax Law, Commercial Law, Economic Contract Ordinance, etc. The decision-making power of both producers and consumers is extended. With the emergence of the multi-component economy, the gradual liberalization of production, circulation, self-determination of prices and choice of consumption, the basic conditions for the formation of a competitive environment and facilitating the operation of competitive mechanisms in the Vietnamese economy have emerged. The competition of Vietnamese goods has taken place not only in the domestic market but also in the international market, not only between Vietnamese products but also with imported goods, not just between state-owned enterprises and Vietnamese private enterprises but also competing with enterprises with foreign investment. From competition policy and the above legal framework conditions, competition in the market mechanism in Vietnam has been

sharpened and has left a number of positive results^[12]. The legislative texts typical of Vietnam's unfair competition during this period include: Competition Law adopted by the Vietnamese Parliament on December 3, 2004 and entered into force on July 1, 2005; Administrative Violations Handling Act 2012; Decree No. 71/2014/ND-CP dated July 21, 2014 of the Government detailing competition law on the handling of violations of the law in the field of competition; Civil Code 2005; Criminal Code revised in 2009;. However, the current system reveals difficulties, constraints, and partly slows down the contribution that competition policy can make to the Vietnamese economy.

Based on this fact, on June 12, 2018, the National Assembly of the Socialist Republic of Vietnam officially passed the 2018 Competition Law. The law consists of 118 articles divided into 10 chapters, which regulate competition-restrictive conduct, economic concentration that has or is likely to have a competitive restrictive effect on the Vietnamese market; unfair competitive conduct; competition proceedings; infringement of competition law; and state management on competition.

In particular, unfair competition behavior is mentioned scatteredly in many different laws, for example:

Among them, unfair competition behavior is mentioned scatteredly in many different laws, for example: Article 3(6) on interpretation of words; Article 4 on application of competition law; Article 8 on strictly prohibited practices relating to competition; Article 45 on unfair practices being forbidden; Article 59 on the mandate and powers of the Chairman of the National Competition Commission in proceeding with competition proceedings. Article 81 on the deadline for investigation of competition cases; Article 90 on the treatment of cases of unfair competition; Article 92 on the suspension of the settlement of the competition case; Article 100 on the resolution of the complaint and decision to deal with the case; Article 111 on fines for violations of the law on the Article 113 on authority and forms of handling violations of competition law.

In addition, the issue of unfair competition is also regulated in Decree No. 42/2014/ND-CP of the Vietnamese Government dated May 14, 2014 on the management of multi-level sales activities; Decree No. 71/2014/ND-CP of the Vietnamese Government dated July 21, 2014 detailing the Competition Law on the handling of violations of the law in the field of competition; Circular No. 24/2014/TT-BCT of the Ministry of Commerce of Vietnam dated July 30, 2014 on detailed regulations for the implementation of certain articles of Decree No. 42/2014/ND-CP dated May 14, 2014 of the Vietnamese Government on the management of multi-level sales activities; Declaration No. 07/2015/ND-CP of the Vietnamese Government dated January 16, 2015 on the regulation of the functions, duties, powers and organizational structure of the Competition Council; Circular No. 251/2016/TT-BTC of the Ministry of Finance of Vietnam dated November 11, 2016 on the regulation of the level of income, methods of collection, payment, management and use of competition fees; Decree No. 94/2017/ND-CP of the Vietnamese Government of 10 August 2017 on goods, services and territories exercising State monopoly in commercial activities; Decree No. 75/2019/ND-CP of the Vietnamese Government dated September 26, 2019 on penalties for administrative violations in the field of competition; Decree No. 35/2020/ND-CP of the Vietnamese Government dated

March 24, 2020 guiding the Competition Law; Circular No. 58/2020/TT-BTC of the Ministry of Finance of Vietnam issued on 12/06/2020 regulating the level of collection, collection, payment, management and use of competition processing fees; Circular No. 63/2021/TT-BTC of the Ministry of Finance of Vietnam dated July 29, 2021 regulating the establishment, management and use of regular expenditure funds during the assessment of applications for exemption from competition restriction agreements; during the evaluation of economic concentration notification files; in the investigation of competition cases and competition proceedings; Criminal Code 2015 amended, supplemented in 2017 (Article 217);... In addition, Vietnam has enacted legislative instruments in specific areas such as the Intellectual Property Law, the Consumer Protection Ordinance, the Pricing Order, the Advertising Order, etc to specify sanctions against unfair competition.

In order to provide a basis for dealing with unfair competitive behavior, Vietnamese law has provided provisions in Section 6 of Article 3 to explain unfair competitive behavior, which is the conduct of an enterprise contrary to the principles of goodwill, honesty, commercial practices and other norms in business, causing damage or may cause damage to the rights and legitimate interests of other enterprises.

