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## Unfair Competition: Vietnam's Conflicting Decrees

On July 21, 2014, the Vietnam Government issued Decree 71/2014/ND-CP (Decree 71), which sets out the prescribed remedies for competition violations. Among these include sanctions in cases of antitrust, unfair dealings, and unfair competition. While these measures are a step in the right direction, they potentially conflict with last year's Decree 99/2013/ND-CP on administrative sanctions in industrial property (Decree 99), complicating the enforcement of Decree 99.

### Conflicts with Decree 99

Decree 71 restates the remedies in Decree 99 that are available in cases of unfair competition relating to industrial property. As a consequence of this restatement, a conflict arises between how the two decrees treat remedies, proceedings, and competent authorities.

In terms of remedies, Decree 71 states different levels of fines as compared to Decree 99. For example, Decree 71 lowers the ceiling fine to just VND 200 million (USD 9,430) on infringing juristic persons (i.e., companies) who palm-

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off their goods as the goods of other entities, whereas the same fine under Decree 99 is VND 500 million. For infringing individuals, the maximum fine drops from VND 250 million under Decree 99 to VND 100 million under Decree 71. Whether such lower levels of fines still act as a deterrent is questionable.

Although Decree 71 decreases the amount of fines for palming-off, it raises the fines imposed on cyber-squatting, the unauthorized use of trademarks by agents, and the infringement of trade secrets. Decree 71 also raises the fine from VND 10 million to VND 40 million on representatives or agents of brand owners who, without any authorization or justification of the owner, use marks that are protected in a foreign country and are also a contracting party to the Paris Convention. Additionally, Decree 71 applies the same fine to the registration or use of domain names that cause harm to the reputation and goodwill of trademarks, trade names, or geographical indications. It also creates a range of

fines from VND 10 million to VND 30 million to sanction any unauthorized access, use, or disclosure of trade secrets. These fines are slightly higher than those under Decree 99.

As far as supplementary measures are concerned, Decree 71 leaves out some important measures that could render enforcement actions ineffective. Under Articles 28 and 29, Decree 71 provides for such supplementary measures as confiscation of the infringing goods and means whereby the violations are committed and confiscation of the profits earned from the unfair dealing. Bearing in mind these measures, brand owners would be uncertain as to whether they can recover a disputed domain name, force an infringer to change an infringing company name, or seek removal and/or destruction of the infringing elements of the infringing goods. Given the comprehensive and detailed measures under Decree 99, Decree 71 seems to be a step backwards in the fight against unfair competition acts relating to industrial property.

Decree 71 reduces the number of choices that competent authorities have to deal with unfair competition. Under the Decree, the only authority authorized to tackle misconduct relating to industrial property is the Vietnam Competition Authority of the Ministry of Industry and Trade. The Decree clearly rules out the other agencies that previously held such authority under Decree 99, including the Inspectorate of Science and Technology, Customs, the Inspectorate of Information and Communication, and the Market Control Bureau.

Under Article 43 of Decree 71, enforcement actions must follow specific proceedings laid out in Decree 116/2005/ND-CP (Decree 116) to deal with violations of competition regulations. Meanwhile, Decree 99 requires competent authorities to carry out enforcement actions in accordance with its administrative procedure and the Law on Handling Administrative Violations. Essentially, the proceedings under Decree 116 are quasi-administrative procedures and in the vicinity of administrative procedures and civil proceedings.

The proceedings do bring about positive progress when enabling the competent authorities to handle the disputes *ex parte*. Such *ex parte* resolutions are not available under the administrative measures governed by Decree 99 and the Law on Handling Administrative Violations. With the *ex parte* regime, Decree 71 can address cases where the infringers cannot be tracked down or disappear during the enforcement action.

### Validity of Decree 99

Given the prevailing laws and regulations, it seems likely that Decree 71 will take precedence over Decree 99 in rulings on misconduct governed by both Decree 71 and Decree 99. While both decrees were promulgated by the government, Decree 71 was introduced at a later time. In accordance with Article 83.3 of the Law on the Promulgation of Legal Documents of 2008, the competent authorities will therefore give priority to Decree 71 in handling unfair competition relating to industrial property.

In addition, Articles 198.3 and 211.3 of the Law on Intellectual Property grant competent authorities the power to sanction acts of unfair competition relating to industrial property in cases of unfair competition. Accordingly, it seems that Decree 71 will supersede Decree 99 in dealing with unfair conduct cases relating to industrial property when it takes force on September 15, 2014. 🏠