In addition, Vietnamese law prohibits unfair competitive behaviors (Article 45 of the 2018 Competition Law). Accordingly, unfair competitive behavior includes: *i*) infringement of business confidentiality in the following forms: Accessing or collecting business-secret information by opposing the security measures of the owner of the information; Disclosure, use of confidential information in business without the permission of the owner of such information; *ii*) Forcing clients or business partners of other enterprises by threat or coercion to force them not to trade or stop trading with the enterprise; *iii*) Providing untrue information about another enterprise by providing, directly or indirectly, false information about the enterprise which adversely affects the reputation, financial position or business activity of that enterprise; *iv*) Disrupt the business of another enterprise by directly or indirectly obstructing or interrupting the legitimate business of that enterprise; *v*) Attracting unlawful customers in the following forms: Provide false or misleading information to customers about business or goods, services, promotions; Compare your goods or services with the goods and services of the same type of other enterprises; *vi*) the sale of goods or the provision of services at a lower price as a whole resulting in or likely to result in the elimination of other enterprises and the business of such goods and services; *vii*) Other unfair competitive practices are prohibited by the provisions of other laws.

Regarding the agency handling unfair competition: Vietnam's law establishes the National Competition Commission (owned by the Ministry of industry and trade of Vietnam) as the agency that deals with cases of unlawful competition. In addition, participating in this activity is the Council for Handling Competition Restriction Cases; The Complaint Resolution Council decides to handle the competition case; Competition investigation agency.

Vietnamese law also specifies the time limits for investigating competition cases; dealing with unfair competition matters; suspending the settlement of

competitive cases; resolving complaints, deciding to deal with competitive events; on fines for violations of competition law; and the jurisdiction and forms of dealing in competition violations. The sanctions imposed by Vietnam to deal with unfair competition cases include:

1. Warning punishment;
2. Fine punishment with the maximum fine for violation of unfair competition regulations is two billion VND.
3. Apply one or more of the following remedies: Restructuring enterprises abusing market dominance, abusing monopoly positions; Remove illegal clauses from contracts, agreements or business transactions; Divide, separate, resell part or all of the capital, assets of the enterprise formed after the economic concentration; Under the control of the competent State authority on the purchase price, sale price of goods, services or other terms of transaction in the contract of the enterprise formed after the economic concentration; Public improvement; Other measures necessary to remedy the impact of the violation.
4. Request the competent State authority to apply some of the following additional forms of punishment: Revocation of business registration certificate or equivalent document, deprivation of the right to use license, practice certificate; Confiscation of exhibits and means used to violate competition laws; Confiscation of profits earned from committing violations (Articles 110-113 of Vietnam's Competition Law 2018).

In particular, Vietnamese law clearly regulates the application of competition law. Accordingly, the investigation, processing of competition cases, exemption from prohibited competition restriction agreements and notification of economic concentration must apply the provisions of the 2018 Competition Law of Vietnam. In case another law has provisions on unfair competition practices and the handling of unfair competition practices is different from the provisions of this Law, the provisions of that law shall apply.

Basically, Vietnam's laws against unfair competition practices are relatively comprehensive and progressive, including both substantive and formal laws, with regulations designed to suit the circumstances and the specific economic conditions of the country and at the same time in accordance with the general development trend of world competition law. Besides these positive points, the 2018 Competition Law still does not specify all the unfair competition behaviors occurring in the market. In addition, handling unfair competition behaviors with different sanctions has been clear for each specific behavior but the deterrent effect is still low.

Generally speaking, unfair competitive behavior under Vietnam's law is not fully structured and does not demonstrate a clear legislative philosophy. Some behavior is derived from the competition law-making experience of developed countries at different historical periods; others come from the requirement of domestic trade practices. In addition to the provisions of Chapter VI - Competition Law 2018, there are no more specific guidelines on unfair competition in the texts under the Law. The most important of these is the Vietnamese Government Decree No. 116/2005/ND-CP, which provides guidelines on the control of competition-restricting behavior and competition

proceedings, and the Government has issued Decree No. 75/2019/ ND-CP which provides for the punishment of administrative violations in the competition sphere.

In addition, the law enforcement authority on unfair competition in Vietnam belongs to the competition administration of the Ministry of Industry and Commerce and not to the courts, which also significantly restricts the possibility of the laws being interpreted, specified through penalties, which play an important role in the development of this area of law ^[22].

Experience against unfair competitive behavior in China, the United States and Germany and lessons for Vietnam

a. Experience of China, the United States, Germany

1. China's experience

China (People's Republic of China) was one of the countries that introduced unfair competition rules quite early. In 1993, the Anti-Unfair Competition Law was enacted. This Law is adopted at the 3rd Meeting of the Standing Committee of the Eighth National People's Congress on September 2, 1993; revised at the 30th Meeting of the Standing Committee of the Twelfth National People's Congress on November 4, 2017; amended in accordance with the Decision on Revising the Construction Law of the People's Republic of China and Other Seven Laws at the 10th Meeting of the Standing Committee of the Thirteenth National People's Congress on April 23, 2019. This law consists of five chapters and 33 articles, which is enacted for the purposes of promoting the sound development of the socialist market economy, encouraging and protecting fair competition, preventing acts of unfair competition, and safeguarding the lawful rights and interests of business entities and consumers.

In addition to the Anti-Unfair Competition Act, unfair competitive behavior in China is covered by various laws, such as the Civil Code of the People's Republic of China, the Administrative Procedure Law, Administrative Compulsion Law, the Copyright Law, Invention Law, Trademark Law, Computer software protection Regulations, the New Crop Protection Regulations and the Integrated Circular Protection Regulation, etc.

According to Article 2 of the China Anti-Unfair Competition Act, amended in 2019, unfair competition is the conduct of an operator that disrupts market order, damaging the rights and legitimate interests of businessmen or other consumers in the process of their business production.

Unfair competitive practices under Chinese law include misleading instructions, bribes of a commercial nature, false advertising, violation of trade secrets, sales with false prizes (trading with fraudulent prizes or with the highest prize of a lottery sale exceeding CNY 50,000), falsification or dissemination of false information to the detriment of the goodwill of competitors, Unfair competition on the Internet destroys or interferes with competitor's network products by technological means ^[3].

On 22 November 2022, China's State Administration for Market Regulation ("SAMR") released the Draft Amendments to the Anti-Unfair Competition Law. This Draft Amendments introduces measures targeting a broad swathe of unfair competition activities that have caught the authorities' attention. These measures include improving fair competition in the digital economy, prohibiting malicious

trading, expanding liability to persons who aid acts of confusion, refining the prohibition against false advertising, promoting the establishment of an integrated trade secret protection system, prohibiting companies with a "relatively advantageous position" from abusing their market position, updating the scope of commercial bribery, and adjusting (and in some cases, increasing) violators' legal liabilities.

The Draft amendment to the Anti-Unfair Competition Law proposes amendments to some of the following issues:

1. Amendments to the commercial bribery provision, which now prohibits business operators from providing commercial bribes to transaction counterparties (and not just their employees) and persons and entities from receiving bribes in commercial transactions;
2. New or updated measures targeting malicious transactions and unfair competition in the digital economy;
3. Expansion of the prohibition on committing confusing acts, which now makes those who aid or facilitate confusing acts liable for such acts; and
4. Enhanced or updated penalties for certain anti-competitive behavior.

In particular, Article 8 of the Draft Amendments proposes the following changes to the ban on commercial bribery of the Anti-Unfair Competition Act: Prohibits business operators from providing commercial bribes to counterparties to transactions; Prohibits business operators from instructing a third party to give bribes; Prohibits entities and individuals from accepting bribes in transaction activities; Increases penalties for giving bribes (Article 29 of the Draft Amendments).

With the digital economy in full swing, new business models have given rise to new forms of unfair competition that leverage data, algorithms, technologies, and platform rules. Against this backdrop, the Draft Amendments propose regulating a raft of unfair competition activities, including the following: Malicious trading (Article 14 of the Draft Amendments); Using technical means to influence user choice (Article 16 of the Draft Amendments); Traffic hijacking (Article 16(2) of the Draft Amendments); Intercepting or blocking (Article 16(5) of the Draft Amendments) likely targets Chinese internet companies' practice of blocking each other's links on their sites; Improper exclusion or obstruction (Article 17 of the Draft Amendments); Improperly obtaining or using another business operator's commercial data (Article 18 of the Draft Amendments); Price discrimination enabled by big data (Article 19 of the Draft Amendments)

Regarding sanctions against unfair competition, under current Chinese regulations, violations of anti-unfair competition laws will be subject to civil, administrative and criminal penalties.

With regard to civil sanctions, article 17 of the Anti-Unfair Competition Act, revised in 2019, states: Where business operators violate this Law and cause damages to others, they shall bear civil responsibility in accordance with law. Where business operators' lawful rights and interests are harmed by acts of unfair competition, they may file lawsuits in the people's courts. The amount of compensation for business operators who have been harmed by acts of unfair competition is determined on the basis of the actual losses they suffered as a result of the violation of their rights; and where the actual losses are hard to calculate, compensation

is determined on the basis of the benefit received by the infringers as a result of the infringement. The amount of compensation shall also include reasonable expenses paid by business operators in stopping the infringing conduct.

In cases where the trader is conducting misleading instructions, violating trade secrets and

Where business operators violate misleading instructions, violating trade secrets, and the losses suffered by the rights holder and the benefit gained by infringer are both difficult to determine, the people's courts are to make judgement for compensation of up to 3,000,000 RMB (about 442,000 USD) on the basis of the circumstances of the infringement.

Currently, Article 36 of the Draft Amendments increases the maximum penalty for violating Articles 16 – 20 of the Draft Amendments from RMB 3 million (about 442,000 USD) to RMB 5 million (about 737,000 USD) and adds that the SAMR shall order cessation of the illegal activity and confiscate the illegal gains^[4]. Article 38 of the Draft Amendments imposes enhanced penalties for particularly serious violations⁵ of its Articles 13 and 16 – 20 in the form of higher fines of up to 5% of the business operator's annual turnover from the previous year, suspension of the business, and revocation of a business operator's business permits or business license. In addition, if found personally liable in such cases, the legal representative, primary person in charge and directly liable persons of the business operators, shall be subject to a fine between RMB 100,000 (about 14,700 USD) and RMB 1 million (about 147,000 USD)^[3].

Especially, Chinese law clearly defines the level of damages per unfair competitive behavior, such as:

Where business operators violate Article 6 of this law by carrying out confusing conduct, the supervision and inspection departments shall order them to cease the unlawful acts, and confiscate the unlawful goods. Where the illegal business revenue is above 50,000 RMB, a concurrent fine of less than five times the amount of illegal business revenue may be imposed; where there is no illegal business revenue or the illegal business revenue is less than 50,000 RMB, a concurrent fine of less than 250,000 RMB may be imposed. Where the circumstances are serious, business licenses are to be revoked.

Where the registered names of business operators' enterprises violate the provisions of Article 6 of this Law, formalities to change registered name shall be promptly completed; and prior to the name being changed, the organ of original registration is to use the uniform social credit number in place of the name.

Where business operators bribe others, the supervision and inspection departments are to confiscate illegal income and give a fine of between 100,000 and 3,000,000 RMB. Where the circumstances are serious, business licenses are to be revoked.

Where business operators violate article 8 of this law with commercial promotions that are false or misleading, or by helping other business operators conduct false misleading commercial promotions by conducting fake transactions, the supervision and inspection departments shall order them to cease the unlawful acts, and impose a fine of between 200,000 and 1,000,000 RMB; where the circumstances are serious, a fine of between 1,000,000 and 2,000,000 RMB is imposed, and business licenses may be revoked.

Where business operators violate the provisions of false advertising, punishment is in accordance with the provisions of the "Advertising Law of the People's Republic of China."

Where business operators bribe other or accept bribes in violation by infringing on commercial secrets, the supervision and inspection department shall order them to cease the unlawful acts and shall impose a fine between 100,000 and 500,000 RMB; where the circumstances are serious, impose a fine between 500,000 and 3,000,000 RMB.

Where business operators conduct prize promotions, the supervision and inspection departments shall order them to cease the unlawful acts and shall impose a fine between 50,000 and 500,000 RMB.

Where business operators harm competitors' commercial reputation, or that of their goods, the supervision and inspection department shall order them to cease the unlawful acts and shall impose a fine between 100,000 and 500,000 RMB; where the circumstances are serious, impose a fine between 500,000 and 3,000,000 RMB.

Where business operators violate by impeding or undermining other business operators' lawful provision of internet products and services as normal, the supervision and inspection departments shall order them to cease the unlawful acts and shall impose a fine between 100,000 and 500,000 RMB; where the circumstances are serious, impose a fine between 500,000 and 3,000,000 RMB.

About administrative sanctions: Where the supervision and inspection departments' lawful performance of their duties is impeded by refusal or obstructing the investigation, the supervision and inspection departments are to order corrections, and may give individuals a fine of up to 5,000 RMB, and give units a fine of up to 50,000 RMB, and the public security organs may concurrently give public security administrative sanctions. Parties dissatisfied with a supervision and inspection department's decision may apply for an administrative reconsideration or bring an administrative lawsuit in accordance with law. Where employees of the supervision and inspection departments abuse their authority, derelict their duties, twist the law for personal gain, or disclose commercial secrets learned of during the investigation, they are to be given sanctions in accordance with law.

China's Principles of Administrative sanctions: Where business operators who have engaged in unfair competition in violation of the provisions of this Law, have circumstances such as taking the initiative to eliminate or mitigate the harmful consequences of the illegal acts, they shall be given a lighter or mitigated administrative punishment in accordance with law; if the illegal act is slight and promptly rectified, and no harmful consequences are caused, no administrative punishment shall be given.

Regarding Criminal sanctions, where a violation of the provisions of Anti-Unfair Competition Law constitutes a crime, criminal responsibility is to be pursued in accordance with law.

Regarding unfair competition regulation and behavior: Previously, China's unfair competitive behavior was regulated and handled by the following agencies:

1. The State Administration for Industry and Commerce (SAIC): SAIC was the primary enforcement agency for the AMA, responsible for investigating and penalising anti-monopoly violations in the market;
2. The State Intellectual Property Office (SIPO): SIPO was responsible for investigating and penalising anti-monopoly violations in the field of intellectual property,

- such as the abuse of patent monopolies and the imposition of unreasonable licensing terms;
3. The National Development and Reform Commission (NDRC): NDRC was responsible for investigating and penalising anti-monopoly violations in the field of pricing, such as price-fixing and resale price maintenance; and
 4. The Ministry of Commerce (MOFCOM): MOFCOM was responsible for merger reviews.

In 2018, following a government agency reshuffling plan, the State Administration for Market Regulation (SAMR) was set up to replace SAIC and to perform more functions in 'market regulation'. After this reform, the State Administration for Market Regulation has become the primary anti-monopoly enforcement agency in China, responsible for merger reviews and investigating and penalising anti-monopoly violations in all areas, including market competition, intellectual property and pricing. By November 2021, a reorganised State Anti-Monopoly Bureau (formerly part of MOFCOM) was officially announced under the leadership of State Administration for Market Regulation. Nevertheless, it is only until this 2022 Amendment, that Article 10 of the old Anti-Monopoly Act was revised to confirm State Administration for Market Regulation's (and its future successor's) role in unifying the enforcement of the Anti-Monopoly Act.

This unification of enforcement in China is considered instrumental in improving the consistency and coherence of anti-monopoly enforcement and increasing the deterrent effect of the Anti-Monopoly Act. There is now a single agency responsible for enforcing the law which makes it easier for businesses to understand and comply with the provisions. Although, it is arguable that State Administration for Market Regulation, remaining as the company registration house, may not be the proper agency to enforce competition law^[9].

United States' experience

As one of the most developed countries in the world, the United States' anti-unfair competition legislation comes early with rich content. Typical anti-unfair competition documents in the United States are: Executive Order 13725 of April 15, 2016. This decree sets out steps to boost competition and provide better information to consumers and workers to support the continued growth of the US economy; The 1946 Federal Trademark Act (Lanham Act) (Resolving Complaints for Unregistered Trademarks Violations, False Advertising (also known as Commercial Discrimination, Product Discreditation and Commercially Abused), Misdesignation of Origin and False Authentication); the 1995 Federal Brand Reduction Act^[24]; the 1890 Sherman Anti-Monopoly Act (Sherman Act), which prohibits a company from becoming a monopoly if it is engaged in fraudulent or unfair competition; The Clayton Anti-Monopoly Act of 1914 (the Clayton Act), which protects U.S. consumers by preventing mergers or acquisitions that may restrict competition; The Federal Trade Commission Act of 1914^[23], which created a new agency responsible for enforcing competition law in the United States, was the FTC;... In addition to the laws governing unfair competition in general, the United States has enacted laws to combat unfair Competition in specific fields at the federal and state levels, such as: The Packaging

House and Warehouse Act of 1921; The Celler-Kefauver Anti-Mergers Act (Act 81-899, 64 Act 1125), The Bank Mergers Act of 1828) and The Telecommunications Act of 1996; The Federal Wine Management Act, The Bank Mergers Law, The Drug Price Competition Act and Patent Restoration Act of 1984; The 1984 Transportation Act; the 1995 ICC Termination Act (Law 104-88, 109 Stat. 803), the 1996 Telecommunications Act, the Fairness Act for Consumers of Contact Lenses (Act 108-164, Act 117 2024, 15 USC 7601 et seq.), and the Dodd-Frank Wall Street Reform and Consumer Protection Act (Doc. 111-203, 124 Stat. 1376) (Dodd-Franc Act); California's Unfair Competition Act 2003, etc^[10].

U.S. law has identified two common examples of unfair competition: trademark infringement and seizure. Other behaviors falling into the field of unfair competition include: false advertising; sales tactics of "prey and transfer"; unauthorized replacement of this trademark with another trademark; use of confidential information of former employees to attract customers; theft of trade secrets; breach of a restricted agreement; commercial slander; misrepresentation of products or services^[7].

In the United States, unfair competition is largely governed by state law. Federal laws may apply in the field of trademarks, copyrights and false advertising. Congress established the Federal Trade Commission (FTC) to protect consumers from fraudulent commercial practices on the one hand, and indirectly to protect competitors on the other, as some fraudulent commercial behavior that damages consumers also damages competitive. The FTC regulations relating to unfair competition are set out in various sections of Article 16 of the Federal Regulatory Code. If there is a conflict between federal law and state law, federal law will often be used with priority thanks to the theory of priority purchase.

In 1964, the U.S. Federal Trade Commission identified three criteria for assessing unfair competitive behavior, namely: (i) cause harm to consumers. (ii) Violate existing social policies; and (iii) be immoral and careless. Also on this approach, in the Policy Declaration on Fraud, the Commission identifies three factors to consider in a fraud case, which are: (i) There must be an interpretation, omission or action that may be misleading to the consumer;(ii) Consumers behave consciously and rationally in the context of receiving advertisements; (iii) The interpretation, omission or action must have a material impact, which means that it can lead the consumer to a decision or action of purchase. When there is a material impact, it leads to the potential to harm the consumer, which the consumers might have chosen if there was no fraud.

About the competition law enforcement agency in the United States: The Federal Trade Commission Act laid the foundation for the establishment of the U.S. Trade Commission, one of the two agencies responsible for enforcing competition law in the United States. Unlike the rest of the competition agency, the Anti-Monopoly Office of the Ministry of Justice, which is responsible for restricting competition under the Antitrust Act, the broader function of the Federal Trade Commission, in addition to investigating and monitoring anti-monopoly cases, includes dealing with "unfair competition ways affecting trade and unfair or fraudulent behavior affecting commerce"^[23].

With regard to enforcement mechanisms: The United States has established two enforcing mechanisms to prevent

unfair competition, namely: (i) the Federal Trade Commission (Federal Trade Commission Act empowers the Commission to take proactive anti-advertising legislative measures aimed at unclear competition as a representative of the public interest and the protection of consumer rights); (ii) competitors – the direct subject of unfair behavior violated (the Lanham Act allows direct competitor to file complaints) ^[15].

On sanctions: When a violation occurs, the Federal Trade Commission will hold a hearing in the presence of the offender to clarify the conduct, from which, a decision to force the suspension and termination of conduct considered being unhealthy; civil, criminal sanctions (finance, imprisonment.) may be applied. Consumers or competitors who suffer damage will be entitled to take legal action to claim compensation for the infringement.

German's experience

As a capitalistic country with a developed economy, since 1990, the Germany has enacted unfair anti-competition laws. Currently, the issue of unfair competition is being regulated by the country's 2022 Anti-Unfair Competition Act. With 20 sections, divided into four chapters, and 01 Appendix, the anti-unfair competition law of the Germany focuses on the following issues: i) general regulations; ii) legal consequences; iii) procedural rules; iv) provisions of criminal law and provisions on violations of law.

Firstly, in addition to listing the signs of unfair commercial practices prohibited in Section 3, the Germany Anti-Unfair Competition Act provides an Appendix to detail the list of 32 unfair trade practices that are illegal. Sections 4 to 7a of this Law provide details on unfair commercial practices, typical of which are: Aggressive commercial conduct (Part 4); Misleading Commercial Conduct (Part 5, which includes: Part 5a - Misunderstanding by Failure; Part 5b - Documentation Information; Section 5c - Prohibition of infringement of consumer rights by unfair commercial practices); Comparative Advertising (Parts 6); Unacceptable Harassment (Parties 7). The law also specifies that disturbing advertising behavior will be considered illegal if the advertiser uses means of communication such as telephone, fax, e-mail or other media to advertise, present goods or services without the recipient's consent. However, this behavior would be excluded if the seller obtained the address from the customer or the customer did not object to it ^[1].

The anti-unfair competition law of the Germany identifies two groups of unfair commercial behavior, namely: (i) misleading commercial conduct; (ii) Aggressive commercial practices.

There are 23 types of misleading commercial behavior: False declaration of signing the code of conduct; Unauthorized display of trusted trademarks and the like; False declaration of authentication of a code of conduct; False declaration of recognition by a third party; Seductive advertising that does not involve the unreasonable quantity of inventory; Advertising of prey involving the sale of other goods or services; Misrepresentation of the availability of an incentive for a limited period of time; Change the language of customer service in case the contract is negotiated in a foreign language; Misrepresentation of marketing capability; Presentation of statutory obligations as a distinctive feature of the offer; Advertising - Using social media content to advertise goods or services that the

entrepreneur has paid for this promotion; Secret ads in search results; Misrepresentation of risks to personal safety and security; Commercial origin fraud; Snowball or pyramid program; False declaration of business cessation; Declaration on increasing chances of winning in gambling; False claims of healing; False declaration of market conditions or supply; Do not award advertised prizes; False advertising is free; Misunderstand the order that has been placed; Misunderstanding of entrepreneurial status; Misunderstanding related to customer support in other Member States of the European Union (re-selling event tickets, misunderstanding about the authenticity of consumer reviews, misjudgment of consumers).

In addition, the unfair anti-competition law of the CIS also identifies nine aggressive commercial practices, including: Keep the consumer in place; Do not leave the consumer's home despite being asked to do so; Permanent illegal messaging by means of remote sales; Prevent the enforcement of contractual rights in the insurance relationship; Attracting children; Request payment for unreserved goods or services; Information relating to risks to work or livelihoods; Misunderstand the prize or winnings; Requests for payment in the event of a voluntary visit to the consumer's home on the date of signing of the contract (Addendum Section 3 (3) of the anti-unfair competition law of the Germany).

Furthermore, unlike other countries, in addition to consumers and competitors injured with the right to claim, the German Civil Service recognizes the rights of legal entities, entities qualified on the list of entities eligible as referred to in section 4 of the Provisional Relief Act (Unterlassungsklagengesetz), or entities from other Member States of the European Union qualified in the list held by the European Commission. The Commission as referred to in Article 4 (3) of Directive 2009/22/EC of the European Parliament and of the Council of 23 April 2009 on prohibitions to protect consumer rights (OJ L 110, 1.5.2009, p. 30), as last amended by Regulation (EU) 2018/302 (JO L 60I, 2.3.2018, p. 1); trade unions, organizations established under the Commercial and Crafts Code (Handwerksordnung) and other professional associations under public law in the performance of their mandates, as well as unions in the exercise of their duties relating to the representation of independent professional interests (Part 8 (3) – Preventive measures, anti-unfair competition law of the German CST, 2022). The jurisdiction to deal with cases of unfair competition does not belong to a specialized body like the laws of other countries that are handed over to the regional courts ^[8].

Regarding sanctions, as provided for in section 16 of the Germany's Anti-Unfair Competition Act of 2022, anyone who, with the intention of creating the impression of a favorable incentive, misrepresents the truth by using false statements in public announcements or in media communications aimed at more audiences, will be punished by imprisonment not exceeding two years or a fine; Anyone who, in the commercial process, acts to get consumers to buy goods, services or rights by offering the prospect of receiving specific benefits from the advertiser himself or from a third party if they get others to conclude equivalent transactions, in which, for this type of advertising, these other people in turn receive those advantages from the

corresponding advertising to the subsequent buyers, is punished by imprisonment not exceeding two years or a fine.

Like the laws of other countries, the Germany also requires a violating business to terminate its conduct and to compensate for damage caused by the violation or to pay a fine. The country's laws also provide for a different penalty, which is confiscation of profits obtained from violations. If the prosecution finds that the violation is serious, it may be prosecuted ^[14].

Experiment Lessons for Vietnam

From the study of the experience of Vietnam, the United States, and the Germany, we can draw some lessons in improving legislation and improving the effectiveness of law enforcement on unfair competition behavior as follows:

Firstly, we need to develop a separate law against unfair competition.

This is the experience of the United States, China. Accordingly, Vietnam needs to study a separate anti-unfair competition law, which fully explains the relevant terms, clarifies unfair competitive behavior, processes for handling unfair case competition, entities with authority to deal with unfair cases competition and sanctions for handling cases of unfair concurrence.

Secondly, clearly identify unfair competitive behavior.

Currently, some countries, such as the United States and the Germany, have developed unfair competition laws that only lay down general principles to identify unfair behavior and that only detail some common unfair conduct. On the contrary, some countries, such as Laos, Vietnam, and China, list behaviors that are considered unfair competition. While this listing facilitates competition regulators to enforce the law, it creates vulnerabilities, overlooking many unfair competitive practices, especially emerging ones, thus leaving the law outdated and not guaranteeing enforcement. Therefore, in addition to indicating unfair competitive behavior, the legislation regulating this issue needs to specify specific principles, signs to identify behaviors, and at the same time, giving to the competition regulatory authority, the Court has the power to interpret the law, apply penalties to resolve unfair Competition cases, thus contributing to the flexibility in application, ensuring effectiveness, effectual enforcement.

Thirdly, it gives a competent authority (such as a competition authority, or a court) the right to interpret the law.

In fact, however carefully and thoroughly written the law may be, it is not possible to predict what will happen in the future. Moreover, there are more and more sophisticated violations of the law, situations that lawmakers can't foresee. When new violations or situations arise, what needs to be done is to amend and supplement the written legal regulations in order to correct these situations in a timely manner. However, this process requires a sequence of legal procedures and will take a certain amount of time, so a lack of regulation for adjustment is likely. Thus, the supplementary sentences have helped make the written law more practical than ever before. Furthermore, in constructing sentences, the court contributes to the improvement and development of future written law. To a certain extent, condemnation is still seen as a source of law, and practice shows that condemning plays an increasingly important role in written legal systems ^[21]. It is for these

reasons that the process of improving the law on unfair competition now requires punishment. This approach will make it easier for law and authorities to control prevent and deal with unfair competitive behavior ^[16].

Fourthly, identify unfair competitive behavior within the scope of private law, thus providing additional legal grounds for dealing with unfair practices.

The detection of violations as well as the resolution of compensation issues come from the victim. The competent state authority can only deal with the case if there is a claim of the injured person ^[17]. While some countries (such as the Federal Republic of Germany) have authorized competitors, trade associations, Chambers of Commerce and Industry to take action against unfair competitive behavior, the Competition Authority actively identifies violations in the presence of the perpetrator (United States). This regulation has facilitated the timely detection and prevention of violations, the limitation of harm to consumers, competitors, and the protection of a fair and healthy competitive environment ^[8, 63-64].

Some proposals aimed at improving Vietnamese law on unfair competition

In order to perfect the provisions of Vietnamese law on unfair competition, Vietnam needs to:

Firstly, develop a separate Decree guiding the implementation of the 2019 Competition Law in the field of unfair competition in order to ensure effectiveness, enforcement by supplementing the guidelines some of the missing content.

In the current integration trend, with the new, more sophisticated forms of manifestations of unfair competitive behavior, especially those of commercial promotion, the existence of a Government Decree detailing the implementation of a number of articles of the Competition Law on unfair grouping of competitive conduct clarifying signs such as identification for icons, business slogans, regulating signs for ill-spoken conduct, imposing other enterprises to distinguish and define boundaries with the right to freedom of expression; the addition of regulations on the conduct of selling goods or services at full price in order to unfairly compete (dumping) to the group of unlawful competitive practices... It's absolutely necessary, because if competition laws don't specifically regulate it, it's clear that dealing with these behaviors is not really effective.

Among them, a number of issues that need to be clarified in the Decree of Guidelines relating to rules on unfair competition are as follows: i) Complement and refine the concept of unfair competitive behavior in the 2019 Vietnam Competition Law; ii) clarify the criteria for identifying unfair Competitive Behavior and provide detailed regulations clarifying a number of specific provisions in existing unfair practices

Secondly, improve sanctions for ill-competitive behavior through the elaboration of a separate Decree detailing the Competition Law on the treatment of violations of the law in the field of competition.

In order to improve sanctions against unfair competitive behavior, first of all, Vietnam needs to broaden the scope of the sanctions. Currently, according to article 2 of the 2019 Vietnam Competition Law, the subject of application of this law includes only organizations, business individuals, trade associations and professions operating in Vietnam, relevant

domestic and foreign agencies, organizations and individuals without mentioning other entities such as representative offices and branches of traders abroad in Vietnam and entities that “sell business” such as printers, publishers, magazines and newspapers that are not considered enterprises. Meanwhile, in international practice, some countries have extended the scope of liability for unfair competition violations to individuals who are business leaders and do not rule out criminal sanctions. Therefore, the law on unfair competition in Vietnam in addition to the behavior of business entities need to regulate the behavior of individuals, organizations, agencies that are not business entity but “help” to other people’s competition which negatively affects the competitive environment. In addition, Vietnamese legislation needs to add entities with the right to sue unfair competitive behavior, in addition to partner and businessmen who have been infringed unfair Competitive Behavior need to put consumers in the group of entities entitled to sue against unfair conduct to increase their ability to defend themselves.

Vietnam’s law needs to clarify the civil sanctions that can be imposed to deal with unfair competitive behavior. In addition to the form of compensation for damages, it is necessary to supplement the provision that permits the possibility of infringement also has the right to require the authorities, organizations competent in including the Court to apply one of the forms such as: recognition, respect, protection and safeguarding of their civil rights; forcing an end to the act of violation; compulsory apology, public reform; compelling the performance of obligations, cancellation of individual decisions against the law of the authority, organization, person competent.

Moreover, Vietnam’s law needs to specify specific principles in compensation for damage caused by unfair competitive behavior, such as the principle that the profits obtained by an individual who has an unfair conduct of competition will naturally belong to the individual who is violated by that unfair concurrent conduct ^[13].

In particular, in order to ensure the strictness of the law, to create a deterrent to the perpetrators of violations, in the future, Vietnam needs to consider increasing the level of penalties for unfair competitive behavior. Because, in fact, unfair competitive behavior can bring huge benefits to far more than the penalty they face. Currently, the fine for unfair competitive behavior is relatively low, not sufficient to deter, for example: the current maximum allowance is Rs. 1 billion for the sale of goods, the provision of services at a lower price as a whole leading to or potentially leading to the elimination of other enterprises and the business of the goods and services.

Thirdly, harmonize the rules on unfair competitive behavior in the text of the Specialty Law, specifically unfair Competitive Conduct in the field of intellectual property in the Law of Intellectual Property, advertising conduct aimed at unhealthy competition in the Act of Advertising, promotional conduct in Commercial Law, etc.

Fourthly, improve the level of officials and public officials in the state mechanism of competition management from central to local; promote the role of the Court in the management and handling of unfair competitive behavior, and move towards the establishment of a competition court.

Fifthly, promote advocacy, dissemination, and legal education on unfair competition to the audience, especially, consumers and business associations to raise their legal awareness of the issue.

Conclusion

The pursuit of innovation, the building of a market economy based on free and equal competition between from all economic components, will not be able to the desired results without an effective tool for controlling monopolies and anti-competitive behavior, including unfair competitive conduct. Successful enforcement of competition law will be a key factor, playing an important role in ensuring that the market economy operates effectively. For a developing country like Vietnam, studying and learning the experiences of developed economies such as China, the United States and Germany would be a more efficient and cost-effective solution to perfecting the law on unfair competition.

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